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ONEONONE

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

Message from the Past Chair

Zachary Abella

One Tuesday morning last January, I sat in the back of the Nassau Hall Room at the New York Hilton and allowed myself a little bit of a smile. In front of me were row upon row of members of the General Practice Section, listening attentively. These were our colleagues from all over the State, who had descended on New York to participate in our Section's Annual Meeting. We will have spring and / or fall meetings again and when we do, they will be tremendous, but until then, it is only the meeting in Midtown Manhattan that brings us together as a Section. As I spoke with members, I also noted the cities on their lapels: Bayside, Syracuse, Saratoga Springs, Rochester, etc. It was a time for our membership to interact face-to-face, catch up, trade war stories, learn something, and,

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Message from the Chair

Lewis Tesser

The General Practice Section is very excited about the upcoming year. We have an ambitious agenda that I think will enhance the value of your GP Section membership, help you in your daily practice, and effect positive changes in our communities.

First, I am pleased to announce the creation of a local GP Section Chapter in your area! The Section's Executive Committee has voted to establish regional chapters based on Judicial Departments within New York State. Through these local chapters, meetings will be held in your area concerning matters that are important to you and your practice. You can make a difference in the practice of law in New York, network in meaningful ways to enhance your practice, serve your clients more effectively; and work to en-

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A Message from the Past Chair

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incidentally, marshal up some CLE credits. And, truth be told, that was really why I was smiling. Not the CLE credits themselves, but the caliber of speaker our organizers were able to get to attend. The speakers and panels our team put together this year were remarkable in both its scope and educational value. Moreover, they did not lack for a share of state legal "boldface." Introduced and organized by Marty Minkowitz, appellate division judges from (almost) all four Departments were there, representing the entire state in a discussion of attorney discipline, or, as the topic was called, "Four Different Departments, Four Different Approaches."

The nearly 99-minute panel flew by, aided ably by moderator J. Richard Supple, as the large crowd paid rapt attention to the interplay of Appellate Division judges from across the state: The Hon. Luis A. Gonzalez, Presiding Justice, First Department, the Hon. Mark C. Dillon of the Second Department and the Hon. Karen K. Peters, the Presiding Justice in the Third Department. But for inclement weather in Western New York, the Hon. Eugene M. Fahey, of the Fourth Department was to have been on the panel as well (the Fourth was ably represented by Anthony Gigliotti, principal counsel for the Grievance Committee in the Fifth District). Together with Hofstra Law professor Roy Simon, the lively, crowded session breezed by. In something of a coup, the *New York Law Journal* sent a journalist who picked up on what I also thought was the most fascinating discussion of an entirely captivating discussion: the role of oral argument, or the lack thereof. Justice Dillon said that oral arguments in attorney discipline matters would throw a "monkey wrench" in how the court handled other matters, while Justice Peters opined that she loved seeing and hearing from people. "The more they speak, the more I learn," she told the Meeting, "and that affects my decision." You likely already knew that every Department has its own procedures and customs, but to hear the different Departments interact and engage with the audience (there were many pointed questions) was rewarding.

Though it was the centerpiece of our Annual Meeting, it was bookended by host Bill DaSilva's always informative whirl around the latest legal developments from all corners of the world of general practice, and David Rosen's brisk CPLR Update. It was a perfect encapsulation of everything the Section does best—engaging with issues of concern to our members, hewing fastidiously to a statewide focus, and doing it in a way that is not only informative, but engaging as well.

This is my last Chair's message. By the time you read this, I will have long since moved on to less green pastures, and the face you'll see in the next issue will be that of Lewis Tesser. Twelve months is an awfully brief time in which to be the Chair of any group. It may be the lifespan of a brine shrimp, but for me, it's felt like the blink of an eye. Once you get acclimatized to the role and the responsibilities, you're rounding the corner and heading for home. I'm certain that's probably by design. Being Chair of the General Section is an inherently collaborative process—one is constantly working with one's predecessor and successor to ensure continuity. I am proud of what I think has been achieved this past year. Membership has increased, particularly among younger lawyers and those in Central and Western New York. I'm delighted we have been able to broaden the reach of our Section's membership, and I am certain that success will be carried forward in the months and years ahead. We hosted a great CLE on attorney liens and fee arbitration in Midtown Manhattan last fall, which was incredibly well received. And, of course, the abovementioned Annual Meeting, which was superb. Could we have done more? Of course, and I'll have the next few years to contemplate roads not taken and ideas not pursued. But I am very proud of what we did do and what we were able to accomplish.

I, like many of you, have spent the past few years evangelizing for the General Practice Section. How it's the potpourri of State Bar sections, representing not only the interests of solo and small firm practitioners but, by extension, also keeping *all* lawyers abreast of the areas in which they might practice, which is almost all of them. From real estate to immigration, tax to intellectual property, estates to matrimonial law, the General Practice Section represents the needs of lawyers who have clients with the widest variety of needs. It has been an honor to be able to serve at the fore of this remarkable Section, and I envy the individuals who will appear in this space in the coming years. I, and they, serve the interest of a wonderful, brilliant community of the finest legal minds in New York.

Zachary J. Abella

A Message from the Chair

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hance the public interest. There are now GP chapters available to Section members in each of the State's four Judicial Departments. To join your local chapter, please visit www.nysba.org/GPChapters.

Second, in an innovative approach to mentoring, the General Practice Section is establishing a new "mentoring blog," GP Law Connect. GP Law Connect will be a legal blog where mentors and mentees are paired up to co-author articles for online publication. Through publishing in a reputable public forum, mentors will be given a potential and growing referral source for business development, as well as the opportunity to share their invaluable knowledge and experience with a new lawyer. Mentees, likewise, will have the opportunity to draft and/or co-author articles in their chosen field of law and benefit from the insight and direction of an experienced attorney. GP Law Connect will kick off with an MCLE program October 17th at Baker Hostetler in New York City, Blogging 101—Social Media Marketing and Mentoring—Ethical and Practical Considerations. (The program will be recorded for those who are unable to attend in person.) The program is co-sponsored by the NYSBA Law Practice Management Committee, and the GP Section will host a welcoming reception following. If you are interested in participating in GP Law Connect, please contact GeneralPractice@nysba.org.

The Section's leadership has also recently made plans to institute a new law student writing competition. The competition will give the lawyers of tomorrow a chance for exposure in the legal community through their writing, as well as the potential for winning prizes. Details will follow. In the realm of enhancing the public interest, the GP Section, through the New York Bar Foundation, is pleased to be making a generous contribution to aid pro bono work in New York State. At this writing, details are being finalized for the grant.

The GP Section continues to offer you, as a member, the resource of its listserve—soon to be available with some great new enhancements with the launch of NYSBA's new website—as well as its weekly wEbrief updates, periodic GPS Tracker with practical tips for busy practitioners, and of course the publication you are holding right now, *One on One*.

