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ONEONONE

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A Message from the Chair

As we enter the new year, it is time to think about what this year will bring. A new year always brings new hope and a new beginning. 2012 promises to be an interesting year. We have a presidential election year, many candidates on the Republican side, the influence of the Tea Party and concern where the Occupy Wall Street protests will lead. Many of us marched in the protests against the Vietnam War in our youth and the current protests do bring back some memories. I think the argument that there is too much financial inequality is correct. When I went to college in the 60s the goal was to be a doctor, a lawyer or an accountant. There was respect for the professions. I didn't know many people whose goal was to work on Wall Street. In fact, there were layoffs on Wall Street in the early 1970s. We now hear that medical school is not that attractive because it takes too long to become a doctor and doctors don't make that much money. A recent article in *The New York Times* pointed out that law school has become very expensive as it is deemed a profit center for universities. Yet the article questioned whether law school was worth it because it is very hard to obtain a job upon graduation from law school. The outlook for a law school graduate is no job and huge loan obligations. The article also noted that many law school graduates have to go solo because they have no other options. One of our goals for the new year should be to work to restore respect for the professions. Another goal should be for older lawyers to help younger lawyers to get started in their career.

We have discussed a mentoring program for young lawyers at the Executive Committee meetings

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but have not yet developed the idea and how to do it. The listserve does provide some assistance but it is not quite the same as working under the supervision of an experienced attorney. Despite the current economic climate, there is plenty of business for lawyers out there. Many of the lawyers I come in contact with tell me they are busy and could use more help. Those of us in smaller firms who could use some assistance but cannot afford to hire full time associates should give consideration to hiring younger lawyers for part-time work. In my office, we have tried giving office space to young lawyers without charge and giving them some work to do with pay but not a salary. We pay for per diem appearances and work product in the office and then bill the client for the work. The advantage to us is that we have someone who is familiar with the cases and additional help. The advantage to the young lawyer is that he or she gains experience and will have a reference for a job with a firm in a year. I think it would be good if we could implement that kind of system on a statewide basis.

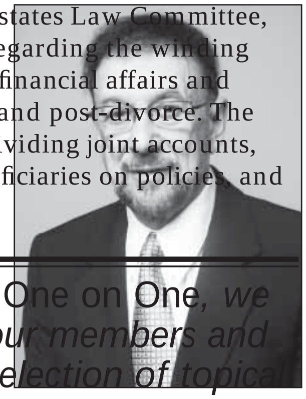
On the CLE front, the Section's program at the Annual Meeting in January was a joint program with the Professional Discipline Committee, which was well-attended by members of our Section. On the practice front, it is becoming increasingly difficult to avoid using a computer. Electronic filing of papers is rapidly becoming the norm and it may not be possible for litigators to ignore electronic discovery. I am embarking upon a course of study to learn about electronic discovery and hope to chronicle my knowledge in a series of articles in future editions of this publication. Even if you never engage in electronic discovery, you can learn what others are doing and where the law is headed. If you suddenly have a case where you have to do electronic discovery, these articles will serve as a guide.

I enjoyed seeing many of you at the Annual Meeting in January. Happy New Year.

Martin Kera

From the Co-Editors

Richard Klass



Martin Minkowitz

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

Tax implications in divorce: The authors, Jamie D. Svenson, Esq. and Paul W. Siegel, CPA, discuss the implications of divorce on tax deductions for the formerly married couple, including childcare credits and child exemptions. Part of the tax-filing process involves fairness and openness between the former spouses, and the agreement between them as to which of the spouses is going to claim the various tax credits and exemptions on tax returns. Using the hypothetical couple, Hortence and Wilma, the authors illustrate the tax implications for them and the anticipated monthly payments of support between them.

Evicting one's ex: Todd Thomas, the Managing Attorney of Southern Tier Legal Services, delves into a problematic area of landlord-tenant law—the eviction of an ex-girlfriend or boyfriend from an apartment. In some cases, the ex is treated merely as a licensee, who may be evicted through summary proceedings; in other cases, courts have granted the ex status similar to "family" for the purpose of residency. The delineation will depend upon the particulars of the living situation on a case-by-case basis.

Medicaid planning: In an article by Anthony J. Enea, Esq., the Chair-Elect of the Elder Law Section of the New York State Bar Association and Past President and founding member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA), he writes about the new regulations put in place by the New York State Department of Health which, among other things, redefine the term "estate" for Medicard recovery purposes. Mr. Enea notes that the new regulation expands the definition of "estate" to include assets in various types of trusts so as to prevent the shielding of assets from Medicaid recovery.

Estate planning and divorce: When couples are divorcing, it is important to remember some steps to protect each spouse's separate property. Lynne S. Hilowitz, Esq., Chair of the Trusts and Estates Law Committee, lists all of the considerations regarding the winding down of the married couple's financial affairs and protection of assets, both pre- and post-divorce. The list includes matters such as dividing joint accounts, changing designations of beneficiaries on policies, and changing security codes.

"As the Co-Editors of One on One*, we endeavor to provide our members and readers with a great selection of topical articles on issues affecting the varying and diverse areas of law in which our General Practice Section members practice."*

Debt collection: In an article by Rebecca Adams Hollis, she discusses two recent New York State Court of Appeals' decision which affect debt collection and the enforcement of judgments. In *Koehler v. Bank of Bermuda*, the court held that, even where a New York court lacks personal jurisdiction over the debtor and *in rem* jurisdiction over his assets, a money judgment may still be enforced in New York so long as the court has jurisdiction over the garnishee (third party may be compelled to turn over property held outside of New York State). In *Hotel 71 Mezz Lender LLC v. Falor*, the court clarified that, just as attachment of a debtor's property located inside New York may be used to confer *quasi in term* jurisdiction over a nondomiciliary, personal jurisdiction over a defendant confers upon the court jurisdiction over the individual's property for purposes of attachment, even if the property is located outside of New York.

Insurance Law changes: Elizabeth Fitzpatrick, a partner with Lewis, Johs, Avallone, Aviles LLP, where she heads the firm's insurance coverage unit, informs how New York State revised its insurance law in ways more favorable to insureds. New legislation significantly alters an insurer's ability to rely on late notice of the reporting of a claim by an insured as a defense to coverage. Until the amendment of Insurance Law §3420, New York was in the minority of states that did not require an insurer to demonstrate that it was prejudiced by the untimely reporting of the claim in order to disclaim coverage. The law now imposes a burden of proof that, if notice is given within two years of the time required, there is a presumption that the insurer has not been prejudiced. The insurance law was also amended to require insurers to disclose within 60 days the existence of a policy and its limits for certain liability policies.

> *"The General Practice Section encourages its Section members to participate on its committees and to share their knowledge with others, especially by contributing articles to an upcoming issue of* One on One.*"*

Trademarks and Website Vanity URLs: The rise in popularity and legitimacy of social networking websites has changed the face of the Internet; in turn, businesses must take steps to protect their trademarks in this environment, writes Eric Joseph Shimanoff, a partner with Cowan, Liebowitz & Latman, P.C. Mr. Shimanoff explains the nature of social networking websites, such as Facebook and Twitter, along with "URLs." The rising use of "vanity URLs" on these social networking websites require more vigilance in protecting a business's trademark. It is important to note the distinction of vanity URLs from domain names for websites.

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

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

Sincerely,
Martin Minkowitz
Richard Klass
Co-Editors

Get a Better Bang for Your Buck in Divorce

By Jamie D. Svenson and Paul W. Siegel

Introduction

Jamie D. Svenson

Unbeknownst to many, there are several implications on taxable status and tax returns created by separation and divorce. With further education on this topic, persons, their lawyers, and their CPAs (Certified Public Accountants) will be better equipped to deal with these issues into the future.

In 2011, Federal Insurance Contributions Act (FICA) rates changed, and the effects of this are not only felt by employers and employees. Child support amounts will also change as a result and it is therefore necessary to reiterate tax implications of the same. The current child support calculation consists of the parental adjusted gross income (AGI) minus FICA, which is now 4.2% for employees and 6.2% for employers. Therefore, when calculating child support in a divorce agreement, each party's AGI is calculated by subtracting FICA from their base income. Then, a combined parental income (CPI) is used to determine if basic annual child support obligations apply. If the CPI is less than $80,000.00, the parents will pay their portion of child support pro rata based on the statutory percentages (i.e., 17% for one (1) child; 25% for two (2) children; 29% for three (3) children; 31% for four (4) children; and at least 35% for five (5) or more children). Therefore, FICA greatly affects child support amounts.

It is important to remember that although the Internal Revenue Code (Internal Revenue Code) is a federal law and applies uniformly to the states, its effect can be different depending on the state where a divorce is filed. This is because matrimonial and family laws are regulated by the states. For example, the IRC is dependent on the stage of a divorce, legal separation, and separate decrees for maintenance or the validity of a divorce agreement, the tax differs between states. Discussed herein are several stages where the aforementioned implications must be applied.

Throughout this article, reference will be made to Hortence Husband and Wilma Wife in order to illustrate the effects of the issues discussed. Hortence and Wilma reside in New York State (NYS) and were married in Suffolk County, Long Island, so NYS law will apply to their situation herein.

Paul W. Siegel

Hortence earns $50,000.00 per year, before taxes, and Wilma earns $35,000.00 per year, before taxes. Wilma is the custodial parent and therefore does not have to pay child support. Hortence's AGI will be $50,000.00 – $2,100.00 (income minus FICA) = $47,900.00. Using the former FICA percentage of 7.65%, Hortence's AGI would have been $50,000.00–$3,825.00 = $46,175.00. Wilma's AGI will be $35,000.00–$1,470.00 = $33,530.00. Using last year's percentage, it would have been $35,000.00–$2,677.50 = $32,322.50. The Combined Parental Income (CPI) will be calculated by adding their AGIs = $81,430.00.

> *"In 2011, Federal Insurance Contributions Act (FICA) rates changed, and the effects of this are not only felt by employers and employees. Child support amounts will also change as a result and it is therefore necessary to reiterate tax implications of the same."*

Since Hortence and Wilma have three children, Sammy Son, Debrah Daughter, and Stephen Son, the percentage of child support will be 29%, which leaves annual support obligations in the amount of $23,614.70. Hortence, as the non-custodial parent, will be the payor of child support and will pay his pro-rata share of the annual obligation. This is calculated by multiplying his AGI ($47,900.00) by 100 and dividing that by the CPI ($81,430.00) which equals 58.82%. Hortence's annual obligation will therefore be 58.82% of the annual child support obligations ($23,614.70), equaling a total yearly obligation of $13,890.17. Therefore, Hortence will have monthly payments in the amount of $1157.51. However, it should be noted that if Hortence were paying spousal maintenance to Wilma, this number is different.

The parties then agreed to each pay 50% of all other expenses for the children, which includes medical/dental care, childcare, activities fees, and educational expenses. These payments will not be deductible from Hortence's child support obligations.

File Jointly When Possible

To begin, in a situation where a couple has legally or functionally separated, but is not yet divorced, they may not file as “single.” Instead, when a couple is married, they must file either married filing separately, or married filing jointly. *See IRC 1.6013-1; IRC 152; IRC 154; IRC 156; IRC 162*. Please note that one should always adjust their W2s or 1099s to reflect the appropriate filing status as well, as this affects the withholding rate on a paycheck.

Where it is possible for parties to amicably file jointly, they should, for the sake of saving money. It is an exception where it is financially advisable for a person to file with the status of “married filing separately.”

To be sure, parties should always get advice from an accountant, inclusive of a tax projection of each status prior to filing. However, “married filing separately” is typically the worst status to utilize. There are also occasions when “head of household” is better than “married filing jointly,” but every situation may be different.

> *“Strategically, parties should strive to finalize a divorce before the last day of the year if it would be financially beneficial to file as “single” or “head of household.” This furthers the need to simulate tax implications prior to the December 31 deadline.“*

While the couple (or ex-couple) is negotiating the divorce, or at trial, they are still considered married and must follow the aforementioned rules of a legally separated couple. Only upon judgment of divorce is a couple legally divorced for purposes of the IRC.

Wilma and Hortence were not yet divorced in 2010. They went to Andy Accountant to get a projection of their taxes for the 2010 tax year. Andy told them that filing married jointly would give them the greatest benefit. Since they get along well enough, they decided to do the same and filed as married jointly in 2011 for the 2010 tax year.

Keep an Eye on the Calendar

The most important date in the calendar year for couples seeking a divorce is December 31. This is because the taxable status of a person on December 31 is operative for the entire year. If a final divorce decree is granted on or before that day, the persons’ tax statuses are considered single for the *entire* previous year and consequently may file “single” or “head of household.” The inverse of this is where a couple is married on December 31; their taxable status becomes “married” for the entire previous year. Consequently, those couples must file married filing separately, or married filing jointly for that entire year, despite having been married for only one (1) day during the year.

Strategically, parties should strive to finalize a divorce before the last day of the year if it would be financially beneficial to file as “single” or “head of household.” This furthers the need to simulate tax implications prior to the December 31 deadline.

Wilma contacted Andy and he did a projection of her taxes, which would give her the greatest benefit as Head of Household. Since Wilma and Hortence decided she would have custody of the children, she is able to be designated as such. Therefore, Wilma advised Larry Lawyer, who represents her in the divorce action, to ensure that she was divorced by December 31, 2011 so that she could file as Head of Household for that year in February 2012. Hortence is unrepresented in the matter and signed an informed consent letter indicating his desire to proceed Pro Se.

After Divorce

After a divorce is finalized, it should be obvious that one cannot file “married filing jointly” or “married filing separately” as the parties are no longer married. However, for those couples with children, there are tax questions.

Children as Exemptions

The default rule is that the parent with primary physical custody may claim the child as an exemption. The custodial parent, as determined by the IRC, is the parent who the child resides with the most nights per week regardless of court order. When the child spends an equal amount of time with each parent, the parent with the higher AGI (adjusted gross income) may claim the child(ren) as an exemption(s). The custodial parent may only waive this right if the requirements of the statute are met. *See IRC139-A*.

In reality, whoever files first, using valid Social Security Numbers (SSNs) gets the benefit of the exemption for their children. When one files his or her taxes and claims children as an exemption, stipulations of settlement and custody matters mean little to the IRS (Internal Revenue Service). The IRS’s primary concern is not the agreement between the ex-couple or what is fair; it only cares that they are not applying the child(ren)’s exemption(s) twice.

There can be a large amount of money at stake with exemptions. In fact, every person claimed as a dependent on a tax return creates the same additional exemption. In 2010, the exemption was $3,650.00 per person. For the 2011 tax year, the exemption will be $3,700.00 per person.

The first-in-time, first-in-right rule creates a survival strategy wherein it is important to keep in mind January 1 of every year as the first day one is eligible to file his or her taxes. Realistically, most people do not have the necessary W2s, 1099s, and other requisite paperwork at this time. Yet, where there is a preceding acrimonious divorce action, parents should beware of the other parent filing with children as exemptions earlier out of spite, even without the right to do so.

Additionally, there are rare circumstances where the electronic filing system (E-FILE) is not functioning, as it did in 2010, until the middle of February, so preparers that use the electronic system are unable to file until that time. In fact, most preparers do utilize the E-File system when preparing returns for their clients. If a situation arises wherein a parent is racing to file, he or she may take advantage of the E-FILE system being offline and file on their own using the paper documentation in order to claim the children first. When the second-in-time spouse later attempts filing using the children(s)' SSNs, the return will be rejected because those SSNs were already utilized in a previous return.

Wilma has physical custody of the children as they spend four (4) out of seven (7) nights per week at her home, although Hortence has joint legal custody. Therefore, Wilma is planning to file her taxes claiming all three of the children as exemptions. Hortence learned of this, and plans to file his taxes using the children as exemptions. Both Wilma and Hortence are excited about the prospect of getting $14,600.00 in 2011 (from the 2010 tax year) and $14,800.00 in 2012 (for the 2011 tax year) by claiming their three (3) children as exemptions (as persons can include themselves as well as dependents). Although their divorce is not litigious, since Wilma and Hortence have not discussed this with each other, they are both planning on filing first to get the benefit. After all, who does not want a little extra cash?

Since Hortence is planning on filing in January 2012 on paper, and Wilma will be going to Andy who is planning on filing in February 2012, this could create a problem for Wilma, who is entitled to the exemptions as she has physical custody of the children.

Childcare as a Credit

Pursuant to 26 U.S.C.A. §21, expenses for household and dependent care services necessary for gainful employment are allowed as a credit against taxes imposed, subject to the terms of the statute, as long as those expenses were *actually paid during that taxable year* by the taxpayer claiming the credit. The applicable percentage of employment-related expenses, defined as thirty-five (35%) reduced (but not below twenty percent (20%)) by one (1) percentage point for each $2,000.00 (or fraction thereof) by which the taxpayer's AGI for the taxable year exceeds $15,000.00.

To claim said credits, the dependent must be a qualifying individual pursuant to §21(b)(1), wherein the dependent must be either under thirteen (13) years of age or physically / mentally unable to care for themselves (child *or* spouse).

There are also dollar limits on childcare expenses (*see* subsection (c)), earned income limitations (*see* subsection (d)) and restrictions on credit allowances (see subsection (a)).

The importance of filing under the correct status is amplified here, where there are special rules in allowing credits under 26 USCA §21(e). For example, subsection (2) reads that the taxpayer and his or her spouse (if married) cannot collect such credits unless they filed a joint return for the taxable year. *However*, under subsection (3), an individual legally separated from his or her spouse under a decree of divorce or separation shall not be considered married.