This edition of *One on One* contains articles on medical evidence, autism as it affects the family unit, exciting specifics about the 2013-2014 New York State Executive Budget, the individual liability of board members and enforcing money judgments in Surrogate's Court. It also has NYSBA Ethics Opinion 950-60.

This is a great Section, and I am proud to be writing to you as its Chair. Its greatest asset, though, is you—its members. We want to provide a forum for you to share your knowledge and experience as a practicing attorney, and to benefit from the breadth of experience of others. Many of us operate in a solo or small firm environment, but as members of the General Practice Section, we are each part of a diverse and growing community. I encourage you to get involved in your local GP Section Chapter; contact the authors of this newsletter for publication opportunities, join in the conversation on our listserve, take advantage of the opportunity to participate in GP Law Connect. The GP Section has much to offer you and you have much to offer your Section!

I personally want to extend my thanks, appreciation and best wishes to Zach Abella, our outstanding Chair for the 2012-2013 season. Under Zach's leadership, the GP Section made great strides in helping all general practitioners in New York State. Fortunately for us all, Zach is remaining as an active member of our Section—stay tuned for notice of a very exciting CLE that Zach is coordinating."

If you have any comments or suggestions on how we can serve you better, I would love to hear from you. You can contact me directly at ltesser@tesserryan.com, or if you have any questions, we are available at generalpractice@nysba.org. Be sure to check out our website for more details on the Section and upcoming events at www.nysba.org/GP.

Lewis Tesser

From the Co-Editors

Richard Klass

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

Litigation Graphics: As the saying goes, "A picture is worth 1,000 words." All the more so at a trial, where the picture can present the theory of the case to a jury. David Mykel, Litigation Communications Consultant with VisuaLex, LLC, presents techniques that make multimedia effective in litigation strategies.

Workers' Compensation: An article by Co-Editor Martin Minkowitz, Esq., discusses what evidence will prove the causal relationship between a worker's employment and his / her disability. There are certain presumptions under the Workers' Compensation Law and then other criteria which would be used to establish injury.

Family Law: Matrimonial attorneys Steven D. Cohn, Esq., of Goldberg & Cohn LLP, and Amanda N. Cully, Esq., in an article titled *Autism and the Family Unit: A Matrimonial Perspective*, discuss the general background of autism and its relationship between autism and marriage and divorce. The role of the matrimonial courts in divorce proceedings in the context of resolving custodial and financial issues of children with special needs is discussed.

Co-op/Condo Law: In what some attorneys have referred to as a "sea change" in the law of condominium / cooperative housing, the case of *Fletcher v. The Dakota* has been one of the most controversial cases of the last year. As Vincent Di Lorenzo discusses in *Individual Liability of Board Members After Fletcher v. The Dakota*, the First Department reiterated that causes of action against individual members of condominium / cooperative boards in the context of a breach of contract action can only be sustained if it can be shown that the members committed individual, independent tortious acts; however, the First Department then went on to declare that prior decisions may have been misleading in the context of tort cases. In tort cases against a board, independent tortious conduct may not be a necessary element; instead, the liability exposure may be more expansive to include board members who voted for or ratified the complied-of act.

Martin Minkowitz

Insurance Law: Walter Taylor, president of The Hamilton Wharton Group, Inc., sets forth the changes to the law concerning insurance coverage issues under the 2013 / 2014 New York State Executive Budget. One of the programs introduced is the large deductible workers' compensation program to provide economic advantages to New York State employers.

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

Autism and the Family Unit: A Matrimonial Perspective

By Steven D. Cohn and Amanda N. Cully

I. Autism

Autism Spectrum Disorder is a group of disorders, "each of which has a different etiology with overlapping features."[1] It is a "pervasive developmental disorder of the brain" often manifesting itself in outward symptoms such as little to no speech; parroting (echolia); monotone speech with a blunt affect; obsessive compulsive behaviors; an inability to read and understand facial expressions and social cues; a preference of isolation; temper tantrums; self-injurious behaviors; an inability to appreciate or understand danger; and repetitive behaviors such as spinning, flapping, and rocking.[2] These symptoms can often be classified into three core areas: problems with social interaction, impaired communication skills both verbal and nonverbal, and a pattern of repetitive behavior and narrow, restricted interests.[3] Autism is a fairly recently acknowledged disease, one about which there is not much information on its cause or possible cures even though it affects approximately 1 in 100 children in the United States.[4]

II. Autism and Marriage

Autism not only affects the child with special needs but the child's parents, siblings, extended family, and community.[5] All of these people helping and supporting an autistic child must have a thorough understanding of Autism Spectrum Disorder.[6]

Raising an autistic child can place a heavy strain on a marriage. Aside from dealing day to day with the symptoms, the variety of treatments available can lead to conflict. Treatments vary in method, frequency, intensity and price range. The physical, emotional, and financial strain on the family can often prove too much for the marriage to handle.

III. Autism and Divorce

The process of a divorce can be extremely complex and often devastating to a family. The complexity and devastation of the situation are only multiplied in a family with an autistic child. Beyond the common custody, child support and visitation issues addressed during the divorce process, a myriad of more intricate issues arise. Special needs children are more susceptible to adverse mental and physical reactions, as well as worsened medical symptoms such as "withdrawal, regression, aggression, loss of language ability, loss of social skills, loss of toilet training, emotional outbursts, loss of academic skills, depression, self-injury, hopelessness, [and] suicidal ideation."[7] It is important for those handling divorces involving autistic children to take extra care and precaution to address the plethora of new challenges involved in these cases.

In determining custody in cases involving autistic children a basic best interests evaluation is insufficient. A number of factors must be considered and to varying degrees based on where a child falls on the autism spectrum. These include who the primary caregiver is, attending to child's special needs, which parent the child has developed special bond with, and which parent has a workable schedule with child's.[8] In determining whether a parent's schedule will be conducive to attending to the child's special needs the child's school schedule must coincide with the custodial parent's work schedule, travel time away from the child for work must be considered. Further, to avoid setbacks in the child's development, disruption of the child's current living and / or schooling situation must be carefully examined.[9]

In addition to primary physical custody, parents need to agree on schooling and medical care for the child both in the short and long term. Also, how the extended family will be involved in the child's life.

Financial issues are considerably more intricate in a divorce involving an autistic child. In determining child support, "[t]herapy, equipment, medications, supplements, dietary costs, sensory items, respite care, professionals, modification of the home environment," added costs of child care and specialized schooling must all be taken into account. Costs of therapy alone can include speech, language, sensory integration, communication, behavioral, and socialization therapy.[10] It must also be factored in that costs of child and medical care can also vary greatly over time based on the child's specialized needs at each stage of development. Alimony is affected since round-the-clock care is often necessary for an autistic child which may inhibit one parent from working.

An eight-step approach has been suggested for addressing the addition considerations in divorce involving a special needs child:

1. Identify the special needs and determine relevance to the family court case
2. Understand why we should address special-needs issues in family court
3. Determine whether a guardian ad litem is required or advisable
4. Ascertain what information is essential

5. Evaluate the assumptions lawyers and judge may be making about people with special needs
6. Address the financial issues of the case
7. Handle custody and visitation
8. Consider utilizing a special-needs protocol to create a working plan[11]

This approach can help to keep negotiations and considerations on track throughout the course of a divorce.

IV. Autism, Divorce, and the Courts

There are a number of key points to be considered by a judge in deciding divorce cases involving autistic children. These include the extent or seriousness of the disorder; behavioral therapy benefits; serious commitment of time; intensity and consistency of therapy at home; need of constant stimulation and reinforcement; financial strains; school districts and special programs offered.[12]

In the few appellate court decisions involving autistic children key factors were considered. In *Martocchio v. Savior*,[13] the court focused on capacity to provide and care for the child. In awarding sole custody to the father the court noted favorably the father's voluntary continuous participation in "the study of autism and the proper treatment and care of his son," specifically citing connecting with experts, participating in support groups, and becoming a "relentless advocate" for his son.[14] The court in *Martocchio* praises a caregiver eager to learn about the special needs of the child and to apply this knowledge.[15]

V. Conclusion

In determining the best interests of an autistic child in a divorce, judges and attorneys must educate themselves on the implications of the disorder. The care and monetary expense increase dramatically, as well as the emotional strain and hardship. Further, consistency and routine must exist in any custody and visitation plans. The special needs of each individual child on the autism spectrum must be determined and considered before any long-term custody, visitation, care, and treatment plans are determined.

Endnotes

1. Sheryl Dicker & Robert Marion, *Judicial Spectrum Primer: What Judges Need to Know About Children with Autism Spectrum Disorders,* JUV. & FAM. CT. J., SPRING 2012, at 1, 3.
2. Lawrence R. Jones & David L. Holmes, *Autism and Divorce Guidelines for Family Court Practice,* NJ LAW., FEB. 2009 at 7, 7-8.
3. Dicker & Marion at 3.
4. Jones & Holmes at 8.
5. Dicker & Marion at 2.
6. *Id.* at 2-3.
7. Margaret "Pegi" Price, *Special Needs and Disability in Custody Cases: The Perfect Storm,* 46 FAM. L. Q. 177, 183.
8. *Id.* at 190-91.
9. *Id.*
10. *Id.* at 186-90.
11. *Id.* at 178-79.
12. Jones & Holmes at 8.
13. *Martocchio v. Savior,* No. TTDFA064006261, 2008 WL 3853514 (Conn. Super. Ct. July 28, 2008) (*quoted in Dicker & Marion* at 15).
14. *Id.*
15. *Id.*

Medical Evidence

By Martin Minkowitz

An injury, or a personal injury, is defined by the Workers' Compensation Law as an accidental injury which arises out of and in the course of the employment. It also includes an occupational disease or infection that naturally and unavoidably results from the accidental injury. The Workers' Compensation Board (WCB) will decide whether an injury is causally related to the employment accident based on the medical evidence in the case. The claimant (the injured employee or his or her representative) will present medical evidence, as will the employer or its workers' compensation carrier. The issue of credibility, when there is conflicting medical evidence, is for the WCB to decide. The WCB's decision, if supported by substantial evidence, will not be disturbed by an appellate court. That decision is within the exclusive jurisdiction of the WCB.

The claimant, like a plaintiff in a litigation, has the burden to prove that there is a causal relationship between his or her employment and the disability. Causation must exist to establish the claim.[1] The WCB's decision as to causation is given great deference by an appellate court.[2] In making its decision the WCB may use the report of an Independent Medical Examiner. There is also a statutory presumption which provides that the WCB is to accept a claimant's medical report as prima facie evidence of fact of what it states. This is clearly a method of having the claimants medical evidence introduced without necessarily needing the doctor to testify. However, when the employer or carrier needs to cross examine the claimant's doctor, it should be given that opportunity.

Both the claimant and the employer, or their representatives, are entitled to produce witnesses, including medical witnesses such as the treating or examing physicians. It may be the basis for a reversal of a WCB decision that it did not permit testimony of claimant and his or her medical provider to testify at a hearing at the WCB. Such a refusal can be an abuse of discretion where the employer and/or its carrier need the testimony to prove that there was no causal relationship of the employment to the injury. The carrier, or the employer, has a right to develop the record on that defense to the claim.[3]

In the *Mason v. Glens Falls Ready Mix* case the WCB/refused to permit medical testimony and defended its refusal to allow the physician's testimony by alleging that the carrier was estopped from contesting liability because it paid for the medical bills to treat the injury it was contesting. The court responded that "while an advance payment of compensation in the form of covered bills precludes a defense based on the statute of limitations, it does not foreclose a carrier from asserting other defenses." The court also noted that the WCB did not cite any authority for its estoppel position, and in reversing the decision remitted it back to the WCB.

In conclusion, it should be noted that while there exist presumptions in section 21 WCL to aid the claimant in establishing his or her claim, the medical opinion to be relied upon should be stated so that the WCB is reasonably convinced that it is supported by a rational basis and indicates a probability that the accident caused the injury. It cannot be based upon mere speculation or surmise. If the WCB based its decision on medical opinion that was based on speculation it would probably be reversed on appeal as not being supported by the necessary substantial evidence.

Endnotes

1. *Bland v. Gelman Brydges & Schroff*, 100 AD3d 1289 (2012); *Maye v. Alton Mfg. Inc.*, 90 AD3d 1177 (2011).
2. *Roberts v. Waldbaum's*, 98 AD3d 1211 (2012).
3. *Mason v. Glens Falls Ready Mix et al.*, __ AD3d __ (2013).

Martin Minkowitz is counsel to Stroock & Stroock & Lavan LLP and practices in the area of Insurance and Workers' Compensation regulation.

Large Deductibles and the Aggregate Trust Fund: Good News in the 2013-2014 New York State Executive Budget

By Walter Taylor

Recently, commercial carriers selling workers' compensation insurance in New York State, insurance brokers and insureds have become aware of attractive features for workers' compensation insurance included within the 2013-2014 New York State Executive Budget ("the Executive Budget"). An obvious interest for carriers and brokers is how to pursue opportunities to grow their businesses while providing savings to New York employers pursuant to the Executive Budget.

This article will center on the impact of changes the Executive Budget will have on large deductible workers' compensation programs ("large deductible programs") and the economic advantages for large employers who participate or who subsequently decide to participate in large deductible programs as a result of Governor Cuomo's Executive Budget which immediately ends all transfers of PPD awards to the Aggregate Trust Fund.