> *"A wronged spouse, who was otherwise entitled, through the divorce decree or stipulation of settlement, to claim the children for exemptions on his or her tax return, may sue the wrongfully filing spouse."*

There are also special dependency tests in the case of divorced parents under subsection (5) of the same wherein credits are only applied if the child is a dependent of the custodial parent, and shall not be treated as a qualifying individual with respect to the noncustodial parent. Therefore, only custodial parents may claim such credits and exemptions.

Since Hortence contributes to the childcare expenses, each of the parents paying fifty percent (50%) of the cost of daycare, he may claim half of those expenses on his tax return. Sammy, Debrah, and Stephen are aged four (4), seven (7), and eleven (11), so they are all currently considered to be qualifying individuals. Wilma will claim the other fifty percent (50%) on her tax return.

Remedies and Options

There is a remedy for a parent who should have been able to claim the children as exemptions pursuant to a divorce decree, but filed second and therefore lost that benefit, but it is not pursuant to the IRC or IRS. A wronged spouse, who was otherwise entitled, through the divorce decree or stipulation of settlement, to claim the children for exemptions on his or her tax return, may sue the wrongfully filing spouse. It is advisable to utilize either Small Claims or District Court so attorneys' fees do not circumvent the entire recovery. This, however, should be a last resort as this can be costly with court fees, as well as time and emotions.

"It is savvy to add agreements concerning the 'children as exemptions' to a stipulation of settlement, divorce decree, or child custody arrangement, as it protects parties if it is not followed and it further protects parties if they are audited by the IRS and an issue is raised, however unlikely."

Some ex-couples will amicably "split" the child(ren) for exemption purposes, regardless of physical custody arrangements, in the nature of fairness and equity. Some couples even alternate every other year if they have an odd number of children, i.e., one parent claims two (2) children one year while the other claims one (1) child, and the next year they switch. This is definitely permitted, as long as there is no attempt to double-dip (where both spouses claim the same child), which would be rejected upon the second attempt to file. If these arrangements are stated in the divorce decree, or the stipulation of settlement, then it is valid for IRS purposes. However, even if filing does not mirror the agreements, the IRS would not audit based on the "wrong parent filing" as it is not privy to these agreements between the parties. In fact, the IRS might not even raise a question where there is an audit, although it technically could.

It is savvy to add agreements concerning the "children as exemptions" to a stipulation of settlement, divorce decree, or child custody arrangement, as it protects parties if it is not followed and it further protects parties if they are audited by the IRS and an issue is raised, however unlikely. When doing so, it is advisable to speak in terms of exemptions and tax liability, but not rebates because those may be altered by each parties' unilateral elections on their W2 forms.

Wilma and Hortence realized that they were both going to be using the children as exemptions in 2012 for the 2011 tax year, as they are planning to finalize the divorce in September 2011. Wilma threatened to go to Small Claims Court to recover the money if Hortence claimed the children. Neither of them wanted to litigate, so they came to an agreement which Larry added to the Stipulation of Settlement in their divorce. Larry added an item wherein Hortence could claim two (2) of the children as exemptions in odd years, starting with filing in January 2012 for the 2011 tax year, while Wilma would claim the other one. Wilma could claim two (2) children as exemptions in the even years, starting with filing in January 2013 for the 2012 tax year, while Hortence would claim the other one. When the oldest child becomes emancipated, they will each claim one (1) child every year. Then, after the next child is emancipated, they will rotate claiming the child with Hortence claiming odd years, and Wilma claiming even years.

Maintenance and Support

Spousal maintenance, formally known as alimony, may be claimed as a deduction by the party paying (the payor) and is considered income for the spouse that is receiving it (the payee). If the agreement reads that one (1) spouse will pay the other spouse's mortgage in lieu of cash payments for maintenance, the payor will be eligible to receive a deduction for the mortgage interest *or* maintenance payments.

Child support, on the other hand, is not a tax deduction for the payor, and is not considered income to the payee. The spouse who is not claiming the children as exemptions may still be able to file as "head of household" even if the children do not live with him or her, which is often a better tax rate than "single." Therefore, it is imperative that negotiating parties consider the tax implications when straying from CSSA (Child Support Standards Act) and specifically designating a payment as maintenance or child support.

Hortence will pay Wilma maintenance for the next eight (8) years pursuant to their Stipulation of Settlement, and he will therefore claim that as a tax deduction, while Wilma will claim the same as income on her tax return. Hortence will file under the tax status of "Head of Household" because Andy Accountant indicated that would be the most beneficial to him.

Conclusion

Once a person decides to get separated and / or divorced, it is important to consult with a lawyer and a CPA in order to better protect one's interests, and reap the greatest monetary benefit by doing so. To be clear, big money is at stake in a matrimonial action and thereafter and clients need professional tax advice too.

Wilma and Hortence are glad to have consulted with Andy Accountant and Larry Lawyer in order to resolve their divorce, and the tax implications that come along with it, in the most financially beneficial and amicable way possible.

Jamie D. Svenson, Esq. is an Associate Attorney of Lieb at Law, P.C. with offices at 376A Main Street, Center Moriches, NY 11934 and 21 East Shore Road, Manhasset, NY 11030, and a Hofstra University School of Law graduate.

Paul W. Siegel, CPA has been a Certified Public Accountant for over twelve (12) years. Mr. Siegel recently began his own practice with an office located at 33 Walt Whitman Road, Suite 208, Huntington Station, New York, 11746.

Previously Paramours: Eviction at Relationship's End?

By Todd Thomas

"Licensee" is an easy word to define and an increasingly more difficult one to apply. New York statutes do not explicitly define the term as used in the law. *Black's Law Dictionary*, the go-to for law students and lawyers, gives as a first definition "a person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land by who goes on the land for his own purpose rather than for any purpose or interest of the possessor."[1] In plain language, a licensee is one given permission to live on the real property of another, where the right to remain can be revoked at any time. The focus of this article concerns the complications that can arise when the possessor, usually a person in title, wants an alleged licensee to leave where the alleged licensee is a former domestic or romantic partner. Current jurisprudence is unclear whether certain persons are licensees or merely paramours cohabitating. More specifically, what happens when a relationship sours and persons who are previously paramours dispute the right to remain in what had been a mutual home?

For example, what of a woman who owns a home and invites a boyfriend to live with her? What if they have children together, where he is a stay-at-home caregiver and she the breadwinner? If the relationship ends, does the partner who moved in, with permission, have any rights in the property? Can he be evicted as a licensee who no longer has permission to remain?

Possibly more complex, and taken from my own case files, is when a monied partner purchases a home, with cash or by credit, during the relationship, fully intending to share the property happily ever after. When that relationship ends, what of the stay-at-home caregiver with no education, credit or finances? What of the displaced homemaker's legal standing?

Courts across New York have considered eviction petitions brought by titled owners, seeking to remove their former partner. The decisions, as shown below, have been varied and no clear rule of law has emerged. This article suggests that one court has put forth a rule of law as an excellent starting point for dealing with this as-yet unsettled nexus of family law and property rights.[2]

Eviction of Licensees Under New York's Summary Proceeding Statute

New York enacted a statutory eviction process for licensees in 1951.[3] The Real Property Actions and Proceedings Law (hereinafter "RPAPL") was created in 1962 by the reconsolidation of existing laws to collect the real property proceedings into a single chapter of the laws.[4] All four Appellate Divisions have issued opinions that, as statutory creations, the statutes governing summary proceedings must be strictly construed.[5] This has led to a significant body of law construing, for example, service and filing requirements or even who is subject to such a proceeding.

> *"Courts across New York have considered eviction petitions brought by titled owners, seeking to remove their former partner. The decisions…have been varied and no clear rule of law has emerged."*

RPAPL 713 governs summary proceedings where there is no landlord / tenant relationship. Subsection 7 authorizes the use of a summary proceeding to remove a licensee in certain specific situations. This includes where the license has been revoked, but also where the license has expired or the licensor no longer had authority to grant a license. The summary proceeding must be brought by the person entitled to possession under the law. Upon ten days' notice of the revocation, the person entitled to possession (typically a property owner) can then bring a summary proceeding to have the alleged former licensee removed.

Summary proceedings are generally brought on the lowest rungs of New York's Unified Court System. Although titled a "summary" proceeding, there are great differences in the amount of time a case can take to wind through the courts. After the ten-day notice has run, the Notice of Petition and Petition can be served on the respondent. In the Justice Courts, commencement is by service and then the papers are filed with the court.[6] Justice courts in some more populated areas of the state sit daily, while some in more rural areas may hear civil cases once a month.

In a City or District Court, as with County and Supreme Courts, the action is commenced by filing and then must be served.[7] Generally, County and Supreme Courts have jurisdiction over summary proceedings, but rarely does this type of action get brought in these courts. This is probably as much due to the busy dockets as the higher costs for filing actions in these various courts.

Other considerations for a practitioner include: In District Courts, Civil Courts and City Courts, judges are lawyers; however, there is no guarantee of a lawyer judge in the Justice Courts. Further, there is a geographic split. The more populous the area, the more cases that are brought. This also means the most case law, precedential or persuasive, exists in these areas, including the rare Appellate Division cases concerning eviction matters. As a result, there is no statewide clear rule on how any judge should deal with the legal quandary where an alleged licensee is the former paramour of the person claiming entitlement to possession.

> *"Decisions in this area have tended to fall into two main camps—the paramour either is or is not a licensee."*

A Mixed Set of Cases

Decisions in this area have tended to fall into two main camps—the paramour either is or is not a licensee. In 1987, the New York City Civil Court heard the case of *Minors v. Tyler*.[8] An unmarried couple who had lived in the home for years ended the relationship and the owner of the apartment sought to evict the alleged licensee. The Civil Court held it did not have jurisdiction because the respondent was not a licensee. Referencing a Bronx trial court's decision, the Civil Court held that the unmarried couple "acquire[d] some rights with respect to continued occupancy" in the housing "not unlike" the rights of a spouse. It relied on *Concourse Village,* which dealt with a surviving occupant to a cooperative apartment after the death of the titled owner / shareholder.[9] The pair in *Concourse* had lived together, holding themselves out as husband and wife, for a decade prior to the male partner's death, and it was only after his death that it was discovered they were not married, at which time the co-op filed suit to remove her. The trial court held that the surviving partner was essentially the "immediate family" of the decedent, and therefore could not be evicted as a mere licensee.[10]

Meanwhile, *Blake v. Stradford* exemplifies the opposite position.[11] The male ex brought an eviction petition against the female ex and the couple's minor children. Mr. Blake had owned the property since 1989 and in 1997, Ms. Tyler and the couple's child (born 1994) moved in. A second child was born in 2000. In late 2000, an order of protection was granted to Ms. Stradford, ordering Mr. Blake to stay away from the home. Mr. Blake then filed a licensee proceeding to remove Ms. Stradford and the children from the home. The court noted that there was no common law marriage in New York, by explicit choice of the legislature, and there was no specific legal status or protection granted to a cohabitant.[12] The District Court, in coming to its conclusions that Ms. Tyler was a licensee, explicitly disagreed with *Minors*, relying on the Court of Appeals holding in *Morone v. Morone*.[13]

Morone, decided in 1980, was not a housing case. An unmarried couple split and the female sued for what would now be termed "maintenance." The Court found there to be no right to "palimony" in this matter. The Court ruled "cohabitating without marriage" does not lead to the same rights as those that vest in a married couple.[14] This language was then quoted in *Blake*, as grounds for ordering the removal of an unmarried domestic partner.

The reliance on the 1980 *Morone* decision in 2001 is somewhat misplaced and in conflict with a 1989 Court of Appeals decision easily analogized to the licensee-versus-family member issue, to bounce back toward the opposing legal position.[15] Consistent with the overturned trial court decision in *Concourse Village*, the Court of Appeals majority found that "family" should be construed broadly. The surviving member of a same-sex couple, who was not the tenant of record in a rent-controlled apartment, sued to preserve the rent-controlled status and assume the tenancy. The Court's majority held that "family," which was the concept in dispute under the rent control law, should be defined based on the relationship of the parties and not "rigidly restricted" to only specific formalized legal categories.[16] The dissent argued for a stricter construction of the law and a traditional view of "family" as blood or marriage related.[17]

The rulings, taken at a general level, appear to patchwork between "family" relationships being non-licensee and a more traditional strict reading of "licensee." A case from a District Court in Suffolk County attempts to synthesize a general rule for these broken relationship / real property disputes.[18] In *Drost v. Hookey*, Judge Hackeling catalogued and noted the diverse decisions under the RPAPL on licensee proceedings at relationship's end, stating that previous attempts at using a "case by case test" (although not identified as such in *Blake*, one of the cited cases) could be reached using a more simplified test.[19] In a case by case test, the court examines whether the family members lived together under one roof, were financially and socially dependent on each other and whether any party had a legal duty of support toward another party.[20]

In *Drost*, the court looked for a simpler way to answer the question of whether the respondent was a licensee. The court ruled that the operative consideration was the modification of the common law licensor / licensee relationship by specific statutory provisions. The new rule puts the burden on the respondent paramour to raise a statutory rationale as to why he or she is not a licensee and not subject to a holdover summary proceeding. Where the court finds the statutory status modifies the common law to grant greater rights to a resident, then the respondent is not a licensee and is not subject to a summary proceeding on such grounds.[21] At least one other court, the City Court of Middletown, has decided a case using this analytic tool.[22]

> *"Housing and family litigators will likely continue to push the weight of decisions back and forth until there is strong Appellate or legislative direction."*

A Brief Discussion

The effort to promulgate some standard should be applauded, in the face of the inconsistent decisions that predate *Drost*. However, the test does not appear to create any substantive analytic change from the previous standard. In each case previously cited, no matter the result, the respondent raised a claim that he / she was not a licensee. Not all raised statutory grounds, but in cases with rent control, mutual children or domestic violence, to pick three examples, the respondant had a specific statutory status beyond mere licensee. The case by case test, while potentially cumbersome, seems more effective in addressing the complexities of modern family life, with greater attention to financial and social interdependence than to a change in legal status.[23]

The result for practitioners of the attempt to state a clear rule is that, arguably for all practical purposes, there is not any change. It seems unlikely that there will be a single, solid approach for attorneys practicing in this area until there is further direction from Albany, either by a Court of Appeals decision or by legislative change. Given the ambiguous nature of "family" and, as shown in the cases, how disparate and dissimilar any two "families" may appear, even further refinement by the courts or legislature may still leave some households out of the ambit of the law and requiring interpretation by courts as a matter of first impression.

Conclusion

The easiest conclusion to reach is that there is no single clear test for when a previous paramour is a licensee or a family member. Housing and family litigators will likely continue to push the weight of decisions back and forth until there is strong Appellate or legislative direction. An unmarried partner has the best claim of staying in housing where there is a claim beyond equity or beyond arguing for an alternative interpretation of licensee. The partner seeking to dispossess is aided in showing that there are no issues but possession or that any issues, like support of mutual dependents, are before (or already decided by) the applicable court. In either case, it's the lawyer's duty to frame the case, a talent perhaps oft forgotten in the fact-specific landlord / tenant practice.

Endnotes

1. Black's Law Dictionary, abridged 6th edition, 1993, West Publishing, p. 635.
2. *Drost v. Hookey*, 25 Misc.3d 210, 881 NYS2d 839 (Dist. Ct., Suffolk Co., 2009).
3. L1951 c 273.
4. L1962 c 142.
5. *See, e.g., Radlog Realty Corp. v. Geiger*, 254 A.D. 352, 5 N.Y.S.2d 82 (1st Dep't, 1938); *Rotunno v. Gruhill Const. Corp*, 29 A.D.3d 772, 816 N.Y.S.2d 139 (2d Dep't, 2006); *Cotignola v. Lieber*, 34 A.D.2d 700, 309 N.Y.S.2d 498 (3d Dep't, 1970); *Western New York OTB v. Perotta*, 98 A.D.2d 1, 469 N.Y.S.2d 504 (4th Dep't, 1983).
6. Uniform Justice Court Act §400.
7. Uniform City Court Act §400, Uniform District Court Act §400, New York City Civil Court Act §400.
8. 137 Misc.2d 505, 521 NYS2d 380 (Civ. Ct., Bronx Co.).
9. 133 Misc.2d 973, 509 NYS2d 274 (Civ. Ct., Bronx Co., 1986).
10. However, the Appellate Term, First Department, in 1988 reversed the trial court holding on *Concourse Village* and stated that there was no familial relationship as contemplated by the statute. 139 Misc.2d 886, 531 NYS2d 850.
11. 188 Misc.2d 347, 725 NYS2d 189 (Dist. Ct., Nassau Co., 2001).
12. *Blake* at 193, 352.
13. 50 NY2d 481, 429 NYS2d 592 (1980).
14. *Morone* at 486.
15. *Braschi v. Stahl Associates Co*., 74 NY2d 201, 543 NE2d 49, 544 NYS2d 784 (1989).
16. *Id.* at 788, 53, 211.
17. *Id.* at 792, 216, 57.
18. *Drost v. Hookey*, 25 Misc.3d 210, 881 NYS2d 839 (Dist. Ct., Suffolk Co., 2009).
19. *Id.* at 215, 843.
20. *Lally v. Fasano*, 23 Misc3d 938, 875 NYS2d 750 (Dist. Ct., Nassau Co., 2009).
21. *Drost* at 216, 844.
22. *Piotrowski v. Little*, 30 Misc.3d 609, 911 NYS2d 583 (2010).
23. At the same time, raising the issue solely to be Devil's Advocate, if the state has a public policy goal of promoting marriage, perhaps a piecemeal structure may further that goal in limiting clear-cut legal rights to married persons.