Prior to the Executive Budget, Section 46 of the Workers' Compensation Act of 2007 ("2007 Comp Act") required carriers selling workers' compensation insurance to deposit the "present value" of permanent partial disability awards ("PPD") into the state's Aggregate Trust Fund (ATF). After depositing the present value of the PPD claim reserve into the ATF, should the ATF determine that the original reserve was insufficient, the carrier was required to transfer additional amounts to meet the new reserve set by the ATF. However, if the additional reserve transfer to the ATF resulted in an overfunding, the overfunded portion would remain with the ATF.

Prior to the Workers' Compensation Act of 2007, the ATF, which was created pursuant to Section 27 of the New York Workers, Compensation Law, was authorized to regulate the payment of death benefits and certain permanent disability cases. However, under the predecessor Trust, funds transferred to secure payments which resulted in an overfunding were returned.

New York employers paying premiums of $500,000 or more participate in large deductible programs to save substantial premium dollars. The large deductible program requires the employer to accept a deductible on each claim after which the carrier pays the remaining portion of the claim. The carrier's premium is calculated by pulling out the amount of the deductible which the employer agrees to pay and replacing the balance of the claim reserve with reinsurance. The larger the deductible amount selected by the employer the smaller the insured's premium. The employer is also required to present the carrier with an irrevocable letter of credit to guarantee payment of the deductible amounts.

Prior to the Executive Budget, the old formula of forwarding the present value of PPD awards to the ATF reduced some of the economic advantages for employers in large deductible programs. However, Governor Cuomo's Executive Budget has restored these economic advantages as follows:

1. Employers in large deductibles programs now have the cash flow advantage of paying claims over time. Prior to Governor Cuomo's Executive Budget the employer's deductible amount was included in the carrier's transfer of PPD claim reserves to the ATF.
2. Employers have regained the opportunity to invest their unpaid deductible amounts which can help reduce the cost of the claim.
3. Employers have regained the advantage of paying the deductible amount since they no longer are at risk of overfunding a PTD claims reserve transfer to the ATF which will not be returned.
4. The end of PPD claims transfers to the ATF will reduce the employers' concerns that the carrier will seek increases in collateral to guarantee the employer's payments on future claims.
5. Large employers no longer have to anticipate increases in their reinsurance premium due to the carriers lost opportunity to invest PPD claims reserves transferred to the ATF, which also affect the carrier's own reinsurance costs.
6. The employers in large deductible programs no longer have to worry that overfunded PPD claims payments into the ATF, which were previously not returned, will increase the excess claims amount calculated in their experience modification factor, which might increase the employer's premium.
7. Carriers have regained the economic advantages of investing their PPD claims reserves and no longer have to allocate a cost factor into their rates to compensate for the lost investment.

The Workers' Compensation Act of 2007 focused on reducing workers' compensation rates by reducing the impact of PPD awards on the carriers' rating structure. Reducing lifetime benefits for PPD awards contributed

to an overall 20% reduction in workers' compensation rates for all industry classification codes.

However, before the announcement of the 2013-2014 New York State Executive Budget employers in large deductible programs did not fully benefit from the rate decreases of the 2007 Comp Act because of the economic advantages lost in transferring PPD claims reserves to the ATF.

Now, for New York employers large enough to benefit from participation in a large deductible program, this is their moment to shout, "Thank you Governor Cuomo for restoring economic advantages to our large deductible programs; because of your Executive Budget our comp story now has a happy ending."

Walter Taylor is president of The Hamilton Wharton Group, Inc., which focuses on workers' compensation and manages a health care safety group in the New York State Insurance Fund.

Individual Liability of Board Members After *Fletcher v. The Dakota*

By Vincent Di Lorenzo

Introduction

In *Fletcher v. The Dakota, Inc.* the First Department reconsidered when board members of cooperative corporations will be individually liable for the discriminatory actions of the board.[1] Prior to *Fletcher* board members had relied on the court's decision in *Pelton v. 77 Park Avenue Condominium*.[2] It stated:

> In bringing an action against the individual members of a cooperative or condominium board based on allegations of discrimination or similar wrongdoing, plaintiffs were required to plead with specificity independent tortious acts by each individual defendant in order to overcome the public policy that supports the business judgment rule.....[3]

In *Pelton* the court refused to impose individual liability on board members because neither the complaint nor plaintiffs' submissions "assert a specific claim against any of the individual defendants other than as a member of the 77 Park board."[4] Specifically, plaintiffs failed to show that any board member engaged in "individual wrongdoing…separate and apart from the actions taken by the board members collectively on behalf of the condominium."[5]

Six years later, in the *Fletcher* decision, the First Department concluded that in the *Pelton* decision it had misinterpreted the governing case law.[6] It rejected the independent tortious act requirement and ruled that "although participation in a breach of contract will typically not give rise to individual director liability, the *participation* of an individual director in a corporation's tort is sufficient to give rise to individual liability."[7] Is the *Fletcher* court's interpretation and application of the case law correct? If so, what precise involvement triggers individual liability for board members?

Fletcher's Reading of Prior Case Law—Breach of Contract Actions

The *Pelton* decision's recognition of an independent tortious act requirement was based on the Court of Appeals' decision in *Murtha v. Yonkers Child Care Assn.*[8] *Murtha* involved a claim of breach of a contract of employment by Yonkers Child Care Association. The court addressed the liability of individual defendants in tort for inducing a breach of contract. It concluded that a director or officer of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract merely because, while acting for the corporation, the director or officer made decisions and took steps that resulted in the corporation's contractual promise being broken.[9] Rather, the officer or director is immune from liability "if it appears that he is acting in good faith as an officer [or director]…[and did not commit] independent torts or predatory acts directed at another."[10]

Although the *Murtha* decision was indeed a decision regarding individual director liability for inducing a breach of contract, the decision did not explain why actions alleging breach of contract, and seeking to impose individual liability on directors, should be treated differently than actions alleging other wrongdoing—e.g. other tortious conduct, or discriminatory conduct. However, the *Murtha* decision cited lower court decisions that did explain why the courts imposed an independent tortious act requirement for personal liability on the part of board members for inducing a breach of the corporation's contract.[11] The First Department explained in *Brookside Mills, Inc. v. Raybrook Textile Corporation*,[12] a decision cited by the Court in *Murtha*, that:

> To hold otherwise would be dangerous doctrine, and would subject corporate officers and directors continually to liability on corporate contracts and go far toward undermining the limitation of liability which is one of the principal objects of corporations.[13]

The court further explained that the actions of the two directors in question were taken on the corporation's behalf in the exercise of business judgment, and if their actions resulted in a breach of the corporation's obligations under the contract in question, it was the corporation alone that was liable.[14] Similarly, in *Buckley v. 112 Central Park South Inc.*,[15] also cited by the *Murtha* decision, the First Department explained that to be immune from individual liability the corporate officers or directors must have been acting in good faith,[16] i.e., in the interest of the corporation. The *Buckley* decision further explained that:

> Running through many opinions upon the subject, there is the thread of thought that an officer of a corporation may have the right and perhaps the duty of inducing the corporation to breach a contract of the corporation with a third party if it appears to him to be for the best interests of the corpora-

> tion to do so.… This, of course, is but one facet of the freedom of action rule upon which the immunity is based.[17]

Thus, the case law addressing individual director liability for inducing a breach of contract by the corporation contains two reasons to reject a mere participation standard as the threshold for liability: (a) fear of excessive exposure of board members to litigation, and (b) a recognition that what is wrongful conduct on the part of the corporation, acting through its officers and directors, is not necessarily wrongful conduct on the part of the individual director or officer.

Fletcher's Application of Case Law Involving Tortious Conduct

The *Fletcher* court's refusal to apply the independent tortious act requirement to allegations of discriminatory conduct by board members is also a correct reading of the existing case law. However, the New York Court of Appeals and the Second Circuit have not addressed the exact question at hand. The *Fletcher* court, first, correctly noted that decision-making tainted by discriminatory considerations is not protected by the business judgment rule.[18] The court, second, highlighted that the Court of Appeals has instructed, generally, that the New York City Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."[19]

In *Fletcher* the court then ruled that: "the *participation* of an individual director in a corporation's tort is sufficient to give rise to individual liability."[20] The court cited prior case law supporting the position that a corporate director is not liable in tort only when the director commits a tort independent of the tort committed by the corporation. Rather, personal liability may be imposed for an action taken regardless of whether the officer or director acted on behalf of the corporation in the course of official duties.[21] However, the *Fletcher* court's stated threshold for individual liability raises a great deal of uncertainty, because that decision does not clearly indicate how or when a director can avoid liability. It is not clear if "participation" involves merely casting a vote consistent with the decision of a majority of the board, regardless of whether the vote of the particular director was tainted, i.e. could independently be deemed a violation of the civil rights laws.

The case law involving tortious conduct generally on the part of a corporate board states that a director may be held individually liable if the director either participated in the tort or else directed, controlled, approved or ratified the decision that led to the plaintiff's injury.[22] However, the decisions applying this standard have involved proof of some connection to the misconduct in question. Thus, "participation" has been found to exist when the officer or director *directly* committed the tort even though he was acting in his capacity as officer or director of the corporation.[23] No personal liability attaches if an officer or director took no part in the tort committed by the corporation.[24]

A scenario where the Court of Appeals has directly addressed the personal liability of a corporate officer or director for tortious conduct has involved a specific tort, an action for fraud against a corporation and its officers. The Court of Appeals discussed the threshold for individual liability. It noted:

> Joseph Russo's individual liability is another matter. As a general proposition, corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it…Mere negligent failure to acquire knowledge of the falsehood is insufficient.[25]

The tort of fraud requires, *inter alia*, an untrue representation of a material fact, known to be untrue or with reckless indifference to truth or falsity, as well as intention to deceive.[26] Thus the Court of Appeals has ruled that the "participation" in a corporate fraud by a corporate officer or director, which can lead to personal liability, requires some direct involvement in the actual wrongdoing.

In summary, the corporate case law that has addressed the individual liability of board members, apart from cases alleging discriminatory conduct, has involved allegations of corporate wrongdoing in the form of inducing breach of contract, commission of a tort generally, and commission of the tort of fraud. In all of these cases, to hold a director or officer individually liable some individual wrongdoing on the part of the director or officer appears to be required.

As discussed above, the action taken by a board member, in his or her capacity as a board member, that might be deemed to be inducing a breach of contract is not necessarily wrongful conduct, since the best interest of the corporation may be served by inducing a breach of contract and the board member must always act in the interest of the corporation. In other words the individual board member's action, distinct from the corporation's action, is not improper. As a result the courts imposed an independent tortious act requirement. Similarly, the case law imposing individual liability on a board member for torts generally has in fact involved some individual involvement in the wrongdoing by the director. Where the tort is the negligent conduct itself, the courts have held a director individually liable when the director was himself guilty of the negligent conduct, or controlled or ratified the negligent conduct of others. Where the tort is fraud,

the courts have made it clear that an individual director's conduct becomes actionable when there is also evidence of personal participation in the fraud, or at least actual knowledge of the falsity of a representation made by the board and intention to deceive.

Many cases of discriminatory conduct are arguably similar. The misconduct by the board is not necessarily misconduct by each director. The denial of an application to purchase, for example, is not a wrongful act unless the denial was due to discriminatory reason(s). A member of the board that voted to deny an application to purchase is not engaged in wrongful conduct unless that particular individual's vote was motivated by discriminatory reason(s).

Case Law Involving Discriminatory Conduct

In the *Fletcher* decision itself the cause of action against an individual director, Barnes, for retaliation against Fletcher for opposing alleged discriminatory conduct by the board while he was president of the board, was dismissed based on a lack of factual allegation that Barnes was aware of Fletcher's protected activity (opposition to alleged discriminatory conduct).[27] However, the action was dismissed without prejudice because discovery may reveal that Barnes was indeed aware of Fletcher's protected activity.[28] Thus, the court's opinion suggests that as long as Barnes was aware of the protected activity and "participated" in the *board's* vote to deny Fletcher the right to purchase an apartment adjacent to his own, Barnes could be individually liable. In other words, if Barnes voted to deny Fletcher's application but did *not* do so for reasons prohibited by the civil rights laws, it is not clear if the court's view of the required threshold of "participation" would allow Barnes to avoid liability.

There is some additional case law in the federal district courts supporting this low threshold for individual director liability. In *Sallee v. Tropic Seas, Inc.* the court considered whether the action against two individual directors should be dismissed.[29] In that case the court certainly did not apply an independent tortious act requirement. Indeed, it did not even require that the individual directors *actively* participated in the discriminatory conduct.[30] Rather, the court reasoned that:

> Because the duty to comply with the Fair Housing Act is nondelegable, a corporation's officers and directors may be held individually liable for their failure to ensure the corporation's compliance… This is so even where the individual director or officer did not actively participate in the alleged discrimination and did not subjectively intend to discriminate against the complainant.[31]

In the *Tropic Seas* case the plaintiffs alleged a violation of the Fair Housing Act Amendments of 1988 which prohibits discrimination based on "familial status."[32] Plaintiffs held a proprietary leasehold interest in a Wakiki cooperative apartment complex. The state circuit court had found that the corporation, Tropic Seas Inc., had violated the statute, and HUD had issued a Determination of Reasonable Cause and Charge of Discrimination against Tropic Seas and members of the board of directors. However, the alleged discriminatory actions were all, seemingly, actions of the board in enforcing an occupancy policy of limiting occupancy to two persons.[33] When denying the motion for summary judgment by two individual directors the court noted that:

> The acts and omissions alleged by the Sallees [plaintiffs] give rise to at least a genuine issue of material fact as to whether Tropic Seas engaged in discriminatory conduct *during the tenures of Worth and Mello*[34] on the board of directors. Summary judgment in favor of Worth and Mello is thus not appropriate. Thus, the formal action(s) *of the board* during the tenure of the individual directors was enough to potentially hold the directors individually liable.[35]

Arguably, however, *Tropic Seas* is a distinct case. The decision to enforce the occupancy policy itself had the effect of improperly denying access to the plaintiffs based on "familial status" because the couple in question had a child. Any board member voting in favor of enforcing the occupancy restriction would be participating in the civil rights violation. However, what level of participation would be required if the decision itself (e.g. to deny an application to purchase) is not necessarily improper, but only becomes improper based on a prohibited basis (reason) for the decision?