Todd Thomas is a Managing Attorney with Southern Tier Legal Services, a division of Legal Assistance of Western New York, Inc.®

With thanks for editorial assistance to Jennifer Valvo McCann, Esq.

Medicaid Expands Definition of "Estate" for Recovery Purposes

By Anthony J. Enea

The following is the first of a two-part article. Pursuant to 42 U.S.C. 1396 p (b) (4) (B) the definition of "estate" for the recovery of Medicaid properly paid included all real and personal property and other assets of the decedent as defined for purposes of State probate law. Additionally, at the option of the States, the definition of "estate" can include any other real and personal property (and other assets) in which the decedent had any legal title or interest in at the time of death (to the extent of said interest). The States at their option can include such assets conveyed to a survivor, heir or assign of the deceased through joint tenancy, tenancy-in-common, life estate, living trust or other arrangement.

As part of the recommendations made by the Medicaid Redesign Team appointed by Governor Andrew Cuomo, the legislature amended 360-7.11(b) of the NYCRR by adding new paragraphs (7) (8) and (9) on April 1, 2011, *subject to* the promulgation of regulations by the New York State Dept. of Health (emphasis added). Pursuant to this new legislation the definition of "estate" was expanded to include any property in which the individual has any legal title or beneficial interest at the time of death, including jointly held property, retained life estate, beneficial interest in a trust to the extent of such interest. However, the claim against the recipient of property received by descent, distribution or survival shall be limited to the value of the property received by the recipient and in no event greater than the Medicaid benefits otherwise recoverable.

Since April 1, 2011, the elder law bar has been waiting for the Department of Health to promulgate the implementing regulations. On June 21, 2011 the Department of Health issued State Plan Amendment transmittal #11-42 to Title XIX attachment 4.17 A: Page 1. The Governor's office reported no comment to transmittal #11-42. While as of the date of this writing the Regulation has not yet been officially promulgated, the aforesaid transmittal #11-42 provides the best view of the regulation we have been awaiting. If it is not or is modified in any way, I will report same in the second part of this article.

Pursuant to transmittal #11-42, the term "estate" for Medicaid recovery purposes is defined to include all real and personal property and other assets included within the Medicaid recipient's estate and passing pursuant to the terms of a valid Last Will or by intestacy. It also includes any other property in which the individual has any legal title or beneficial interest at the time of death including jointly held property, retained life estates and beneficial interests in trusts, to the extent of such beneficial interest. However, the claim against the recipient of such property by descent distribution or survival shall be limited to the value of the property received by the recipient and in no event greater than the amount of medical assistance benefits otherwise receivable, whichever is less.

Interestingly, transmittal #11-42 also defines what is not part of the Medicaid recipient's "estate" for recovery purposes. For example, (a) interests in real or personal property, irrevocable trust, life estate or joint interest where the transfer or conveyance was made prior to the adoption of the regulation or within 60 days thereafter or where the interest was held prior to adoption of the regulation, except those assets included within the individual's probate estate and passing under the terms of a valid Will or by intestacy; (b) an irrevocable trust where the recipient has no interest in the principal of the trust, but only a right to income or the right to the use of trust property. However, if such individual has the right to trust income, the individual's estate shall include any trust income that has not yet been distributed on the date of death of such individual; (c) any beneficial interest in any trust or life estate created by someone other than the individual, a life estate purchased for consideration by the individual, or a retained life estate owned by the individual as of his or her death; (d) any beneficial interest created in a Special Needs Trust (except first party trusts with payback provisions); (e) any beneficial interest in a pension plan, IRA's, 401(k), 403(b), 457 plans or any work-related pension plan for self employed such as Keogh plans, except to the extent that an individual's estate is the beneficiary of such account or plan; (f) any beneficial interest in a life insurance policy and/ or annuity payable to anyone other than the individual or his or her estate; (g) any remainder interest in real property owned by a person other than the individual Medicaid recipient; (h) any power that is not a beneficial interest, including, but not limited to, a limited power of appointment, power to substitute property of equivalent value or other grantor trust powers under Sections 671 through 679 of the IRC which are not beneficial interests; (i) any jointly owned bank account to the extent of the surviving joint owner's verifiable deposits thereto; and (j) any jointly owned securities account to the extent of the surviving joint owner per capita share thereof.

Additionally, within 30 days of receipt of a written notice of death from the representative of the estate of a Medicaid recipient or any party with an interest in the estate, the Department of Health shall file a Notice of Claim or Waiver of Claim upon the estate. If the Department of Health fails to file a Notice of Claim within 30 days, this failure to do so shall constitute a waiver.

From the above stated it is clear that the use of retained life estate, revocable living trusts and retaining title to real property jointly will not be able to shield a Medicaid recipient from the claims for Medicaid paid. It's also clear that the use of an Irrevocable Income Only Trust continues to remain a viable long-term care planning tool. Whether or not any further changes to the proposed Regulations will be made remains to be seen. It is also anticipated that litigation challenging the legislation and regulations may be forthcoming.

In the second part of the article I will address the planning options available in light of the new legislation and its implementing regulations as well as bringing you up to date on any changes in the regulation.

Anthony J. Enea, Esq. is a member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. His office is centrally located in White Plains and he has a home office in Somers, New York, (914) 948-1500.

Mr. Enea is the Chair-Elect of the Elder Law Section of the New York State Bar Association.

Mr. Enea is the Immediate Past President and a founding member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys.

Mr. Enea is also fluent in Italian.

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"It Ain't Over 'Til It's Over"

By Lynne S. Hilowitz

One of the most overlooked areas of estate planning is the advice to a client who is in the throes of a divorce or whose child or other family member is experiencing a termination of his or her marriage.

Because most estate plans include provisions for close family members, including among others, children and grandchildren, the termination of a marriage of the client or any person who has an interest or a prospective interest in the client's estate plan would inevitably distort the intentions of the client.

For example, has a son-in-law been designated as an executor or trustee? Will payments from a trust to a daughter be considered income to her in her divorce battle? Will a disposition to a grandchild end up under the control of an ex-daughter-in-law? The situations are myriad.

Thus, if your client is experiencing or anticipates termination of his or her marriage or that of any family member or other person who may be involved in a dissolution of marriage and is mentioned in any capacity in the client's estate plan, it is important to advise the client that certain protections are essential. Following is a checklist of considerations for any client whose estate plan may be affected by a judicial termination of a marriage.

There are many considerations in "wrapping up" the divorce case of a person who is or may be a part of an estate plan. Each such beneficiary or potential beneficiary should be reminded, among other things, to do the following:

1. Change life insurance beneficiaries.
2. Remove the spouse from automobile insurance.
3. Cancel credit cards.
4. Establish new credit charge accounts.
5. Review existing wills and estate plans.
6. Suggest financial planning.
7. Review health insurance coverage and be sure of its continuation.
8. Obtain spouse's resignations from your client's corporations, businesses, etc.
9. Obtain resignations from existing trusts.
10. Change responsible parties for telephone, cable, utility and other bills.
11. Inquire regarding authorization to see and obtain school records of children.
12. Divide any joint accounts.
13. Obtain IRS forms for claiming child exemption, if applicable.
14. Obtain all papers relating to real estate, including title reports, surveys, certificates of occupancy, documents showing capital improvements and their costs, etc.
15. Remove liability of client from any guarantees on behalf of the spouse or his or her business activities.
16. Empty safe and bank vaults.
17. Change mailing address, if your client does not remain at the same residence.
18. Change all privacy codes.
19. Return all client's papers.
20. Change beneficiary designations on IRAs, pension and deferred compensation plans, as appropriate.
21. Provide a reminder that a prenuptial agreement may be appropriate in the future.

CAVEAT: If an ex-spouse is to be retained as a beneficiary on a life insurance policy, a pension or retirement benefits plan, a bank account "in trust" form, etc., it is important to make that continuation of beneficiary status crystal clear to the insurance company and/or financial institution. This is due to the revocatory effect of divorce upon beneficiary designations. See EPTL § 5-1.4.

No list of reminders is complete because each case has its own circumstances. However, the foregoing can serve as a reminder for some of the items which may otherwise be overlooked.

You have heard of the "never-ending divorce." Those are some tips for the beneficiaries and potential beneficiaries to help it *end!* After the entry of a judgment of divorce, following either an agreement of the parties and uncontested submission of dissolution papers or after a trial of the action followed by the entry of a judgment, it may be assumed that the case is over. However, to quote the famous Yogi Berra truism, "(i)t ain't over 'til it's over."

By Lynne S. Hilowitz, Esq., Chair, Trusts and Estates Law Committee of the General Practice Section.

Reinsurance and Excess Lines

By Martin Minkowitz

Many people have heard of the term "reinsurance" but few really understand what it is. More so with the term "excess line."

Reinsurance, unlike other kinds of insurance so familiar to all, is not sold to individuals. It is a product sold by an insurance company but instead of the buyer being the general public, it is another insurance company. Someone once told me that an insurance company accepts the bet that a fortuitous loss will not occur and when it takes more bets than it wants to cover, it lays off some of it to another insurance company and that policy or treaty is reinsurance. All insurance companies that are authorized to issue a kind of insurance can also reinsure that same kind of insurance from another insurance company.

The New York Insurance Law, with some and limited exceptions, prohibits the sale of insurance unless it is by an insurer licensed and authorized to write that kind of insurance. Where one of those exceptions applies, coverage can be procured from an unauthorized insurer. An unauthorized insurer can be one authorized to write the line of insurance in another jurisdiction but not New York. Such coverage is excess insurance and is procured in the excess line market by an excess line broker. Such a broker obtains a license to sell excess lines from the State Insurance Department. That broker must comply with the special provisions of the Insurance Law relating to such placements (see §2118 IL).

A new Federal Law, the Non-admitted and Reinsurance Reform Act of 2010 (NRRA) was signed on July 21, 2010, which prohibits any State, other than the insured's home state, from requiring a premium tax payment for non-admitted insurance. In addition, only the home state of the insured can regulate the sale, solicitation solution or negotiation of the non-admitted insurance to the resident insured. Thereafter, on March 31, 2011, New York amended its Insurance Law to conform to the NRRA. (See Chapter 61 of the Laws of 2011.) For those who have an interest greater detail can be found in Insurance Regulation 41 (11 NYCRR 27) as revised October 19, 2011.

Martin Minkowitz (212-806-6256) is Of Counsel in the Insurance Practice Group of Stroock & Stroock & Lavan LLP. Mr. Minkowitz concentrates in insurance regulatory and litigation matters and on workers' compensation law, in which he is a nationally recognized author and expert.

Dealing with the Dodgy Debtor: The Art of Enforcing a Money Judgment Under Article 52 of the CPLR

By Rebecca Adams Hollis

So, you've won the case. What to do next? Notoriously, enforcing a money judgment can be as arduous, if not more so, than prosecuting an action and obtaining the judgment in the first place. In all too many instances the chance of voluntary payment by the defendant/judgment debtor after a judgment is obtained is slim to none.

The difficulty in collecting on a judgment may be the result of a stubborn defendant who hopes that, faced with continued stonewalling, the plaintiff will conclude that the prospect of enforcement is too daunting or expensive to pursue. Increasingly, in the context of the recent financial climate, the difficulty inherent in enforcing a money judgment may simply be symptomatic of an overleveraged debtor. In many such cases, the defendant's inability to repay a debt owed was what led to litigation in the first place.

Whatever the case may be, there are options available to the New York practitioner who, having obtained a money judgment, now faces the often discouraging task of actually collecting from the defendant. While some investigation may be required to determine the most appropriate strategy in this regard, some forethought and careful analysis of the facts and circumstances surrounding the particular case may make enforcing a money judgment through a New York court less cumbersome than it first appears to be.

This article explores recent case law which has expanded the reach of CPLR Article 52's judgment enforcement proceedings as well as that of pre-judgment mechanisms, and the alternative avenues and more creative options available to a judgment creditor taking steps to enforce a money judgment in New York.

The Expanding Reach of Article 52

In New York State, Article 52 of the New York Civil Practice Law and Rules (CPLR) governs the enforcement of money judgments and orders which direct the payment of money. Pursuant to this Article, a judgment creditor may file a post-judgment motion against the judgment debtor, or where the property sought is in the possession of a third party, commence a special proceeding against any garnishee (a third party in possession of the subject property), in order to compel turnover.[1] Because the Federal Rules of Civil Procedure provide for the application of state law with regard to post-judgment remedies, this procedural device is available in both New York State and Federal Courts.[2]

By commencing a special proceeding under Article 52, the judgment creditor can obtain a delivery order or turnover order from the court. A delivery order directs either the debtor or garnishee to deliver property in which the judgment debtor has an interest to the judgment creditor, or to convert it to money for payment of the debt.[3] A party's failure to comply with a turnover order is punishable as contempt of court.[4]

From the CPLR's inception in 1963, it largely was assumed that the enforcement of a money judgment pursuant to the operative provisions of the CPLR required the Court's jurisdiction over either the judgment debtor (*in personam* jurisdiction) or his or her property (*in rem* jurisdiction).[5] Two recent decisions handed down by the New York Court of Appeals have abrogated this assumption, interpreting the operative provisions of the CPLR much more broadly, and without an *in rem* requirement. As discussed below, more avenues are now available to judgment creditors enforcing a money judgment in New York State.

Koehler v. Bank of Bermuda Ltd: Broadening the Scope of Article 52

Prior to 2009, it was undisputed that a New York Court could order a judgment debtor over which it had jurisdiction to turn over any of his or her assets, whether or not they were located in New York State.[6] A Court also had the power to order a garnishee holding assets in which the debtor had an interest to turn them over, regardless of the Court's jurisdiction over the judgment debtor, provided the property itself was located within the state.[7]

Less clear, however, was whether a New York Court could properly order a person *other than the debtor* to turn over assets located *outside of the state*, if the Court did not have jurisdiction over the debtor himself. In last year's landmark decision of *Koehler v. Bank of Bermuda Ltd.*,[8] the New York Court of Appeals answered this dispositive jurisdictional question in the affirmative.

A. Background

The plaintiff in this seminal case was a Pennsylvania resident who in 1993 had obtained a Maryland judgment for $2 million against his former business partner, a citizen of Bermuda. Having been apprised of the fact that his former partner owned stock certificates which were held by the Bank of Bermuda, Koehler sought to enforce the Maryland judgment by registering that judgment with the United States District Court for the Southern District of New York, where the Bank of Bermuda has a branch office, and thereafter commencing a turnover proceeding there.

The Southern District found in Koehler's favor, ordering the Bank of Bermuda to turn over the judgment debtor's stock certificates or money, located in Bermuda, to satisfy the money judgment.[9] The Bank appealed to the Second Circuit, arguing that because the Court lacked jurisdiction over the debtor himself, and because the debtor's property was held outside of New York State, the Court could not properly compel the turnover of these assets pursuant to Article 52. The Second Circuit, recognizing that the state's highest Court had not yet had an opportunity to address this particular issue, certified this question of New York State law to the New York Court of Appeals.[10]

B. The Court's Decision

In a decision which spurred great interest among the New York legal community, particularly in the context of advising clients on the protection of their assets, the Court of Appeals held that even where a New York Court lacks personal jurisdiction over the debtor and *in rem* jurisdiction as to his or her assets, a money judgment may be enforced in New York so long as the court has jurisdiction over the garnishee.[11] In essence, the Court determined that CPLR § 5225 does not have an *in rem* requirement, even where the Court lacks jurisdiction over the judgment debtor. The Court instead interpreted the statute broadly, authorizing a court to require a defendant to turn over out-of-state assets regardless of whether the defendant is the judgment debtor, or merely a garnishee.[12]

In effect, judgment creditors may now seek the recovery of out-of-state assets through a New York Court pursuant to CPLR 5225, by commencing a post-judgment proceeding against a garnishee or custodian of those assets, so long as there is any basis for personal jurisdiction over the garnishee in New York. In practical terms, this allows a New York court to order a bank over which it has personal jurisdiction to turn over money or other assets of a debtor, even if those assets are held by a subsidiary, branch or affiliate of the bank located outside of the state or country.[13]

Faced with a stubborn or elusive judgment debtor, it may prove far easier for a judgment creditor to enforce a judgment against a bank with ties to New York than to enforce the judgment against the debtor itself. If the creditor is aware that the debtor has an account or safe deposit box with an entity that has a New York presence, the creditor need only seek a turnover order against the bank in New York. This order will charge the bank with the responsibility of locating the debtor's assets and turning them over, no matter where the assets are physically located.

While the potential for negative consequences as to banks with branch offices in New York and their customers has been recognized by New York practitioners, it cannot be disputed that from the perspective of judgment creditors and their attorneys, this outcome is a boon.[14]

Hotel 71 Mezz Lender LLC:[15] Further Extending the Creditor's Reach

At the time that *Koehler* was decided, it was still generally assumed that to obtain a pre-judgment attachment order against a debtor's property pursuant to Article 62 of the CPLR, a mechanism by which a creditor can obtain a security interest in the debtor's property leading up to a final judgment, *in rem* jurisdiction by the issuing court was required.[16] In February of this year, the New York Court of Appeals, citing to *Koehler*, abrogated that assumption as well.

In *Hotel 71 Mezz Lender LLC*, the Court clarified that just as attachment of a debtor's property located inside New York may be used to confer *quasi in rem* jurisdiction over a nondomiciliary, personal jurisdiction over a defendant confers upon the court jurisdiction over the individual's tangible or intangible property for the purposes of an Article 62 attachment, "even if the situs of the property is outside New York."[17] Based on this reasoning, the Court held that the lower court had authority to order pre-judgment attachment of property controlled by the defendant, even though the property consisted of ownership interests in out-of-state business entities, based on the fact that the court had personal jurisdiction over the defendant.[18] The Court clarified that in contrast to a situation where attachment of in-state property was used to acquire *in rem* jurisdiction over the defendant, here the attachment mechanism served a security function.

In the wake of *Koehler* and its progeny, creditors now have the option of reaching and attaching the out-of-state assets of a debtor as security, even prior to obtaining a final money judgment, so long as the court has a basis for personal jurisdiction over the debtor. This mechanism is a good option for any creditor concerned that a debtor will assign or transfer his or her tangible or intangible property, in an attempt to place it out of reach of the creditor when the final judgment is obtained. Especially in light of this broader interpretation of Article 62, obtaining pre-judgment attachment may well pre-empt later problems with enforcing the final judgment.

UCC Article 9: The Prospect of Successor Liability

Another scenario which all too often arises in non-payment cases involving corporate debtors is the prospect of enforcing a money judgment against a now-insolvent corporation or limited liability company. In many such cases, before a final judgment can be obtained or enforced, the defendant business has been sold off in an Article 9 foreclosure sale.

Through this procedure, the debtor submits to voluntary repossession of the debtor's assets by the secured lender, followed by an oftentimes contemporaneous resale of the assets to a newly formed corporation under the auspices of Article 9 of the Uniform Commercial Code (UCC). Increasingly, this device is being used to stabilize financially precarious corporations while avoiding the interruption of business operations, because in most states it can be accomplished without the involvement of the court. Depending on the facts surrounding the sale and the extent to which the old officers or owners are involved in the newly formed corporation, such a scenario may altogether preclude collection of the amounts owed. Courts throughout the country increasingly have held, however, that Article 9 transactions do not, as a matter of law, preclude successor liability.[19] Although discussions of successor liability are more often within the context of words of advice and warning to potential purchaser of assets, the doctrine nevertheless provides an interesting avenue for the judgment creditor, where the original defendant has become insolvent. While a claim of successor liability must still be proven, commencing an action against the successor corporation of the original defendant has become an increasingly viable option for judgment creditors with an otherwise "paper" judgment.

While New York courts agree that a successor corporation or limited liability company normally will not be liable for the debts and liabilities of its predecessor, marked exceptions to this rule apply for the purpose of preventing inequity. The exceptions recognized by New York courts include when: (1) the acquiring corporation expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser (*de facto* merger), (3) the purchasing corporation is a mere continuation of the selling corporation, or (4) the transaction was entered into fraudulently to escape debt obligations.[20]

A. Express or Implied Assumption of Debts and Obligations

Successor corporations may be held liable for the debts of their predecessors where they expressly, or impliedly, agree to take on these obligations. Oftentimes, mere examination of the asset-transfer agreement, obtained through the discovery mechanisms described later in this Article, will be enough to determine whether this exception applies.[21] If in the agreement, the purchasing corporation expressly agrees to assume the debts and obligations of its predecessor, it will be held liable for a money judgment obtained against the corporation which it purchased.

Less clear is a situation where the assumption of debts and obligations by the purchaser was not express, but where the purchasing corporation voluntarily pays some of the debts of its predecessor. Generally, to determine whether an implied assumption of liabilities has occurred, an analysis of the surrounding facts is necessary to determine whether the acquiring corporation has manifested its intent to pay the debts of the seller. It should be noted that the fact that a buying corporation has paid certain debts of the selling corporation on a voluntary basis is not, standing alone, grounds to find an implied assumption of liability. Such determinations are made on a case-by-case basis.

B. The De Facto Merger Doctrine[22]

Successor corporations also may be held liable for the debts and liabilities of their predecessor where a court finds that a *de facto* merger of the two corporations has taken place. A *de facto* merger exists where a transaction, although not a formal merger, is in substance "a consolidation or merger of seller and purchaser."[23] New York courts consider the following factors when determining whether a purchase of assets was in fact a *de facto* merger: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of liability necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operations.[24]

New York courts have consistently held that the continuity of ownership factor, as evidenced by a stock for assets transfer, must be present for this exception to apply.[25] As to the other three factors, New York courts have performed more of a balancing test. In short, the finding of a *de facto* merger in New York does not necessarily require the presence of all four factors, so long as continuity of ownership is present.

C. The Mere Continuation Exception

New York courts have applied a "mere continuation" exception to successor liability within the context of an assets purchase, where the owners and directors of one corporation essentially dissolve it and form another in order to continue its business operations while alleviating the need to sell the former corporation's debts and liabilities. "Mere continuation" is so similar to the *de facto* merger exception that some courts consider them to be a single exception.[26]

In determining whether the purchasing corporation is a mere continuation of the selling corporation, courts look to several factors, including: (1) continuity of ownership, (2) cessation of ordinary business by the predecessor, (3) the successor's assumption of liabilities ordinarily necessary for the continuation of the predecessor's business, and (4) the continuity of management, personnel, physical location, assets, and general business operations.[27] Similar to the *de facto* merger doctrine, New York courts have consistently held that continuity of ownership is indispensable to the application of this exception, but apply a balancing test as to all other factors.

In other states, such as Connecticut and Michigan, continuity of ownership is not dispositive of successor liability, so long as some of the other relevant factors are proven.[28] If continuity of ownership is lacking in a particular instance, it may be worth researching how the successor liability doctrine applies in other states with a connection to the corporation or transaction at issue. In many instances, enforcing the judgment in another state may also be a viable option.

D. Fraudulent Transfer

A fraudulent transfer of assets will be deemed to exist for the purposes of successor liability where the consideration paid for the assets transferred to a newly formed corporation did not constitute the fair value of those assets. Simply put, this exception seeks to prevent corporations from transferring assets for the express purpose of avoiding debts and evading creditors. Although New York courts have held successors liable in the context of fraudulent conveyances designed to evade tort liability,[29] there is scant New York case law applying this exception in isolation, in the context of the evasion of debts. Courts have considered a fraudulent transfer, however, as an additional factor which supports the determination that the mere continuation or *de facto* merger exceptions should apply.[30]

Post-Judgment Discovery

While the imposition of successor liability would first require the judgment creditor to commence a separate proceeding against the newly formed corporation to prove the above-described elements of his or her claim, this process may be assisted by first undertaking the broad disclosure allowed pursuant to CPLR 5223. This Section provides that at any time before a judgment is satisfied, "the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena…."[31] First acquiring pertinent information from the debtor may provide the judgment creditor with the facts necessary to establish his or her claims in a summary proceeding against the purchasing corporation. And in a simple enforcement proceeding, such a device will allow the creditor to determine how best to pursue the debtor's assets.

Conclusion

Recovering on a money judgment may require some determination, investigation and creativity on the part of the judgment creditor's attorney. In New York, several options and devices are available when the time comes to enforce. Who to enforce against, or how, certainly involves some amount of strategy, and forethought in this regard may make the difference between a more expedient recovery on the judgment and a good deal of frustration. Happily, courts, including those in New York, have become increasingly sympathetic to the plight of the judgment creditor.

Endnotes

1. *See* CPLR 5225 (1997).
2. *See* Fed. R. Civ. P. 69(a)(1).
3. CPLR 5225(b)(1997). Specifically, the provision states that as to money or other personal property in which the judgment debtor has an interest, "the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor" and if that amount is insufficient, "to deliver any other personal property…to a designated sheriff."
4. *See* CPLR 5210 (1997) ("Every court in which a special proceeding to enforce a money judgment may be commenced, shall **have** power to punish a contempt of court committed with respect to an enforcement procedure.").
5. *See, e.g., Kohler v. Bank of Bermuda, Ltd.*, 2005 WL 551115, at *7 (S.D.N.Y. 2005) (stating "[C]laims against BBL would nevertheless fail for the reason that this Court has no in rem juridiction….").
6. *See, e.g., Miller v. Doniger*, 814 N.Y.S.2d 141, 141 (2006).
7. *See Gryphon Domestic VI, LLC v. APP Intern Finance Co. B.V*., 836 N.Y.S.2d 4, 5 (2007).
8. *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, N.Y.S.2d 763 (2009).
9. No. M18-302 (CSH), 2005 U.S. Dist. LEXIS 3760, at *21 (S.D.N.Y. 2005).
10. *Koehler v. Bank of Bermuda*, 544 F.3d 78, 85-86 (2d Cir. 2008).
11. *See id.*
12. *See id.* at 86.
13. *See id.*
14. For discussions regarding the potential repercussions of *Kohler, see* George Hritz, Nowhere to hide, The Brief, November 2009, at 12 ("New York Courts may now be able to access judgment debtors' assets anywhere in the world as long as they are held in a bank that also has a branch in New York."); Daniel L. Brown & Elizabeth M. Rotenberg-Schwartz, Judgment Secured—Now What?, 242 New York Law Journal 1 (July 20, 2009).
15. *Hotel 71 v. Mezz Lender LLC v. Falor,* 14 N.Y.3d 303, 312, 900 N.Y.S.2d 698 (2010) (holding that a New York court with personal jurisdiction over a nondomiciliary present in New York has jurisdiction over that individual's tangible or intangible property for purposes of attachment, even when the situs of the property is outside of New York).
16. *Hotel 71 Mezz Lender LLC v. Falor*, 58 A.D.3d 270, 273, 869 N.Y.S.2d 61, 63 (1st Dep't 2008), *citing National Broadway v. Sampson*, 179 N.Y. 213, 222, 71 N.E. 766. 768 (1904).

17. *Hotel 71 v. Mezz Lender LLC*, 14 N.Y.3d 303, 312, 900 N.Y.S.2d 698 (2010).

18. *Id.* at 307.

19. *Ed Peters Jewelry Co. Inc. v. C & J Jewelry Co. Inc.*, 124 F.3d 252, 267 (1st Cir. 1997) ("[E]xisting case law overwhelmingly confirms that an intervening foreclosure sale affords an acquiring corporation no automatic exemption from successor liability."); *EEOC v. SWP, Inc.*, 153 F. Supp. 2d 911, 924 (N.D. Ind. 2001) ("The mere fact that the transfer of assets involved foreclosure on a security interest will not insulate a successor corporation from liability where other facts point to continuation."); *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F. Supp. 265, 275 (D.N.J. 1994) (holding that purchase of assets at a secured party sale does not preclude a finding of successor liability); *Cont'l Ins. Co. v. Schneider Inc.*, 810 A.2d 127, 133 (Pa. Super. Ct. 2002) ("[W]e hold that a sale pursuant to Section 9-504 of the UCC does not, as a matter of law, preclude a creditor's claim against the purchaser based upon successor liability.").

20. *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 575, 730 N.Y.S.2d 70 (2001).

21. *See Desclafani v. Pave-Mark Corp.*, No. 07 Civ. 4639(HBP), 2008 U.S. Dist. Lexis 64672, at *15 (S.D.N.Y. 2008).

22. As noted by the Second Circuit in *Cargo Partner*, "[s]ome courts have observed that the mere-continuation and de-facto-merger doctrines are so similar that they may be considered a single exception." *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 45 n.3 (2nd Cir. 2003).

23. *Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 245, 464 N.Y.S.2d 437, 440 (1983).

24. *See Fitzgerald*, 286 A.D.2d 573, 574, *citing Sweatland v. Park Corp.*, 181 A.D.2d 243, 245-246, 587 N.Y.S.2d 54, 56 (1st Dep't 1992).

25. *Cargo Partner AG v. Albatrans Inc.*, 352 F.3d 41 (2d Cir. 2004) (applying New York law).

26. *E.g., Nat'l Gypsum Co. v. Cont'l Brands Corp.*, 895 F.Supp. 328, 336 (D.Mass. 1995); *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F.Supp. 265, 275 (D.N.J. 1994); *see also Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529, 1535 (S.D.N.Y. 1985).

27. *See Miller v. Forge Mench P'ship, Ltd.*, No. 4314, 2005 WL 267551, at *7-14 (S.D.N.Y. 2005).

28. *See Mavel v. Scan-Optics, Inc.*, 509 F.Supp.2d 183, 188 (D. Conn. 2007) (quoting *Bowen Eng'g v. Estate of Reeve*, 799 F.Supp. 467, 487-88(D.N.J 1992); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883 (Mich. 1976).

29. *See, e.g., American Standard Inc. v. Oakfabco Inc.*, 14 N.Y.3d 399, 901 N.Y.S.2d 572 (2010) (holding that the language of the parties' agreement shows that the buyer of a business assumed the seller's liabilities for tort claims based on items sold before the business was acquired, where the tort claimants were not injured until after the acquisition).

30. *See* George W. Kuney, *Successor Liability in New York*, 79-SEP N.Y. St. B.J. 22, 22–27 (2007).

31. CPLR 5223 (1997).

Rebecca Adams Hollis is an associate at Allyn & Fortuna, LLP. She can be reached at radamshollis@allynfortuna.com.

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Notice, Disclaimers of Coverage and the New Prejudice Requirement—No Prejudice No More

By Elizabeth Fitzpatrick

Most policies of insurance, whether personal or commercial, auto or homeowners, include a condition requiring an insured to provide notice of an occurrence or loss to the insurer as soon as practicable or as soon as reasonably possible. Absent an excuse for the delay, notice provided by the insured more than a month after the loss is typically held to be untimely, often as a matter of law. This is exemplified by the 1st Department's recent decision in *Juvenex Ltd. v. Burlington Ins. Co.*, 2009 NY Slip Opinion 05166 (1st Dept. 2009).

In *Juvenex*, the court held that the insured's delay of two months in giving the insurer notice of the claim was unreasonable as a matter of law, citing *2130 Williamsbridge Corp. v. Inner State Indem. Co.*, 55 AD 3d 371 (2008). Addressing the right of an injured party to provide notice to the insurer, the court declined to consider the plaintiff's argument that notice of the claim provided to the defendant by the injured person was timely, noting that, in any event, it would consider the injured claimant's delay in providing notice to the insurer also unreasonable as a matter of law.

An even shorter delay was held to be unreasonable in *Young Israel v. Guideone Mutual Insurance Company*, 2008 WL 2277599 (1st Dept. 2008), where the court held that the insured's 40 day delay in notifying the insurer of the accident was unreasonable as a matter of law. The court rejected the insured's proffered excuse for the delay, to wit, a reasonable belief in nonliability, as the accident involved a rear end collision by the insureds and the claimant was removed from the accident by ambulance.

While, as demonstrated by the court's decision in *Young Israel, supra*, a good faith belief of non-liability may excuse or explain a failure to give timely notice, the insured bears the burden of demonstrating that the delay in giving notice was reasonable. *Travelers Indemnity Company v. Worthy*, 281 AD2d 411 (2nd Dept. 2001). The issue of whether an insured possesses a reasonable good faith belief as to its non-liability is ordinarily a question of fact. *Argentina v. Otsego Mutual Fire Insurance Company*, 86 NY2d 748 (1995).

In *Argentina*, although the insureds notified their liability insurer 171 days after a slip and fall accident by the insureds' brother, the court concluded that the insureds had a reasonable good faith belief in non-liability, based, in part, on the close familial relationship between the insureds and the accident victim.

In *Kambousi Rest., Inc. v. Burlington Ins. Co.*, 2009 NY Slip Op. 00241 (1st Dept. 2009), the court held the insured's notice given 6 months after the incident was excused based upon his reasonable belief in nonliability and the insurer was thus obligated to defend and, if necessary, indemnify the insured.

In *422-428 West 46th Street Owners, Inc. v. Greater NY Mutual Ins. Co.*, 2008 Slip Opinion 08257 (1st Dept. 2008), the court held that despite a ten-month delay by the insured in notifying the insurer of the incident, questions of fact existed as to whether the failure was excused based upon the insured's good faith, reasonable belief of non-liability.

The case law demonstrates that the courts strictly construe the insured's proffered excuses for their delay in providing notice, though not as strictly as the courts construe the timeliness of an insurer's denial.

Insurance Law § 3420 Amendments

In July 2008, New York's governor signed into law legislation which significantly altered an insurer's ability to rely on late notice as a defense to coverage. The law imposes a prejudice requirement on insurers who seek to disclaim coverage based upon their insured's late notice of the loss. Until the recent amendment to Insurance Law § 3420, New York was in the minority of states that did not require an insurer to demonstrate that they were prejudiced by the insured's untimely notice of the loss or claim in order to disclaim coverage. The following is a summary of the key points of the law.

Effective Date

The law applies to claims made under policies issued or renewed 180 days after the bill became law, to wit, January 17, 2009. Thus a claim that occurred on January 30, 2009 is not governed by the prejudice requirement unless the policy under which defense and indemnity is sought either incepted or was renewed after January 17, 2009.

Prejudice

The legislation constitutes a significant change to New York law by imposing a prejudice requirement on an insurer seeking to disclaim coverage based upon the insured's late notice of the claim or occurrence. To establish prejudice, the insurer must demonstrate that the failure to timely provide notice materially impairs the ability of the insurer to investigate or timely defend the claim.

The law imposes a burden of proof such that if notice is given within 2 years of the time required, there is a presumption that the insurer has not been prejudiced and the burden will be upon the insurer to demonstrate prejudice. If the notice is given more than two years after it was required, prejudice is presumed and the insured, injured party or other claimant has the burden to show that the insurer was not prejudiced.