The case law involving housing discrimination does not delineate the degree of culpability or involvement of an individual board member in group decisions such as a board decision to deny an application to purchase in such a scenario. The only case law in the cooperative or condominium setting in which board members were *not* liable for alleged discriminatory actions involved a situation in which the individual board members did not participate in the decision at all.[36] Moreover, in the lower federal courts in New York the cases in which a director *was* found to be individually liable involved a situation in which the individual board member, distinct from the board, directly and willfully violated the Civil Rights laws.[37]

Should the Courts Impose a Higher or Lower Threshold?

In the context of individual liability of board members of cooperative corporations or condominium associations, the differing viewpoints found in the recent *Fletcher* decision and the older *Pelton* decision are a difference in viewpoint as to which public policy deserves primacy. The *Fletcher* decision emphasizes the policy that the NYC Civil Rights Law, and no doubt the state or federal civil rights laws, should be construed broadly in favor of discrimination plaintiffs.[38] This is arguably to discourage discriminatory conduct. The *Pelton* decision recognizes that aim. However, it emphasizes the adverse impact of a low threshold for individual liability for board members who volunteer to serve the interests of all unit owners. The court noted that board policies and decisions are controlled by the board collectively and not by any individual member.[39] Yet,

> the Supreme Court's decision, if permitted to stand, would, without any evidence of individual wrongdoing, subject these defendants to expensive, intrusive and time-consuming litigation…hardly a fitting reward for those "fellow tenants who volunteer their time, without compensation" as members of a governing body that takes on the burden of managing the property for the benefit of the other owners (see Levandusky, 75 N.Y. 2d at 536-537)… the threat of baseless litigation, with its attendant serious financial and personal burdens, would pose a formidable obstacle to those willing to volunteer their talent, experience and knowledge for the common good of their homeowner communities by serving on such a board.[40]

The risk becomes a serious risk in light of the existing threshold utilized for plaintiffs to establish a prima facie case. Namely,

> Plaintiffs may establish a prima facie case of housing discrimination by showing (1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers.[41]

Thus, under the standard announced in *Fletcher* it is possible that any director that voted with the majority of the board in a decision involving a protected class or activity could be named as a defendant in a lawsuit seeking to hold that director personally liable, even if no evidence is presented that the director in question engaged in any discriminatory conduct, e.g., even if the director had a valid reason to deny consent to a purchase or lease. Such a lawsuit would not be dismissed. Rather, the burden shifts and the individual director now must come forward with evidence that his actions were not motivated by considerations of race, for example.[42] Moreover, in attempting to satisfy that burden of proof the courts will carefully scrutinize reasons that are not objective in nature and view subjective explanations with "considerable skepticism."[43]

Such a scenario would raise the risk of continually subjecting corporate officers and directors to personal liability, a risk the courts sought to avoid by imposing the independent tortious act requirement in cases alleging breach of contract. This was the same risk that had originally persuaded the court in *Pelton* to impose the same requirement for individual liability in cases alleging discriminatory conduct, especially since board members are volunteers taking on the burden of managing the cooperative or condominium. It would be up to the Court of Appeals to decide if this public policy should be paramount and, if so, to recognize an individual "tortious" act requirement when the alleged wrongdoing is a violation of the civil rights laws.

Even if the Court of Appeals chooses not to extend the independent tortious act requirement to civil rights violations, it must clarify what threshold the *Fletcher* court intended to impose for individual liability on the part of board members for alleged discriminatory conduct by the board as a whole. A clarification might be to clearly embrace the commission of tort standard followed in the New York case law. Namely, a director would be individually liable only if he or she personally participated in the discriminatory conduct (i.e., not merely the decision but also the unlawful motivation for the decision) or ratified it.

It is interesting that the case law involving alleged employment discrimination and individual liability of corporate officers or supervisory personnel has also focused on the degree of individual involvement in the wrongful decision. The courts have repeatedly ruled that for an individual to be liable in damages for discriminatory conduct under the New York State or New York City Human Rights Laws the individual must have "actively participated in the discrimination."[44] For liability under §§ 1981 and 1983 plaintiff must show some "personal involvement" by the individual defendant in alleged constitutional deprivations.[45] Such case law suggests that a lower threshold for "participation," seemingly embraced by the *Fletcher* decision, is not the wisest standard to impose.

Endnotes

1. 948 N.Y.S.2d 263 (1st Dep't 2012).
2. 38 A.D.3d 1, 825 N.Y.S.2d 28 (1st Dep't 2006).
3. *Id.* at 9-10, 825 N.Y.S.2d at 34.