An irrebutable presumption of prejudice will apply where the insured's liability has been established by a court or by binding arbitration or where the insured has resolved the claim through settlement or otherwise.

Direct Action

The legislation also overrules, at least partially, the Court of Appeals's holding in *Lang v. Hanover*, 3 NY3d 350 (2004). In particular, a new § 3420(a)(6) allows the injured party in bodily injury and wrongful death cases to bring a direct action to establish the validity of the insurer's disclaimer or denial where the denial is based upon the failure to provide timely notice and neither the insurer nor insured has commenced a declaratory judgment action within sixty (60) days of the denial

Policy Disclosure

Finally, the law obligates insurers issuing certain types of coverage to disclose the existence of a policy and its limits. Specifically, with respect to liability policies subject to § 3425 of the Insurance Law, that is, personal lines auto or homeowner's policies, but excluding excess or umbrella policies, or a policy used to satisfy a financial responsibility requirement imposed by law, an insurer who receives a written request for coverage confirmation by an injured person or any other claimant must respond within sixty (60) days advising whether the insured had a policy and if so, its limits.

If the insurer does not have sufficient information to allow the insurer, with reasonable diligence to provide the information, the insurer shall advise the person making the inquiry. Once the information is thereafter provided, the insurer has an additional (45) days to respond unless a court or arbitrator has granted the insurer additional time. A failure to comply with the written request to confirm coverage could result in Insurance Department sanctions. There is much uncertainty on the part of the industry regarding this aspect of the legislation and it is anticipated that the Insurance Department will provide further guidance.

While an insured has an obligation to provide timely notice of a loss for which coverage is sought, most practitioners who handle bodily injury claims in New York are familiar with Insurance Law § 3420 and the strict construction applied by the courts to its directive that an insurer advise the insured, injured party and any other claimant of a denial or disclaimer of coverage as soon as reasonably possible. An insurance carrier who fails to issue a disclaimer as soon as reasonably possible after it first learns of the accident or grounds for disclaiming will be precluded from relying upon a policy exclusion or its insured's breach of a policy condition and it is the insurer's burden to explain any delay in issuing a disclaimer.[1]

Insurance Law § 3420 provides in pertinent part as follows:

> (2) If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.[2]

Thus, the statute applies to claims involving bodily injury or death arising from an accident in New York, where the insurance policy under which the claim is being made was issued or delivered in New York. The purpose of the statute is to protect the insured, an injured party and any other claimant from belated delays by an insurer in issuing a denial. In particular, the law was intended to prevent dilatory practices by an insurer which, the Legislature concluded, inhibit the fair and expeditious resolution of liability claims by allowing the consumer to pursue, in a timely manner, an alternative method of recovering damages.[3]

The reasonableness of the insurer's delay in disclaiming is measured from the point in time when an insurer first knew or should have known of the grounds for disclaimer of liability or denial of coverage.[4] If, however, the claim is outside the scope of the coverage afforded by the policy, no disclaimer is required.[5] The issue of the timeliness of an insurer's denial is frequently litigated and the courts have held that unexcused delays as minimal as 30 days are untimely, thereby precluding the insurer from relying upon the denial.[6] A challenge to the timeliness of the denial where the statute is inapplicable requires a demonstration of prejudice as a result of the delay in disclaiming.

In a narrow line of cases, decided primarily by New York's 1st Department, the court has held that the statute does not apply where the claim was between insurers. For example, in *Bovis Lend Lease v. Royal Surplus Lines Ins. Co.*,[7] after discussing the purpose of Insurance Law § 3420, the court concluded that a co-insurer was not within the class of protected persons under the statute and thus could not challenge another insurer's denial based upon noncompliance with the statute, for untimeliness, for example.

In *Bovis*, *supra*, during the pendency of the underlying action, National Union tendered the defense of mutual insureds, Bovis and Columbia, to insurer, Royal. Several months after the tender, Royal declined National Union's tender. The denial was issued shortly after National Union, Bovis and Columbia had commenced a declaratory judgment action against Royal seeking a declaration that Royal was obligated to defend and indemnify the National Union mutual insureds in the bodily injury suit. In that litigation, National Union also sought reimbursement of the defense fees it had incurred in its defense of the mutual insureds between the date of tender and the commencement of the coverage action. National Union argued, in opposition to Royal's motion for summary judgment, that Royal's disclaimer was untimely.

The court ultimately determined that while National Union was not permitted to rely upon the untimeliness of the denial by Royal so as to allow its recovery of defense costs incurred in defense of the mutual insured, the disclaimer issued somewhere between 36 and 60 days after notice was provided was untimely as to its insureds and therefore, Royal was responsible for the defense and indemnity of both the mutual insureds. The court in *Bovis* noted the distinction between an insurer's own claim, as opposed to a tender by an insurer on behalf of the insured.

Similarly, in *American Guarantee v. State National*,[8] the 1st Department held that the excess insurer for a mutual insured could not raise the untimeliness of the primary insurer's disclaimer since it was not within the class of protected persons the statute was designed to protect.

In a recent decision by the 2nd Circuit, entitled *New York State Insurance Fund v. Mount Vernon Fire Ins. Co.*,[9] the court affirmed the decision of the Southern District, holding that under the circumstances presented, the disclaimer of coverage issued by Mount Vernon was subject to New York's timely disclaimer requirement as set forth in Insurance Law § 3420(d). The court distinguished the 1st Department's decision in *Bovis, supra.*[10]

In *NYSIF*, *supra*, NYSIF contended that the disclaimer of coverage issued by Mount Vernon to its insured, a subcontractor at the site, was untimely and therefore invalid. The disclaimer was issued some two years after Mount Vernon was placed on notice of the loss and undertook its insured's unconditional defense and 56 days after the jury rendered a verdict in the underlying bodily injury action. In an effort to justify the denial's lateness, Mount Vernon cited the independent contractor exclusion to its policy, claiming that it only became aware of facts allowing it to rely upon the exclusion following the jury's verdict. Mount Vernon argued that in any event, NYSIF lacked standing to raise the untimeliness argument, citing the 1st Department decisions set forth above.

Unlike the situation present in *Bovis*, NYSIF and Mount Vernon were not co-insurers of the same insured. Instead, NYSIF had satisfied the underlying verdict, thereby becoming subrogated to the rights of its insured, who had a judgment against Mount Vernon's insured for 20% of the underlying verdict. The Second Circuit thus found the statute applicable as NYSIF had become equitably subrogated to the rights of its insured, noting that: "It is so well-settled as not to require discussion that an insurer who pays claims against the insured for damages caused by the default or wrongdoing of a third party is entitled to be subrogated to the rights which the insured would have had against such third party for its default or wrongdoing." The court concluded that NYSIF had a real stake in the outcome so as to invoke the protections of Insurance Law § 3420 as "any other claimant."

Although the New York Court of Appeals has not weighed in on the issue, the 2nd Circuit's decision has provided clarity as to the applicability of the statute where notice of a claim and a request for coverage is made by an insurer to another insurer. It is likely an issue which will arise in future litigation involving multiple insurers, although once the effects of the prejudice requirement contained in the amendment to New York Insurance Law § 3420 are felt, it is expected that significantly fewer disclaimers founded on late notice will be issued by insurers.

Endnotes

1. *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC.*
2. An Amendment to Insurance Law Section (a)(5) obligates an insurer to demonstrate prejudice as a result of alleged untimely notice under the policy for claims made under policies issued or renewed on or after January 17, 2009.
3. N.Y. Bill Jacket, L 1975, ch 775.
4. *Hartford Ins. Co. v. County of Nassau*; *In the Matter of Prudential Property & Cas. Ins. Co.*
5. *Ciasullo v. Nationwide Ins. Co.*, 32 AD3d 889 (2nd Dept. 2006); *National Union Fire Ins. Co. of Pittsburg, PA v. Utica First Ins. Co.*, 6 AD3d 681 (2nd Dept. 2004).
6. *West 16th Street Tenant's Corp. v. Public Service Mut. Ins.*, 290 AD2d 278 (1st Dept. 2002).
7. *Bovis Lend Lease v. Royal Surplus Lines Ins. Co.*, 27 AD3d 84 (1st Dept. 2005).
8. *American Guarantee v. State National*, 67 AD3d 488 (2009).
9. *New York State Ins. Fund v. Mount Vernon Fire Ins. Co.*, 2010 WL 1299088.
10. U.S. Liability seriously misreads *Bovis*.

Elizabeth Fitzpatrick is a partner with Lewis, Johs, Avallone, Aviles, LLP in the firm's Melville, New York office where she heads the firm's insurance coverage unit. She is the co-chair of the CLE Committee for the NYSBA, TICL Section.

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Reflections on the Use of Trademarks in Social Networking Website Vanity URLs

By Eric Joseph Shimanoff

I. Introduction

The rise in popularity and legitimacy of social networking websites has changed the face of the Internet, not just for Internet users but also for businesses that advertise through the medium. Many businesses now put effort into directing consumers to their Facebook pages and Twitter streams equal to that devoted to their own websites. However, as with any new medium, advertising through social networking websites opens up the possibility that third parties may misappropriate the trademarks of these businesses in violation of their valuable intellectual property rights.

While traditional principles of trademark law should protect trademark owners against many unlawful third-party uses, case law holding that the use of trademarks in post-domain paths of the URL is non-infringing could pose an obstacle to businesses that seek to prevent third parties from misappropriating their trademarks in Facebook and Twitter vanity URLs.

This article posits that the conventional view that post-domain paths of the URL merely show how data is organized within a website, and thus that uses of trademarks therein are not indicators of source or sponsorship, is most likely inapplicable in the context of social networking websites URLs. To the contrary, the content that follows the ".com" in a Facebook or Twitter URL may be just as source-indicative as the content that precedes it.

II. Social Networking Websites

Social networking websites such as Facebook and Twitter have opened new marketing channels for businesses seeking to promote their goods and services via the Internet. Just as businesses in the mid- to late-1990s began to recognize the Internet as a valuable marketing medium, businesses today have begun to recognize the importance of advertising via social networking websites to reach a larger audience.[1]

Social networking sites provide a unique advertising experience for consumers. For example, businesses can easily and at minimal cost set up a "page" on Facebook on which to post and frequently update information about the company and its goods and services. Similarly, businesses can establish Twitter accounts and post "tweets" about their goods and services, including information about time-sensitive discounts and promotions. Through each website, consumers can elect to follow and be notified immediately of these Facebook posts and Twitter "tweets," such that information is passed from the business to consumer nearly instantaneously.

Given its interactive nature, unlike traditional one-way advertising through print, television, and radio, Facebook and Twitter allow users to forward content posted by businesses to other users on the network, to post their own comments about and become fans of businesses that establish pages or send tweets, and to share their own comments and fan status with other users on the network. Social network users who partake in these activities essentially become, perhaps unwittingly, unpaid advocates for the business, dramatically increasing consumer exposure and brand recognition at no additional cost to the business. Moreover, the overall media costs to businesses for advertising on social networking websites are significantly lower than via traditional advertising media. It thus should come as no surprise that numerous businesses, including multi-national corporations such as Coca-Cola and McDonald's, have set up their own Facebook pages and Twitter accounts.[2]

III. Vanity URLs

Just as domain name registrars allow businesses to set up source-identifying domain names utilizing their trademarks (e.g., mcdonalds.com, coca-cola.com), Facebook and Twitter allow users to establish "vanity" user name URLs where businesses can select a personalized address utilizing their trademark to point to their Facebook page or Twitter account (e.g., http://www.facebook.com/mcdonalds, http://twitter.com/mcdonalds). But what can a business do if an unauthorized third party decides to set up a Twitter or Facebook account utilizing a business's trademark in the vanity URL? In the early days of domain name registration, before many corporations had registered their trademarks as domain names, cybersquatting was rampant, as third parties cheaply purchased and hijacked domain names comprised of famous marks in hopes of ransoming them for profit. The offering of vanity URLs by social networking sites creates similar concerns.

IV. Website Policies

Aware of the potential for trademark infringement, prior to offering vanity URLs, Facebook allowed businesses to pre-register their federally registered trademarks with Facebook so that once the URLs were offered, no other user could misappropriate the trademark. However, those users without federally registered trademarks, whose rights in their trademarks may have arisen under the common law, were not afforded the opportunity to take advantage of this pre-registration process and instead were left to fend for themselves when Facebook began to grant vanity URLs on a first come, first served basis. Twitter had no such registration process for holders of federally registered trademarks. What recourse would businesses have against potential trademark infringement via the Facebook and Twitter vanity URLs?

Both Facebook and Twitter have internal policies that prohibit the unauthorized use of a business's trademark in a vanity URL that would result in consumer confusion, and they each have procedures and forms for reporting such violations.[3] However, social networking websites are not necessarily in the best position to make determinations on complex trademark issues such as likelihood of confusion. In some circumstances, they may refuse to make any determination at all. If a trademark holder with a claim of infringement based on the use of a trademark in a vanity URL is unable to obtain relief from the social networking site, what remedies might it obtain from the courts? Given past precedent concerning the use of trademarks in domain names and URLs, the answer is unclear.[4]

V. How Domain Names Differ from Vanity URLs

Before delving into that issue, a review of the basics of domain names is in order. Domain names are divided into different levels. The top level domain name (TLD) is the end of the domain name, such as ".com," ".gov," ".org" and ".biz." Immediately to the left of the TLD is the second level domain (SLD). Thus, in the domain name facebook.com, ".com" is the TLD and "facebook" is the SLD.[5] Because consumers typically expect the name of the business controlling or authorizing the website to be the name in the SLD, trademark infringement or cyberpiracy may be found when another party uses without authorization a trademark that is not its own as an SLD in manner that is likely to cause consumer confusion as to the source of the website.[6] Thus, a consumer who is directed to the website located at http://www.coca-cola.com would likely expect that website to be controlled by or affiliated with the Coca-Cola beverage corporation.[7]

The use of a business's trademark in a Facebook or Twitter vanity URL, however, is *not* the use of a trademark in a domain name, since the user's trademark does not appear within the SLD.[8] Instead, in the vanity URL, the trademark appears to the right of the TLD in what is known as the post-domain path of the URL (e.g., http://www.facebook.com/**coca-cola**, http://twitter.com/**mcdonalds**) (bolding added).

VI. Case Law Concerning the Post-Domain Path of the URL

Read literally, the decisions concerning the unauthorized use of trademarks in the post-domain path of a URL have not been favorable to trademark holders. In *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*,[9] the leading case on the issue, the plaintiff, owner of the trademark LAP TRAVELER for portable computers, filed a suit for trademark infringement against computer resellers for the use of the mark in the post-domain path of the defendants' URL, which appeared as http://www.a2zsolutions.com/desks/floor/**laptraveler**/dkfl-lt.htm (bolding added). The URL at issue, however, did not resolve to a webpage offering plaintiff's LAP TRAVELER branded computer for sale. Instead, it led to one offering a competitor's model for sale.

Although the Sixth Circuit found there was no likelihood of confusion by the use of the plaintiff's LAP TRAVELER trademark, the court made the sweeping statements that, unlike a SLD, "[t]he post-domain path of a URL…does not typically signify source. The post-domain path merely shows how the website's data is organized within the host computer's files.… Because post-domain paths do not typically signify source, it is unlikely that the presence of another's trademark in a post-domain path of a URL would *ever* violate trademark law."[10] Based on this broad generalization about consumer perception of domain names and URLs, subsequent courts have refused to find infringement in cases involving the post-domain path of the URL.[11]

This precedent represents a significant obstacle for a trademark owner who is compelled to seek judicial intervention to prevent the unauthorized use of its trademark in a Facebook or Twitter vanity URL.[12]

VII. Inapplicability of Existing Case Law

In a Web 2.0 world, is the Sixth Circuit's reasoning about the source-identifying properties of a post-domain path of a URL truly applicable to a situation involving a Facebook or Twitter vanity URL? Social network vanity URLs do much more than "show[] how the website's data is organized within the host computer's files."[13] Indeed, their primary function is to make a user's or business's vanity URL their personal destination or home on the Internet and to provide an easy-to-remember way to find a user or a page.[14]

Unlike the unwieldy post-domain URL path at issue in *Interactive Prods. Corp.*, which the court reasoned would probably not be typed into a browser by a consumer searching for the plaintiff's LAP TRAVELER products,[15] a consumer looking for information from a business via a social networking website, especially information about discounts, promotions, or new products and services, likely would type a business's

Facebook or Twitter vanity URL directly into a browser. Indeed, many businesses now include the URL of their Twitter and Facebook pages in their traditional television, radio, and print advertising. Also, using a vanity URL helps ensure that a business's Facebook Page or Twitter account will come up near the top of the results of a search engine like Google, the top results usually being business-sponsored links.

Thus, unlike the post-domain path of the URL in *Interactive Prods. Corp.*, vanity URLs on social networking websites may function as source indicators, and it may be that a high percentage of consumers likely would believe that the page located at http://www.facebook.com/mcdonalds and the tweets posted on the URL http://www.twitter.com/mcdonalds were authorized by the McDonald's restaurant chain.

VIII. Conclusion

Like the broader Internet, social networking websites such as Facebook and Twitter serve a multitude of functions for an expansive and diverse community. In a sense, they are like their own mini-Internets. Just as consumers became more familiar with the Internet and came to expect SLDs to be the indicators of source for traditional domain names, in many social networking platforms, consumers may now have come to recognize the post-domain paths of the URLs as source indicators.