4. *Id.* at 10, 825 N.Y.S.2d at 34.
5. *Id.* at 10, 825 N.Y.S.2d at 35.
6. *See Fletcher*, 948 N.Y.S.2d at 268.
7. *Id.* at 266 (emphasis added).
8. 45 N.Y.2d 913 (1978). The court also cited the First Department's earlier decision in *Konrad v. 136 E. 64th Corp.*, 246 A.D.2d 324 (1st Dep't 1998). That decision involved an allegation of breach of fiduciary duty, not breach of contract.
9. *See Murtha*, 45 N.Y.2d at 914-915.
10. *Id.* at 915 (quoting from the Appellate Division's decision in Buckley v. 112 Cent. Park South, 285 A.D. 331 (1st Dep't 1954)).
11. *See id.* at 915.
12. 276 A.D. 357, 94 N.Y.S.2d 509 (1st Dep't 1950).
13. *Id.* at 367, 94 N.Y.S.2d at 519.
14. *Id.* at 368, 94 N.Y.S.2d at 519.
15. 285 A.D. 331, 136 N.Y.S.2d 233 (1st Dep't 1954).
16. *Id.* at 334, 136 N.Y.S.2d at 236.
17. *Id.* at 335-336, 136 N.Y.S.2d at 237 (citations omitted).
18. *See Fletcher*, 948 N.Y.S.2d at 268 (explaining the applicability of the rule in *Pelton*).
19. *Id.* at 268-9, quoting Albunio v. City of New York, 16 N.Y.3d 472, 477-8 (2011). The *Albunio* decision broadly construed the word "opposed" to any practice forbidden by the New York City Human Rights law in the context of a claim of retaliation for opposition to discriminatory conduct.
20. *Id.* at 266 (emphasis added).
21. *See* American Express Travel Related Servs. Co. v. North Atlantic Resources, 261 A.D.2d 310, 311, 691 N.Y.S.2d 403, 403 (1st Dep't 1999).
22. *Fletcher*, 948 N.Y.S.2d at 268 (citing Fletcher, Cyc. of Law of Corporations); *see generally* Martin Petun, *The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AMER. U. L. REV. 1661, 1668 (2010).
23. *See e.g.*, *Peguero*, 58 A.D.3d 556 (Jeffrey Farkas, president of the corporation, cannot have the complaint dismissed against him merely because his actions were taken in his capacity as an officer of the corporation. However, the "commission of tort" doctrine permits personal liability to be imposed for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act); Savanah T & T Co., Inc. v. Force One Express Inc., 58 A.D.3d 409, 872 N.Y.S.2d 83 (1st Dep't 2009) (defendant Phil Notaro, the corporate defendant's principal, was held personally liable for misappropriation where he withheld plaintiff's goods from them and coerced Edwin Baldin, the plaintiff's principal, into signing a purported lien agreement); Rajeev Sindhwani, M.D., PLLC v. Coe Business Service Inc., 52 A.D.3d 674, 861 N.Y.S.2d 705 (2d Dep't 2008) (the evidence adduced at trial established that Coe was responsible for the determination to withhold the subject records from the plaintiff. Accordingly, the jury rationally determined she personally was liable for conversion).
24. The participation theory of tort liability provides that an officer or director who takes part in the commission of a tort by the corporation is personally liable therefor. However, "an officer [or director] of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other agents, officers or employees of the corporation in committing it, unless he specifically directed the particular act to be done or participated, or cooperated therein," Mill Run Associates v. Locke Property Co., Inc., 282 F. Supp.2d 278 (E.D. Pa. 2003) (discussing the general, if not universal, rule and citing Fletcher, Cycl. of the Law of Private Corporations); *see also* Clark v. Pine Hill Homes, Inc. 112 A.D.2d 755, 492 N.Y.S.2d 253 (4th Dep't 1985) (a corporate officer is not liable for the negligence of the corporation merely because of his official relationship to it. It must be shown that the officer was a participant in the wrongful conduct); Wesolek v. Jumping Cow Enterprises, Inc., 51 A.D.3d 1376, 1378-9, 857 N.Y.S.2d 859 (4th Dep't 2008) (dismissing action against corporate director).
25. Marine Midland Bank v. John E. Russo Produce Co., Inc., 50 N.Y.2d 31, 44, 427 N.Y.S.2d 961, 968 (1980) (citations omitted); *see also* Ecuador Importadora-Exportadora CIA, LTDA v. ITF (Overseas) Corporation, 94 A.D.2d 113, 117-118, 463 N.Y.S.2d 208 (1st Dep't 1983) (since director Cordero was under the impression Intrafina had more than enough cash to meet its obligations he could not be held personally liable. Even if Cordero could be considered culpable of nonfeasance in this regard to his corporate duties, his liability does not extend to a third party).
26. *E.g.*, Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958).
27. *Fletcher*, 948 N.Y.S.2d at 270.
28. *Id.* at 273.
29. 887 F. Supp. 1347, 1366 (D. Haw. 1995).
30. *Id.* at 1347, 1365.
31. *Id.* at 1365.
32. *Id.* at 1353.
33. *Id.* at 1352.
34. *Tropic Seas*, 887 F. Supp.at 1365 (emphasis added).
35. *Id.* at 1365 (emphasis added).
36. *See* Sayeh v. 66 Madison Avenue Apt. Corp., 73 A.D.3d 459, 460, 901 N.Y.S.2d 26, 28 (1st Dep't 2010).
37. *See* discussion of jury's findings in Biondi v. Beekman Hill House Apartment Corporation, 94 N.Y.2d. 659, 664, 709 N.Y.S.2d 861, 863 (2000) (the jury in the federal action found Biondi willfully violated the Broomes' and Demou's civil rights and imposed personal liability on him); *see also* Broome v. Biondi, 17 F.Supp. 2d 211, 229 n. 4 (S.D.N.Y. 1997) (the jury found Beckman Hill House Apartment Corporation liable, the members of the board of directors liable in their official capacity, and Nicholas Biondi liable in his personal capacity).
38. *Flecther*, 948 N.Y.S. at 268-9.
39. *Pelton*, 38 A.D.3d at 10-11, 825 N.Y.S.2d at 35.
40. *Id.*
41. Mitchell v. Shane, 350 F.3d 39, 47 (2d Cir. 2003); *see also* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979); Broome, 17 F. Supp. 2d 211, 216.
42. *See Robinson*, 610 F.2d at 1039.
43. *Id.* at 1040.
44. *E.g.*, Hirsch v. Columbia Univ., 293 F. Supp. 2d 372, 378 (S.D.N.Y. 2003) and cases cited therein; Westbrook v. City University of New York, 591 F. Supp. 2d 207, 224 (E.D.N.Y. 2008).
45. *E.g.*, *Westbrook*, 591 F. Supp.2d 207, and cases cited therein.

Vincent Di Lorenzo is professor of law at St. John's University and author of *New York Condominium and Cooperative Law* (West).

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3 Critical Components in Litigation Graphic Design That You're Not Doing

By David W. Mykel, M.A.

As litigators, we are standing at the edge of another revolution in trial advocacy. In the 1990s and early 2000s, the technology revolution transformed courtrooms around the country into multi-media presentation theaters. The next revolution is going to ensure that audiences are just as engaged as they are at an IMAX: prepare for the Visual Revolution. With almost 70% of the population being visual learners (Deza, Michel Marie & Elena (2009), *Encyclopedia of Distances*, Springer) and more and more people getting their information from the Internet (49% according to Pew Research Center for the People & the Press—http://www.people-press.org), the threshold is near. Knowing this, each and every case that comes through a modern courtroom needs to be told in a visually compelling manner that turns complex facts into a clear and coherent story. We are dealing with a different breed of audience; one that embraces technology, who spends 141 hours in front of a television and 41 hours a month online (*A2/M2 Three Screen Report*, Nielsen Media. Vol. 5, 2Q, 2009). Our audience is pioneering this Visual Revolution and we too need to make this transition by creating an engaging story utilizing multimedia tools to meet the ever-changing needs of this modern, visual, and "instant information" culture. The more effective your courtroom presentation is, the more persuasive your argument is going to be, and the easiest way to accomplish this is with a visual framework and strategy.

In my twelve-year career as a litigation consultant, I have witnessed numerous graphics that have not embraced this ever-changing culture's wants and needs. I have reviewed and critiqued countless visuals that have been carelessly laid out and unintentionally colored, while scrutinizing others that were difficult to read and even more difficult to understand. Visuals have departed from their original, intended purpose of telling a cohesive visual story and have become glorified word processing or a mix of improperly laid out, poorly selected images with an obscene election of colors.