In cases involving social networking websites, where numerous sources may be affiliated with one domain name through various vanity URLs, courts should avoid reliance on the broad generalization made by the Sixth Circuit that post-domain name URL paths do not serve as source indicators. Instead, courts should take a different approach more in keeping with likely consumer perception in the social networking website context. New media uses have always altered traditional notions of consumer perception, and new uses on social networking websites should be no exception.

Endnotes

1. Facebook boasts over 500 million active users who collectively spend over 700 billion minutes per month on the website. Facebook Press Room, *Statistics*, http://www.facebook.com/press/info.php?statistics (last visited Feb. 28, 2011). Twitter has over 16 million users. SFGate, *(Almost) Everybody's on Facebook*, http://www.sfgate.com/cgi-bin/blogs/techchron/detail?entry_id=83924 (last visited Mar. 1, 2011).
2. The Coca-Cola Page on Facebook has over 22,000,000 fans. *See* http://www.facebook.com/cocacola (last visited Feb. 28, 2011). Over 200,000 Twitter users have subscribed to receive Coca-Cola's tweets. *See* http://twitter.com/cocacola (last visited Feb. 28, 2011). The McDonald's page on Facebook has over 7,000,000 fans. *See* http://www.facebook.com/McDonalds (last visited Feb. 28, 2011). Almost 90,000 Twitter users have subscribed to receive McDonald's' tweets. *See* http://twitter.com/McDonalds (last visited Feb. 28, 2011).
3. Twitter Help Center, http://support.twitter.com/groups/33-report-a-violation (last visited Feb. 28, 2011); Facebook Help Center, http://www.facebook.com/help/#!/help/?page=439 (last visited Feb. 28, 2011).
4. No court has yet ruled on this precise issue. Although at least one case was brought against Twitter alleging false association due to the unauthorized of a celebrity's name to post tweets purportedly attributable to the celebrity, the case was voluntarily dismissed after the parties reached a settlement. *See LaRussa v. Twitter*, No. 09 Civ. 2503 (N.D. Cal.).
5. *See GoForIt Entm't, LLC v. DigiMedia.com L.P.*, No. 08 Civ. 2011, 2010 U.S. Dist. LEXIS 120338, at *6-*7 (N.D. Tex. Oct. 25, 2010).
6. *See, e.g., Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999) (holding that defendant's use of domain name moviebuff.com violated plaintiff's trademark rights in the mark MOVIEBUFF); *Sporty's Farm L.L.C. v. Sportsman's Mkt., Inc.*, 202 F.3d 489, 499 (2d Cir. 2000) (holding that defendant's registration and use of sportys.com domain name in violation of plaintiff's rights in its SPORTY'S trademark constituted cyberpiracy under Anti-cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)).
7. *See Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1177 (9th Cir. 2010) ("When a domain name consists *only* of the trademark followed by .com, or some other suffix like .org or .net, it will typically suggest sponsorship or endorsement by the trademark holder.") (emphasis in original); *Sporty's Farm*, 202 F.3d at 493 ("The most common method of locating an unknown domain name is simply to type in the company name or logo with the suffix .com.").
8. *See GoForIt Entm't*, 2010 U.S. Dist. LEXIS 120338, at *20 ("Defendants maintain that a third level domain—the level in question in this case—is outside the scope of the statute, because it is not 'registered with or assigned by' a domain name registrar. The court agrees. The only part of a web address that must be registered is the second level domain.").
9. 326 F.3d 687 (6th Cir. 2003).
10. *Id.* at 696-98 (emphasis added).
11. *See, e.g., Nagler v. Garcia*, 370 Fed. Appx. 678, 680 (6th Cir. 2010) (use of mark DIET RESULTS in post-domain path of URL as http://www.beautyinaflash.com/dietresults.html "cannot support a claim for trademark infringement"); *Knight-McConnell v. Cummins*, 2004 U.S. Dist. LEXIS 14746, at *8 (S.D.N.Y. July 29, 2004) ("defendant's use of the plaintiff's name in the post-domain path of a URL and placement of URLs using the plaintiff's name in the post-domain paths on chat forums, discussion boards, and search engines do not give rise to any source confusion").
12. Resort to relief under the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), or the Uniform Domain Name Dispute Resolution Policy likely would be unsuccessful, since both provide remedies for the use of a trademark in a "domain name" and not in the post-domain path of the URL.
13. *Interactive Prods. Corp.*, 326 F.3d at 696-97.
14. *See* The Facebook Blog, *Coming Soon: Facebook Usernames*, http://blog.facebook.com/blog.php?post=90316352130 (last visited Feb. 28, 2011).
15. 326 F.3d at 697.

Eric Joseph Shimanoff is a partner with Cowan, Liebowitz & Latman, P.C.

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Ethics Opinion 880

Committee on Professional Ethics of the New York State Bar Association (10/6/11)

Topic: Prohibition of contingent fees in criminal matters; violations of the Vehicle and Traffic Law; refund of legal fees.

Digest: Prohibition of contingent fees in criminal matters is inapplicable to simple traffic infractions which are expressly deemed noncriminal; violations of the Vehicle and Traffic Law which constitute misdemeanors or felonies are subject to the prohibition on contingent fees. In agreements to provide legal services for such violations and in advertising related thereto, it must be clear that contingent fees are not available with respect to misdemeanor or felony charges. In criminal matters, an agreement to refund a fee paid in advance upon the occurrence of a certain outcome may be deemed a prohibited contingent fee.

Rules: 1.5(d)(1) and (c); 7.1(a).

Question

1. May a lawyer offer to refund all legal fees paid by a client in connection with proceedings for violations of the Vehicle and Traffic Law if the charges are not dismissed or reduced?

Opinion

2. Rule 1.5(d) of the Rules of Professional Conduct states:

   > "A lawyer shall not enter into an arrangement for, charge or collect:
   >
   > (1) a contingent fee for representing a defendant in a criminal matter...."

3. The question posed requires us to interpret the terms "contingent fee" and "criminal matter" within the meaning of Rule 1.5(d).

4. As to the meaning of "contingent fee," the question is whether that term includes a fee received by a lawyer on an understanding that the client may be entitled to a refund of the fee if the charges are not dismissed or reduced. Of course in some circumstances, refund of fees is clearly contemplated by the rules. *See* Rule 1.16(e) (obligating lawyer to refund "any part of a fee paid in advance that has not been earned"). We believe that when entitlement to a refund depends on the outcome of the matter, then the arrangement must comply with the rules on contingency fees. To trigger those rules, it is not necessary that the stated contingency occur prior to payment of the fee. The common understanding of a contingent fee envisions payment at the conclusion of a matter. However, fees for criminal defense work are typically paid in advance. To construe the term to apply only to fees paid subsequent to the contingency would render the traditional prohibition too easily evaded and virtually meaningless in many cases.

5. Interpreting the term "criminal matter," we first turn to the New York State Vehicle and Traffic Law ("VTL") for guidance. The VTL proscribes a wide variety of conduct including traffic infractions, misdemeanors and felonies. *See, e.g.*, VTL § 1193 (providing that driving while ability impaired is a traffic infraction or misdemeanor, and driving while intoxicated is a misdemeanor or felony, depending on factors including prior record). Simple "traffic infractions" (including most tickets for speeding) are expressly designated as noncriminal. VTL § 155 ("A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment".)

6. Although the VTL applies throughout the State, local regulations provide for considerable variation in the type of conduct proscribed as well as the manner in which violations are prosecuted. Noncriminal traffic infractions are most commonly addressed by the local city, town or village courts, but in New York City, Buffalo, Rochester and the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown in Suffolk County, they are heard by the Traffic Violations Bureau ("TVB") of the State's Department of Motor Vehicles. Violations heard by the TVB are purely civil administrative matters without the involvement of any local city, town or village court or the public prosecutor. Some local courts hearing simple traffic infractions are designated as "criminal courts" and may impose short periods of incarceration. In many local courts, plea bargains are usually negotiated by the issuing officer; however, where the issuing officer is a State Trooper, the plea is negotiated with a representative from the District Attorney's office who, if the negotiations fail, will proceed to trial.

7. The policy underlying Rule 1.5(d) reflects the profession's aversion to allowing defense counsel to have a financial interest in the outcome

of a criminal case. *See* Former Code of Professional Responsibility DR 2-106(C)(1)(prohibiting a "contingent fee for representing a defendant in a criminal case"); *see also, e.g.*, District of Columbia Opinion 262 (1995) (allowing contingent fee in coram nobis proceeding after defendant had been released, and reviewing various policy arguments underlying the traditional prohibition); Charles W. Wolfram, *Modern Legal Ethics*, § 9.4.1, at 526-28 (1986); Standards Relating to the Prosecution and Defense Function: The Defense Function § 3.3(e) (ABA 1971); Geoffrey C. Hazard, Jr. & Susan P. Koniak, *The Law and Ethics of Lawyering* at 508 (1990); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. Crim. L. & Criminology at 498 (1991); Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595 (April, 1993).

8. When a matter is essentially civil, albeit having some relation to the penal law or prior criminal proceedings, the authorities have long recognized that the ban on contingent fees is inapplicable. Thus it has been deemed permissible to agree that a lawyer's fee for representing the accused in defense of certain criminal charges will be satisfied by his or her contingent fee for representing that same client as the plaintiff in a related civil action seeking damages for false arrest. Illinois Opinion 84-9 (1985); *see also, e.g.*, Indiana Opinion 4 (1991); N.Y. City 1986-3 (fee for defense of ancillary criminal case may be tied to success in negligence action).

9. Similarly, the ban on contingent fees in criminal matters has been held inapplicable to related administrative or civil proceedings. *See, e.g.*, Connecticut Inf. Opinion 91-1 (1991) (license revocation proceeding following client's arrest for drunk driving); Kansas Opinion 96-10 (1997) (driver's license revocation proceeding); Pennsylvania Opinion 92-183 (1993) (habeas corpus petition to have client transferred to a different prison); Nassau County Opinion 90-12 (civil action for forfeiture of proceeds of crime); Michigan Inf. Opinion RI-269 (1996) (seizure of property by government); Virginia Opinion 1748 (2000) (civil forfeiture proceeding).

10. In light of the foregoing, we believe that when the VTL defines the initial charge as a noncriminal traffic infraction, the proceedings should not be deemed a "criminal matter" within the meaning of Rule 1.5(d). This result should obtain regardless of whether the venue is denominated a "criminal court," whether the District Attorney's office is involved in the proceedings, or whether the penalty may involve a period of incarceration. When the initial charge constitutes a misdemeanor or a felony, however, the proceedings should be deemed a "criminal matter" within the proscription of the Rule. In such cases, a contingent fee or refund is impermissible even if the lawyer may, or ultimately does, obtain a reduction to noncriminal charges.

11. We are aware of one recent ethics opinion which would apply the traditional ban to so-called "quasi-criminal matters" including traffic tickets. In New Jersey Opinion 717 (2010), the New Jersey Advisory Committee on Professional Ethics determined that its version of the rule should be interpreted to apply to "quasi-criminal matters in municipal court, including motor vehicle cases." In so holding, the Advisory Committee observed the procedural and jurisdictional similarities between clearly criminal matters and those before its municipal courts in hearing "non-indictable and motor vehicle offenses." The question before us concerns noncriminal violations charged under the New York VTL and the procedures for resolving such charges. In that context, for the reasons discussed above, we reach a different result. Moreover, we note that the Advisory Committee recognized that the potential conflict addressed by the prohibition on contingency fees "is not present in many municipal court matters and the [rule against contingency fees in criminal cases] may be fairly criticized as overbroad. Accordingly, the Committee has invited the Supreme Court, in its administrative capacity, to evaluate [that rule] and consider whether a revision would be appropriate." N.J. Opinion 717.

12. Rule 1.5(c) states: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law." But contingency fee arrangements must meet certain standards. For example, when the fee is contingent, Rule 1.5(c) further requires that the fee agreement be in writing and "clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party."

13. Rule 7.1(a) provides: "A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

14. Together, Rules 1.5(c) and 7.1(a) require that in contingent-fee agreements to provide representation in connection with violations of the VTL, and in advertising relating thereto, it must be

clear that contingent fees (or, as in the question posed, “refunds”) are not available with respect to misdemeanor or felony charges.

Conclusion

15. The prohibition on contingent fees in criminal matters is inapplicable to initial charges of simple traffic infractions which are expressly deemed noncriminal under the Vehicle and Traffic Law. Charged violations of the VTL which constitute misdemeanors or felonies are, however, subject to the prohibition. In agreements to provide legal services for violations of the VTL and in advertising related thereto, it must be clear that contingent fees are not available with respect to misdemeanor or felony charges. In a criminal matter, an agreement to refund a fee paid in advance depending on the outcome may be deemed a prohibited contingent fee.

(24-11)

Ethics Opinion 881

Committee on Professional Ethics of the New York State Bar Association (10/6/11)

Topic: Spouses sharing office facilities.

Digest: A sole practitioner may not use the address and telephone number of her spouse's law firm as contact information if the telephone is answered with the name of the spouse's firm unless steps are taken to avoid the misleading impression that the sole practitioner is part of the spouse's firm. However, the sole practitioner's occasional use of the conference room and telephone lines at her spouse's firm does not, by itself, render her "associated in" her spouse's law firm for purposes of conflicts of interest.

Rules: 1.0(h), 1.10(a), 7.1(a), 7.5(b).

Question

1. The inquirer is a sole practitioner in a small community. She practices law from home but occasionally uses the conference room and telephone lines at her spouse's law firm for convenience. She raises two questions:

2.
   A. May a sole practitioner use the address and telephone number of her spouse's law firm as her own contact information, on her letterhead and elsewhere, if the telephone is answered with the name of the spouse's firm?

   B. Will the sole practitioner's occasional use of her spouse's conference room and telephone lines cause her to be "associated with" her spouse's law firm for purposes of imputation of conflicts of interest?

Opinion

Question A: May the Sole Practitioner Use the Address and Telephone Number of Her Spouse's Law Firm?

3. In the New York Rules of Professional Conduct (the "Rules"), Rule 7.1(a) prohibits a lawyer from engaging in misleading public communications about the lawyer for the purpose of seeking retention by prospective clients, and Rule 7.5(b) prohibits a lawyer from practicing under a misleading firm name. We are told that the telephone at the spouse's firm is answered with the name of the spouse's firm. Thus, a client or prospective client calling the sole practitioner would be greeted with the name of the spouse's firm, not the name of the sole practitioner. If the firm's switchboard operator or the firm's automated answering message fails to clarify that the sole practitioner is not associated with the firm, but instead forwards the call to the sole practitioner, or takes a message for her, or simply states that the sole practitioner is unavailable, then the caller would likely be misled into believing that the sole practitioner is part of the spouse's firm. And if the sole practitioner's name is added to the name of the spouse's firm when the telephone is answered, that might violate Rule 7.5(c), which provides that lawyers "shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners."

4. The use of the firm address by itself would not necessarily create the same misleading perception, but it would be improper for the sole practitioner to use both the address and telephone number of the spouse's firm as if they were the inquiring lawyer's own when, in truth, they are not. We conclude that the inquirer's use of the spouse's phone number as contact information, without clarification, is misleading to clients and others. The spousal relationship in a small community could only compound the confusion, especially if the inquirer and the inquirer's spouse use the same last name. As a better practice, the inquirer should consider using a separate telephone number (rather than the spouse's telephone number) to avoid confusion.

5. If the sole practitioner lists the telephone number and address of her spouse's firm on her letterhead, that could present another issue for the inquirer. Rule 7.5(a), whose predecessor in the Code was DR 2-102(A), provides as follows:

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

6. In N.Y. State 546 (1982), we addressed the circumstances under which a law firm could list a "branch office" address for an office that was staffed only occasionally. Applying DR 2-101(A) and DR 2-102(A), we said:

> [W]e believe that a law firm listing an office on its letterhead must do more than staff that office from time to time unless that limitation on staffing is made clear. There is, we believe, an implied representation from such listing that the firm has made arrangements to respond in a timely fashion to all inquiries addressed to that office, to provide legal services from that office as the need may arise, and hold meetings there. If the firm has not made such arrangements, it cannot list its branch office without some appropriate disclaimer indicating the limited hours of its operation.

7. By listing the address and telephone number of her spouse's law firm on her letterhead, the sole practitioner is making an implied representation that she has made arrangements for her spouse's firm "to respond in a timely fashion to all inquiries [to the sole practitioner] addressed to that office," and that she herself will "provide legal services from that office as the need may arise" and "hold meetings there." We do not know whether the sole practitioner has made those arrangements and commitments. If she has, then she may use her spouse's office address and telephone number as her own, provided that the sole practitioner also arranges for the person or machine that answers the telephone at the spouse's law firm to clarify that the sole practitioner is not associated with the firm (or arranges for the phone to be answered with a neutral phrase such as "law offices" without any names, or takes other steps to avoid the misleading impression that the sole practitioner is part of the spouse's firm).

8. If the sole practitioner has not made such arrangements and commitments, however, then putting her spouse's law firm address and telephone number on her own letterhead would violate Rule 7.5(a) without some appropriate disclaimer indicating the limited availability of that office (*e.g.*, saying "By appointment only" or listing specific hours when she is available at that address). Without such a disclaimer, listing the spouse's law office address would be misleading, and thus would not be "in accordance with Rule 7.1," which prohibits false, deceptive or misleading communications.

Question B: Is the Sole Practitioner "Associated With" Her Spouse's Law Firm for Purposes of Conflict Imputation?

9. Rule 1.10(a), New York's basic rule on the imputation of conflicts of interest, provides as follows:

    > While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

10. Whether a particular arrangement between lawyers, be it one for office sharing or some other form of coordination, makes those lawyers "associated in" a single "firm" for conflicts purposes is a fact-intensive inquiry. Rule 1.0(h), in the Terminology section of the New York Rules of Professional Conduct, provides that a "firm" or "law firm" "includes, *but is not limited to,* a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law…." (Emphasis added).

11. Comment [2] to Rule 1.0 elaborates by providing, in relevant part, as follows:

    > [2] Whether two or more lawyers constitute a firm…will depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. For example, a group of lawyers could be regarded as a firm for purposes of determining whether a conflict of interest exists but not for application of the advertising rules.

12. We do not believe that the sole practitioner's occasional use of her spouse's telephone lines or conference space by themselves render the inquirer "associated in" the spouse's firm for purposes of the conflicts imputation rule, Rule 1.10(a). *See* N.Y. State 715 (1999) (noting that "lawyers who share office space but are not in the same firm have been deemed to be 'associated' in a firm for purposes of the conflicts rules and vicarious disqualification rules," but also setting forth guidelines for avoiding the conflicts problem). However, our conclusion would be different if they "present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm," because in that case, per Comment [2], "they should be regarded as a firm for purposes of the Rules."

Conclusion

13. A lawyer who occasionally uses the conference room and telephone lines at her spouse's law firm may not use the address and telephone number of the spouse's law firm as contact information if the telephone is answered with the name of the spouse's firm, unless steps are taken to avoid the misleading impression that the sole practitioner is part of the spouse's firm. The sole practitioner's occasional use of her spouse's telephone lines or conference space does not, by itself, render the inquirer "associated in" the spouse's firm for purposes of the rule on imputation of conflicts.

(25-10)

Ethics Opinion 882

Committee on Professional Ethics of the New York State Bar Association (10/14/11)

Topic: Lawyer's participation in residential real estate transaction that includes both a "seller's concession" and an equivalent "gross-up" in the sales price.

Digest: If the sales price in a residential real estate transaction has been "grossed-up" in exchange for a "seller's concession," all transaction documents containing the grossed-up sales price must disclose that the sales price has been increased by a sum equal to the seller's concession.

Rules: 8.4(c).

Question

1. May a lawyer ethically participate in a residential real estate transaction if the sales contract, the HUD-1 Settlement Statement, the transfer tax return, and any other documents that contain the sales price all disclose both that the amount of the sales price has been increased ("grossed-up") and that the amount of the increase equals the amount of a "seller's concession"?

Facts

2. Seller's attorney has been presented with a contract for the sale of a single-family home for $306,000, with a mortgage contingency clause for $290,700, representing 95% financing. The contract also contains a provision for a "seller's concession" (*i.e.*, a reduction in the sales price)[1] of $6,000. The seller's concession on its face requires the seller to pay $6,000 of buyer's closing costs.

3. In reality, however, the seller will not pay the buyer's closing costs. Rather, the sales contract expressly states that the sales price has been increased ("grossed-up") by $6,000, a sum equal to the seller's concession regarding the buyer's closing costs. The contract thus clearly indicates that the net price the seller agreed to receive was $300,000. Similar disclosures, which show both the seller's concession and the equivalent gross-up in the sales price, are set forth in the HUD-1 Settlement Statement, the Real Property Transfer Tax Return, the Real Property Transfer Report and all other documents stating the sales price in connection with the sale of the real property. The inquiring lawyer wants to know whether it is ethical for a New York lawyer to participate in the transaction under these circumstances.

Opinion

4. In N.Y. State 817 (2007) this Committee opined that a lawyer's participation in a residential real estate transaction that includes both a "seller's concession" and a "grossed up" (increased) sales price is ethically prohibited unless the gross-up is disclosed in the transaction documents. That opinion did not hold that a seller's concession or gross up was improper. Rather, the opinion held that full disclosure of the gross-up in the transaction documents was necessary to avoid a misrepresentation regarding the amount of the purchase price.

5. In essence, we concluded in N.Y. State 817 that it is a misrepresentation under DR 1-102(A)(4) (the predecessor to Rule 8.4(c)) for the transaction documents in a residential real estate transaction either to contain an untrue statement of a material fact or to omit a material fact where the untrue statement or the material omission makes the statements contained in the transaction documents materially misleading.

6. A statement may be literally true with respect to the facts stated, but may fail to include other facts necessary to prevent a false implication, and a "failure to disclose is generally considered as much a misrepresentation as a false affirmative statement." *U.S. Express, Inc. v. Intercargo Ins. Co.*, 841 F. Supp. 1328, 1337 (E.D.N.Y. 1994). An assertion need not be fraudulent to be a misrepresentation. Disclosing a seller's concession without disclosing a matching gross-up in the sales price produces a half-truth, which is a form of misrepresentation within the meaning of Rule 8.4(c).

7. Our opinion in N.Y. State 817, at ¶ 14, makes this conclusion abundantly clear. We stated as follows:

> [A] lawyer may not ethically participate in such a "gross-up" of the actual purchase price and concomitant seller's concession unless there is neither deception nor misrepresentation at work in a transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up

> purchase price) must be disclosed in the transaction documents. We are persuaded that merely reporting "a seller's concession" may imply either that the seller has agreed to reduce the purchase price he or she would otherwise have obtained or that the reported sales price is the actual price of the property, less certain costs the seller has agreed to pay. If neither of these is the case, then reporting a concession, without more, is misleading under DR 1-102 [now Rule 8.4].

8. In reaching this conclusion we were aware of New Jersey Opinion 710 (2006) and its December 22, 2006 clarification.[2] *See* N.Y. State 817 nn. 4 & 8. We are also aware that after we issued N.Y. State 817, a further clarification of New Jersey Opinion 710 was released.[3] Nothing contained in New Jersey Opinion 710 or the two subsequent clarifications is inconsistent with N.Y. State 817 or with this opinion.

9. We have been advised that, in the circumstances addressed in our opinion here, the mortgagee bank is generally furnished with copies of the following documents: (i) the contract of sale with its riders and addenda (if any), (ii) the HUD-1 Settlement Statement, (iii) the closing statement, (iv) the mortgage, (v) the note, (vi) a mortgage title policy, and (vii) the deed. We assume that the real property will be assessed based upon the $306,000 "disclosed" sales price, not the $300,000 actual price, unless the documents make clear to the assessor that the true sales price was $300,000. *See* RP-5217 Real Property Transfer Report Instructions ¶ 13 (requiring that the seller's concession be deducted to reach the actual or full sales price).

10. The factual pattern described in this opinion is unlike the circumstance where the seller actually bears an economic cost equivalent to the concession. For example, if a building inspection discloses a defect in the structure (*e.g.*, a leaky roof) that will require the buyer to expend $6,000 in remediation costs, the seller may reduce the sales price by $6,000. Thus, the initially agreed sales price of $300,000 would be reduced to $294,000 and would not be grossed-up by a like amount. This is a distinction with a difference. In the situation we address, in contrast, the "gross-up" in the sales price to offset the seller's supposed concession could well be characterized as a subterfuge. It does not change the economic result of the transaction for the seller. As stated in *LaSalle Bank, N.A. v. Shearon,* 23 Misc. 2d 959, 964-65, 881 N.Y.S. 599, 603 (Richmond Cty. Sup. Ct. 2009):

> The term *seller's concession* implies that at the time of closing the seller is conceding a certain amount of the purchase price to enable the purchaser to complete the purchase. Using the facts presented in this case, a seller could concede or reduce an amount of the purchase price in order to pay for a portion of the purchase price and / or the closing expenses. But a *seller's concession,* as it is utilized in this transaction, is a misnomer with no foundation in logic or mathematics because the seller concedes nothing to the purchasers. In this case, the sellers inflated the price of their home from $335,000 to $355,100 to allow the Shearons [the buyers] to borrow additional funds to close the transaction. The sellers conceded nothing other than to act as coconspirators to circumvent the Banking Law restrictions on the closing costs to mortgage ratios and to manipulate the public records of the true sales prices and market data.

11. The problem is not the seller's concession in the abstract. Many seller's concessions are legitimate. The problem here is the matching "gross up" of the sales price, which effectively wipes out the seller's concession. If a buyer has to pay $6,000 to get a $6,000 discount, then the true sales price has not changed. Thus, a gross up, if not expressly disclosed as such, is a misrepresentation and is proscribed by Rule 8.4(c). Consequently, if a lawyer participates in a real estate transaction in which the lawyer knows (or should know)[4] that the transaction documents containing the grossed-up sales price do not expressly disclose that the sales price was increased by the same amount as the seller's concession, the lawyer violates Rules 8.4(c). The fact that the practice may be widespread does not authorize an attorney to participate in the misrepresentation. The Rule is equally applicable to the buyer's attorney, the seller's attorney, and the lender's attorney.

12. Even where the seller's concession and matching gross-up are suggested by a mortgage broker, a loan officer, or some other employee at the mortgage bank, the lawyer is not relieved from

making the necessary disclosures. Disclosure may be even more important in that situation because the lender's representative—the very person who might be expected to detect a misrepresentation (the supposedly increased sales price that is fully offset by an unexplained seller's concession)—is encouraging the misrepresentation. No function other than to misrepresent the purchase price can be ascribed to a gross–up equal to an unexplained seller's concession. A lawyer may not participate in that misrepresentation no matter who suggested it.

13. Essentially, the inquiry poses a simple question: are the Rules of Professional Conduct violated when a seller, buyer, lender, and their attorneys engage in the device of a seller's concession accompanied by a like increase in the purchase price that create a misrepresentation? We conclude that the Rules are violated. And the violation is not without consequences. The misrepresentation in the sales price (treating the grossed-up price as the true sales price) may mislead tax assessors, real estate appraisers, and mortgage investors. However, if all transaction documents disclose that the gross up is an increase in price equivalent to the seller's concession, then there is no misrepresentation—and no ethical violation—because everyone later in the chain of mortgage, title, or interest has the information at hand to understand the true sales price.

14. Applying these principles to the facts we have been given, we conclude that an attorney may ethically participate in a real estate transaction where the sales price is grossed-up by an amount equal to a corresponding seller's concession if the amount of the gross-up and the amount of the seller's concession are expressly and meaningfully disclosed in all documents that state the sales price, including but not limited to the contract of sale, the HUD-1 Settlement Statement, and all other documents that the attorneys prepare, review or approve.

15. A seller's concession is not *per se* inappropriate. The vice of the seller's concession here is the misrepresentation resulting from lack of disclosure that the buyer agreed to the grossed-up sales price solely in exchange for the seller's "concession." The misrepresentation would be canceled by meaningful express disclosure of the true nature of the transaction. Thus, where all documents that refer to the sales price also expressly state that the sales price has been increased by a sum equivalent to the seller's concession, the lawyer's ethical duty has been satisfied. For example, a lawyer could ethically participate in a residential real estate transaction where the sales contract, the HUD-1 Settlement Statement, the transfer tax return and any other documents that contain the sales price each contain the following statement (or a substantially similar statement): "The sales price has been increased by a sum equal to the seller's concession."

16. We are aware that when the transaction documents accurately disclose the connection between the gross-up of the sales price and the seller's concession, some banks or other lenders may be unwilling or unable to approve the amount of mortgage money a buyer needs. That does not change our opinion. Under Rule 8.4(c), lawyers may not engage in conduct involving misrepresentation. Whether lenders wish to participate in transactions where the transaction documents meaningfully disclose the connection between the gross-up and the seller's concession is a matter for the lenders and their regulators. Whether lawyers may participate in such transactions when the documents do not meaningfully disclose the connection between the gross-up and the seller's concession is a matter for the Rules of Professional Conduct.

Conclusion

17. We conclude that Rule 8.4(c) does not permit lawyers to participate in residential real estate transactions involving a grossed-up sales price that was exchanged for an equivalent seller's concession unless all documents stating the grossed-up sales price also disclose that the sales price has been increased by the amount of the seller's concession. Conversely, when a residential real estate transaction involves both a seller's concession and a grossed-up sales price, but each document stating the grossed-up sales price also discloses that the sales price has been increased by a sum equal to the seller's concession, there is no misrepresentation, and therefore no ethical violation.

Dissent

18. A minority of the Committee disagrees with the conclusion in this opinion that a disclosure of more than the fact of the seller's concession is necessary. The minority believes that the existence of the federal guidelines cited in footnote 1, which permit, within certain defined limits, seller's concessions that provide a benefit to buyers in connection with their financing without altering the required loan-to-value ratio, strongly indicates that the industry as a whole is

familiar with the practice of financing a buyer's closing costs. There is no evidence that tax assessors, real estate appraisers or mortgage investors are misled where a seller's concession—inherently a reduction in the amount the seller receives—is disclosed in the various transaction documents. It makes no economic or ethical difference, in the minority's view, whether such a concession is agreed upon as part of the initial price discussion or as part of a later "gross-up" of the sales price.

Endnotes

1. 'The existing federal government policy regarding seller's concessions is found in U.S. Department of Housing and Urban Development ("HUD") Handbook 4155.1, § 2.A.3 (available online *at http://www.fhaoutreach.gov/FHAHandbook/prod/infomap.asp?address=4155-1.2.A.3)*, and in HUD Handbook 4155.2, § 4.8 (available online at *http://www.fhaoutreach.gov/FHAHandbook/prod/infomap.asp?address=4155-2.4.8*). HUD apparently has not adopted any provisions addressing the "gross-up" of the sales price in response to a seller's concession; the HUD regulations discussing sellers' concessions are silent as to gross-ups.
2. The December 22, 2006 clarification of N.J. Op. 710 (2006) is available at 187 N.J.L.J 42 (2007) and at *http://www.judiciary.state.nj.us/notices/2006/n061222a.htm*.
3. The further clarification of N.J. Advisory Op. 710 after we issued N.Y. State 817 is available at 193 N.J. 419, 939 A. 2d 794 (2008).
4. Rule 1.0(k) provides as follows:

   > "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

   A lawyer "should know" a fact when it can be readily inferred from the circumstances.

(43-09)

Ethics Opinion 883

Committee on Professional Ethics of the New York State Bar Association (10/27/11)

Topic: Attorney advertisement; fictitious law firm.

Digest: An attorney advertisement may include the portrayal of a fictitious law firm so long as it is not misleading as to the association of lawyers in the advertiser's firm.

Rules: 7.1(c).

Question

1. May an attorney advertisement include the portrayal of a fictitious law firm, such as the portrayal of an argument against fictitious opposing counsel?

Opinion

2. Rule 7.1(c)(2) of the New York Rules of Professional Conduct (the "Rules") states that an attorney advertisement may not "include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case."

3. Strictly read, the rule would appear to bar portrayal of a fictitious law firm in any form, including, for example, an advertisement depicting the advertising lawyer opposing a fictitious adversary firm or in other situations where the depiction was not misleading as to the advertiser's practice. The word "otherwise" in the final clause of the rule, however, suggests a narrower reading: that portrayals of a fictitious law firm are prohibited only if they imply that lawyers are associated in a law firm with the advertising lawyer, or are part of the advertising law firm, if that is not the case. We believe this narrower reading best corresponds with the purpose of the rule, which is to bar advertising techniques that are misleading.

4. For example, a comment to the rule on advertising explains that the prohibition of certain attorney advertising techniques hinges on whether the result is misleading to the viewer. That Comment states, "Lawyers may therefore use advertising techniques intended to attract attention, such as music, sound effects, graphics and the like, *so long as those techniques do not render the advertisement false, deceptive or misleading*." Rule 7.1, Cmt. [4] (emphasis added). The portrayal of a fictitious law firm is not by its nature misleading—it may be used as a humorous attention-getting device, for example. Rule 7.1(c)(2) read as a whole indicates a limiting principle to the prohibition, which is that a portrayal of a fictitious law firm is barred only when it implies that the advertising lawyer is associated in a law firm with other lawyers when that is not the case.

5. This narrower reading is supported by an interpretation that the Attorney General offered, and the United States Court of Appeals for the Second Circuit accepted, in the context of a challenge to the rule. Rule 7.1(c)(2) was among those challenged in *Alexander* v. *Cahill*, 598 F.3d 79 (2nd Cir. 2010), on the ground that it unconstitutionally prohibited non-misleading speech. In that case, an attorney, his law firm, and a consumer rights non-profit organization argued that the current rules regarding attorney advertising infringed their First Amendment rights by prohibiting "truthful, non-misleading communications that the state has no legitimate interest in regulating." *Id.* at 86. The Second Circuit agreed, affirming, with one exception, the District Court's conclusion that the content-based restrictions in the disputed provisions of the Rules impermissibly regulated commercial speech protected by the First Amendment. *Id.* at 89. The one exception was Rule 7.1(c)(2), the rule at issue in this opinion. In considering that rule, however, the court noted that the only categories of commercial speech "clearly exclude[d] from protection are speech that is false, deceptive, or misleading, and speech that concerns unlawful activities." *Id.* at 89 (citation omitted). The court accepted a narrowing interpretation that the State offered, apparently in order to avoid the constitutional question. The court wrote:

> The provision prohibiting advertisements including fictitious firms is susceptible to more than one interpretation. But we need not decide whether it would be constitutional to prohibit dramatizations in which an advertising law firm portrays itself arguing against a fictitious opposing counsel. At oral argument, the Attorney General, representing the Defendants, suggested a narrower interpretation of this regulation. He asked that we construe this legislation as applying only to situations in which lawyers from

> different firms give the misleading impression that they are from the same firm (i.e., "The Dream Team"). (Oral Arg. ~ 12:38:25) We accept this interpretation. So read, this portion of §1200.50(c)(3) addresses only attorney advertising techniques that are actually misleading (as to the existence or membership of a firm), and such advertising is not entitled to First Amendment protection. *See Florida Bar*, 515 U.S. at 623-24, 115 S.Ct. 2371. Accordingly, and subject to the above-mentioned construction, we reverse the District Court's invalidation of that portion of § 1200.50(c)(3) that prohibits advertisements that include fictitious firms.

Id. at 90.

6. In response to the *Cahill* decision, the Appellate Divisions of the New York Supreme Court amended the Rules, but left the text of what became Rule 7.1(c)(2) unchanged. Amendment of Rule, New York Rules of Professional Conduct, 33 N.Y. St. Reg. 92 (May 18, 2011) (to be codified at N.Y. Comp. Codes R. & Regs. tit. 22, § 1200 (2011)). The narrow interpretation of the rule accepted by the Second Circuit is thus not explicitly stated in its text. Nevertheless, in view of the final clause of the rule and the narrowing interpretation that the State offered in the face of a constitutional challenge, we believe that the language of the rule should be read in context to apply only where portrayal of the fictitious firm would be misleading as to the advertiser's practice. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 795-796 (1989) (adopting New York City's "narrowing construction" of a noise ordinance so as to avoid unconstitutionality).

7. We note that any portrayal of a fictitious law firm must comply with other rules, which will reduce the risk of a portrayal of a fictitious firm misleading viewers or listeners. In particular, Rule 7.1(c)(3) states that an attorney advertisement shall not "use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same." In light of this disclosure requirement, where a fictionalized law firm is portrayed using actors or fictionalized events or scenes, viewers are unlikely to be misled as to the existence of a real law firm in an advertisement. The bar on portrayals of fictionalized law firms would, however, itself prevent the kind of "portrayal" of a law firm cited by the Attorney General in its argument to the Second Circuit—an advertisement that described a team of lawyers from different firms by an overarching description such as "The Dream Team" in such a way as to suggest that the lawyers were associated in a single firm.

Conclusion

8. An attorney advertisement may include the portrayal of a fictitious law firm so long as the advertisement is not misleading as to the association of lawyers in the advertiser's law firm.

(30-11)

Ethics Opinion 884

Committee on Professional Ethics of the New York State Bar Association (11/14/11)

Topic: Communication in criminal matter with a witness who is the subject of a separate criminal indictment, in which he is represented by counsel.

Digest: Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in a criminal matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with such witness without the consent of counsel who represents the witness in a related matter. This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

Rules: Rule 1.0(k), Rule 4.2(a), Rule 3.4(a)(2), Rule 4.4, DR 7-104.

Question

1. May counsel for the defendant in a criminal case ("Defendant") interview the complaining witness ("Witness"), who is the subject of a separate criminal indictment, in which he is represented by counsel, without the consent of such counsel?

Opinion

2. Defendant has been charged with burglary and robbery. He allegedly entered the Witness's apartment holding a gun, robbed the Witness at gunpoint and took money from Witness. Witness is cooperating in the prosecution of the Defendant. Because the police who investigated the crime found drugs in the apartment of the Witness, they arrested Witness, who is represented by counsel in connection with the drug possession matter. Conviction of the Witness for drug possession would be a violation of his probation in a prior drug case. The prosecutor has informed Defendant's lawyer that Defendant's actions in the robbery may have been related to a former drug exchange between the Defendant and the Witness.

3. Rule 4.2(a) of the New York Rules of Professional Conduct (the "Rules") states:

    > (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

    This rule, like DR 7-104, its predecessor in the former Code of Professional Responsibility (the "Prior Code"), is often called the "no-contact" rule.

4. The purpose of the no-contact rule is explained in Comment [1] to the Rule:

    > This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and uncounseled disclosure of information relating to the representation.

5. In applying the facts of this hypothetical to Rule 4.2, two issues are raised—whether the Witness is a party to the matter, and whether the Witness is represented "in the matter."

6. Although, by its terms, Rule 4.2 applies to a "*party*," Comment [2] to the Rule states that the Rule applies to communication with any *person* who is represented by counsel concerning the matter to which the communication relates. If the Comment were dispositive, the fact that Witness is not a co-defendant in the matter would be irrelevant as long as Witness's counsel represents Witness in the robbery matter, as well as the drug possession matter. However, the Comments are not dispositive. The Comments were adopted by the New York State Bar Association to provide guidance for attorneys in complying with the Rule. They have not been adopted by the Appellate Divisions. Where a conflict exists between a Rule and a Comment, the Rule controls.

7. The history of this provision in the former Code is instructive. The former Code had both a Disciplinary Rule—DR 7-104(A)—and an Ethical Consideration—EC 7-18—which addressed contact with third parties. The disciplinary rule,

like Rule 4.2, prohibited a lawyer from communicating with a "party" the lawyer knew to be represented by a lawyer in the matter. EC 7-18, on the other hand, was broader, applying to any person the lawyer knew to be represented in the matter by a lawyer. The rationale for the Ethical Consideration was set forth in its first sentence: "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." In 1999, a committee of the New York State Bar Association recommended that the term "party" in the Disciplinary Rule be changed to "person," following a similar change in the ABA Model Rules of Professional Conduct. Although the amendments adopted by the Administrative Board initially used the term "person" in DR 7-104(A), shortly thereafter the Administrative Board issued an order changing "person" back to "party." *See* Simon's New York Code of Professional Responsibility Annotated (2007) at 1170. According to Professor Simon, the change was apparently made at the urging of prosecutors, who feared that the word "person" in the no-contact rule would require them, among other things, to obtain the consent of counsel to interview every non-party witness who was represented by counsel.

8. The argument that "party" means an actual party to a transaction—at least in a criminal case—is supported by *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995), in which the Second Circuit held that a criminal defense lawyer did not violate DR 7-104(A)(1) by interviewing a witness in a drug conspiracy matter even though the lawyer knew the witness was represented by counsel with respect to charges in a related matter. The court held that the related matter was not the same "matter," and the witness therefore was not a "party" in the same "matter." *See United States v. Santiago-Lugo*, 162 F.R.D. 11, 12 (D.P.R. 1995) (interpreting "party" in Rule 4.2 of the ABA Model Rules and holding that the word "party" should be interpreted restrictively).

9. Although counsel for the Defendant may interview the complaining witness without the consent of the Witness' counsel, during such interview Defendant's counsel may not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d).

10. This Committee has treated the application of the no-contact rule more broadly than the courts where the issue arose in a non-criminal context. While recognizing the holdings in various court cases applicable to prosecutors, we have declined to follow that rule in civil matters. For example, in N.Y. State 735 (2001), we stated "we do not understand that the decision to retain the term 'party' was intended to cut back on the long-standing, universal understanding concerning the scope" of the "no contact" rule in *noncriminal cases*" (emphasis added). *See also* N.Y. State 785 (2005) (The "no contact" rule will bar unconsented communication with an insurance adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.) In N.Y. State 463 (1977), we opined that a lawyer for the putative father in a paternity proceeding instituted by the Commissioner of Social Services was free to communicate with the mother, since the mother "could hardly be deemed a party," although we also considered it important that the mother was not represented by counsel. However, since the hypothetical discussed here involves a criminal proceeding, we need not address, in this opinion, whether Rule 4.2 applies to persons connected with civil proceedings who are not "parties."

11. Although the history of Rule 4.2 indicates that the Administrative Board was concerned with the right of prosecutors to interview potential witnesses, we see no basis for reaching a different conclusion where the lawyer who wishes to have an unconsented communication with a potential witness in a criminal case represents the defendant rather than the People.

12. We do not believe a prosecutor may avoid the application of the no-contact rule by dividing the same matter into separate matters, so that only one defendant is a "party" to a particular matter. However, in this case, the matters, although related, seem distinct, and the complaining witness is only a witness and not a co-conspirator.

13. If Rule 4.2 applied to all "persons," rather than to "parties," then the question for counsel for the Defendant would be whether he "knows" that the Witness is represented in the robbery matter. The term "know" is defined in Rule 1.0(k). Although it is defined as denoting actual knowledge of the fact in question, it states that a person's knowledge may be inferred from circumstances. Since there is a relationship between the robbery proceeding and the Witness' drug possession proceeding, it might be logical to conclude that the Witness' lawyer in the drug possession proceeding also represents him as a witness in the robbery proceeding. Thus, any questions the Defendant's lawyer might ask would be about the subject matter of the representation. However, given our conclusion with

respect to the meaning of the term "party," we need not reach those questions. Rule 4.2 by its terms is not applicable, and Defendant's lawyer need not obtain the permission of Witness' lawyer. Nevertheless, Defendant's lawyer should be mindful of Rule 4.4 (Respect for Rights of Third Persons) ("In representing a client, a lawyer shall not use methods of obtaining evidence that violate the legal rights of such a person.")

14. Even though Rule 4.2 does not require the consent of the Witness' lawyer, this does not prevent the Witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. A lawyer may not advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness in the a matter. Rule 3.4(a)(2). But the Witness may insist on his right to the presence of counsel. *See* N.Y. State 463 ("Where the lawyer's intended informant refuses to divulge information unless and until he obtains legal advice, if the informant's interests are either presently or potentially adverse to those of the lawyer or his client, the lawyer must desist.")

Conclusion

15. Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in such matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with the witness without the consent of counsel who represents the witness in a related matter, provided that during such interview the lawyer does not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d). This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

(33-10)

Ethics Opinion 885

Committee on Professional Ethics of the New York State Bar Association (11/14/11)

Topic: Business relationship with non-attorney.

Digest: An attorney may not reduce fees as part of an arrangement to accept referrals from a non-attorney who provides services to clients seeking property tax reductions; an attorney may not be retained by a non-lawyer company to provide legal services to a client.

Rules: 5.4, 5.5, 5.8, 7.1, 7.3, and 8.4.

Facts

1. The inquirer handles tax certiorari proceedings in Supreme Court for the reduction of property assessments and is paid on a contingency basis, ordinarily receiving one-third of any tax refund clients receive. The inquirer has been approached by a non-attorney who owns a company that represents residential homeowners in Small Claims Assessment Review proceedings and who, in exchange for a referral fee, would refer commercial clients to the attorney. The non-lawyer would perform some services for the clients, including a preliminary valuation of the property.

Questions

2. Is it ethically permissible for an attorney who receives referrals of potential clients from a non-lawyer to reduce the attorney's customary contingency fee, refunding the balance to the client with the understanding that the client would owe an amount to the non-attorney?
3. Alternatively, may the attorney be retained by the non-attorney's company, billing the company an hourly fee and returning any tax refund directly to the client?
4. May the attorney accept referrals of clients from the non-lawyer if the inquirer knows that the non-lawyer seeks new clients via direct solicitation?

Opinion

5. Is it ethically permissible for an attorney who receives referrals of potential clients from a non-lawyer to reduce the attorney's customary contingency fee, refunding the balance to the client with the understanding that the client would owe an amount to the non-attorney?
6. Under the facts presented, the lawyer cannot agree to the arrangement with the non-lawyer company as the lawyer either would be impermissibly splitting fees with a non-attorney or entering into a cooperative business arrangement with a non-lawyer who is not a member of one of the professions with which attorneys can create such partnerships.
7. The New York Rules of Professional Conduct provide that an attorney may enter into a cooperative business arrangement with a non-lawyer only where the profession of the non-legal professional is included in a list jointly maintained by the Appellate Divisions. Rule 5.8(a). Tax reduction services are not such a profession. *See* N.Y. Admin. Code, tit. 22, §§ 1205.3, 1205.5 (non-legal professions eligible to form cooperative business arrangements with lawyers).
8. Rule 5.4 provides that lawyers may not share legal fees with non-lawyers except in limited circumstances. Rule 5.4(b) prohibits lawyers from forming partnerships with non-lawyers "if any of the activities of the partnership consist of the practice of law." Rule 5.5 prohibits lawyers from aiding a non-lawyer in the unauthorized practice of law. *See* Suffolk County Op. 96-2 (1996) (opining that a referral arrangement between an attorney and a non-lawyer tax reduction firm was unethical because it involved the attorney in aiding a non-lawyer in the unauthorized practice of law). The attorney seeks to reduce the attorney's own fee, knowing that the amount of the reduction would be owed to the non-attorney company. Although the non-attorney company would perform some unspecified services (including perhaps a preliminary valuation of the property), there appears to be no relation between the funds to be received by the non-lawyer company and the value of the services actually performed for the client. In essence, the non-attorney company would find the clients and refer them to the lawyer, taking a fee from the tax reduction. *See* N.Y. State 705 (1997), at 3. The proposed arrangement would involve improper fee-splitting.
9. May an attorney be retained by the non-attorney's company, billing the company an hourly fee and returning any tax refund directly to the client?

10. The lawyer may not be retained by the non-attorney company to provide services to the property owner, as the furnishing of counsel and the rendering of legal services by non-attorneys is prohibited by statute. N.Y. Judic. L. § 495(d).[1]

11. May the attorney accept referrals of clients from the non-lawyer if the inquirer knows that the non-lawyer seeks new clients via direct solicitation?

12. Assuming that a referral from the non-attorney company is permissible and does not involve the splitting of fees or the payment of a referral fee, *see* Rule 7.2, a separate concern arises in that the company seeks new clients via direct solicitation.

13. An attorney may not solicit a client in person, by telephone, or by real-time computer interaction. Rule 7.3(a). While an attorney may solicit clients via advertising, there are restrictions on such advertising. Rule 7.1. "Solicitation means any advertisement initiated by or on behalf of a lawyer or law firm…the primary purpose of which is the retention of the lawyer or law firm, and significant motive for which is pecuniary gain." Rule 7.3(b).

14. Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the non-lawyer's communications. *See* Rule 8.4(a) ("A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or *do so through the acts of another*…" (emphasis added.)) For example, if the lawyer had control over the non-attorney or control over the solicitation or advertising, the lawyer might be said to be accomplishing through indirect means what the lawyer could not accomplish directly. The level of control the attorney has depends on many factors, including the amount of business the attorney conducts with the non-attorney and any other connections between the two.

Conclusion

15. An attorney may not reduce fees as part of an arrangement to accept referrals from a non-attorney who provides services to clients seeking property tax reductions. The lawyer may not be retained by the non-attorney company to provide services to the property owner as the furnishing of counsel and the rendering of legal services by non-attorneys are prohibited by statute. If the relationship were permitted, the advertising (including direct solicitation) made by the non-lawyer would not be attributable to the attorney unless the attorney uses the non-lawyer to circumvent applicable rules on advertising (including the rules governing solicitation).

Endnote

1. New York Judiciary Law §495 ("Corporations and voluntary associations not to practice law ") provides, in relevant part, that:

   1. No corporation or voluntary association shall
   (a) practice or appear as an attorney-at-law for any person in any court in this state or before any judicial body, nor

   (b) make it a business to practice as an attorney-at-law, for any person, in any of said courts, nor

   (c) hold itself out to the public as being entitled to practice law, or to render legal services or advice, nor

   (d) furnish attorneys or counsel, nor

   (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor

   (f) assume in any other manner to be entitled to practice law, nor

   (g) assume, use or advertise the title of lawyer or attorney, attorney-at-law, or equivalent terms in any language in such manner as to convey the impression that it is entitled to practice law or to furnish legal advice, services or counsel, nor

   (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

(44-10)

Welcome New General Practice Section Members

Louis Mario Adimando
Rubaba Ahmad
Etsuko Akimoto
Ana Brenda Alba
Jennifer Allim
Roman Aminov
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Arbitration
Irwin Kahn
Kahn and Horwitz, PC
160 Broadway, 4th Floor
New York, NY 10038
kahnadr@aol.com

Business Law
Lewis F. Tesser
Tesser Ryan and Rochman, LLP
509 Madison Avenue, 10th Floor
New York, NY 10022
ltesser@tesserryan.com

Election and Government Affairs
Jerry H. Goldfeder
Stroock & Stroock & Lavan, LLP
180 Maiden Lane
New York, NY 10038
jgoldfeder@stroock.com

Family Law
Willard H. DaSilva
DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue, St. L-16
Garden City, NY 11530-4701
whdasilva@aol.com

Insurance
Robert M. Fettman
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
fettmanr@sullcrom.com

Intellectual Properties
Zachary J. Abella
404 East 66th Street
New York, NY 10021
zabella@gmail.com

Membership and Member Service Issues
Lynne S. Hilowitz
DaSilva Hilowitz & McEvily LLP
120 N. Main Street
New City, NY 10956
dhm11@verizon.net

John J. Roe III
Roe Taroff Taitz & Portman LLP
1 Corporate Dr., Suite 102
Bohemia, NY 11716
j.roe@rttplaw.com

Publications
Martin Minkowitz
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038-4982
mminkowitz@stroock.com

Trusts and Estates Law
Lynne S. Hilowitz
DaSilva Hilowitz & McEvily LLP
120 N. Main Street
New City, NY 10956
dhm11@verizon.net

Paul J. O'Neill Jr.
Law Office of Paul J. O'Neill, Jr.
1065 Lexington Avenue
New York, NY 10021
pjoneilllaw@gmail.com

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Co-Editors

Richard A. Klass
Your Court Street Lawyer
16 Court Street, 29th Floor
Brooklyn, NY 11241
richklass@courtstreetlaw.com

Martin Minkowitz
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038
mminkowitz@stroock.com

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