In this day and age of "web-based learners," our communication strategy needs to be structured and adhere to the same concepts our audiences are exposed to daily. This article will demonstrate how to implement easy-to-follow tactics into your next presentation in order to take your communication to the level your audience expects.

Properly Placed Titles and Subtitles in Consistent and Prominent Areas

Placing titles and subtitles in the same spot time after time teaches your audience where to look each and every instance a new visual is introduced. The overwhelming majority of the population reads left to right and top to bottom. Beginning your title in the upper left-hand corner takes full advantage of how your audience learns and educates it where to expect something important to be. Placing your title and subtitle, which should also be your takeaway, in this strategic position, ensures that your audience sees and understands the context and the theme of the graphic first, before other aspects are viewed and considered. We recommend creating two to three template variations that allow for horizontal and vertical positioning of the title and subtitle to accommodate different types of information. Creating a few templates allows more latitude in choosing the best layout to display a variety of documents, images, charts, etc., yet still focuses your audience's attention to the same location for your theme, i.e., takeaway.

A client on a recent case commented that "a good demonstrative can immediately convey a message in a single look," and in our experience, nothing makes this easier than a perfectly worded and placed title.

Consistently Formatted Text, Data, and Images

Adhering to the same principles above, it is a smart practice to consistently format text, data, and images. Effective presentations should always support two principles: education and persuasion. Just as we are educating our audiences about our case, we are also aiding/training them to recognize the visual structure of the presentation, the goal being for the viewer to "know" where to look for important points. By placing important text, data, and images in a consistent manner throughout your presentation, you are subconsciously training your audience where to look if something is attention-worthy. Conversely, if you constantly shift where important text, data, and images appear your audience will become confused as to whether or not this data is meaningful, leaving it up to the audience to decide. Remember, if you don't aid your audience in assessing what is important to your case, it will do it for you, and the result may not be what you wanted or intended.

Presenting information in this fashion enables both presenters and readers to readily "find" critical data during testimony. As communication experts, we know individuals are more likely to be emotionally and/or logically tied to a decision when they themselves have reached it, compared to when another party determines it for them.

Consistent Application of Color in Diagrams, Icons, Labels, and Backgrounds

Since color plays a vital role in our everyday psychology, it would be irresponsible if we ignored it in our presentations. Color has the ability to influence our feelings and emotions in a way that few other mediums can. Color is a catalyst for affecting human mood, behavior, thinking, and rationale. Color invokes emotions, which is why marketing gurus have been integrating color into their strategies for centuries. Do you think the Coca Cola cans have remained red for decades by accident? If you're thoughtlessly mixing colors throughout your presentation, you may end up unintentionally influencing your audience in the wrong direction.

When creating presentations, use blue or green, since it represents honor, trust, and calmness to identify your side of the case. To the contrary, use the most emotionally intense color, red, for the opposition, because it represents danger and caution. By assigning a consistent color to the parties in a case, each side is easily discernible and the point of view being advocated is clearly drawn. Color cannot only be used to differentiate parties, but also to help focus your audience on key information within a graphic. When trying to call attention to something, utilize yellow highlighting (associated with liveliness and energy) to focus the audience's concentration and let it know, "Hey, this is important."

Colors can be a powerful tool to entice and engage your target audience and, when used in a decisive manner, can be the difference between a visual that persuades and a visual that confuses or distracts.

Conclusion

You may notice something "consistent" about these points. Consistency in your strategy, your communication, and your presentation should go hand-in-hand. Grabbing your audience's attention is not simply about communication processes; it is a strategic necessity, and the only true way to do this is to invest as much time in your visual framework as your strategy. You could craft the most persuasive themes ever uttered in a courtroom, but if you present them in a convoluted and unorganized manner, your case will fall short of your desired verdict. Think of it this way: What good is the perfect oratory presentation if your audience is deaf? Remember, nearly 70% of the population are visual learners, so we need to ensure we are addressing our audiences' wants and needs at THEIR level, not OURS.

After completing hundreds of post-trial interviews with jurors, one thing is clear: if you don't supplement your case strategy with compelling, deliberately well-crafted visuals, your audience will be distracted and tune out, forgetting your themes and dismissing the merits of your case. Following these simple yet imperative rules will ensure that your audiences stay engaged throughout your presentation and empowers them to advocate your themes throughout deliberations and verdict.

David W. Mykel is a Litigation Communications Consultant with VisuaLex, LLC. Mr. Mykel has over 12 years of experience in the litigation consulting industry and has consulted on over 200 high profile cases for Fortune 100 companies as well as *American Lawyer's* Top 100 law firms.

Mr. Mykel comes from a psychology background earning his Master's degree in Forensic Psychology from Marymount University in Arlington, Virginia.

He can be reached at DMykel@VisuaLexLLC.com.

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Contemptible: Enforcing Money Judgments in Surrogate's Court

By Gary E. Bashian

"*JUDGE*: Are you trying to show contempt for this court?
MAE WEST: I was doin' my best to hide it."

— Mae West

Litigation in New York is undeniably on the rise. Market volatility, unemployment, ever increasing medical, health care, and living costs, the reasons for this explosion in litigated matters of all kinds are innumerable. The confluence of political, economic, and social turmoil that has made headlines across the globe over the past several years, and has been felt especially hard here in New York, has prompted a downward pressure that has undeniably fueled this litigation boom.

These same underlying factors that have led to this surge in litigation generally have also directly impacted a growth in estate litigation. The noticeable increase in contested accounting proceedings, and even discovery / turnover proceedings, is forcing many trusts and estates practitioners to cope with a problem more regularly encountered by civil litigators in other areas of practice: Judgment Enforcement.

Ordinarily, a favorable Order, or final Judgment, on an issue that directs an opposing party to pay money is considered to be a victory by counsel and client alike. However, they can find themselves "clutching defeat from the jaws of victory" where they are forced to deal with an opposing party who simply refuses to remit the funds, documents, goods etc. as directed by the Court. Increasingly, if not unsurprisingly, this is a situation many of us are facing.

The problem here is obvious: how is a party who has no compunction about flouting the authority of the Court forced to comply with what amounts to be little more than a piece of paper telling him or her what to do with a raised seal and signature?

Enforcement of Judgments is governed by New York Civil Practice Law and Rules ("CPLR") Articles 51 and 52. Consisting of over 40 subsections, almost all are characterized by a deeply technical tone even for the CPLR, the denseness of the language itself serving almost as a warning about the practical difficulties of utilizing their provisions.

Generally speaking, enforcement falls into one of two categories: Execution or Contempt. Overwhelmingly, executing a judgment is a complex, costly, and time consuming endeavor that may ultimately fail in compelling payment if the judgment debtor has effectively hidden assets and / or income.

However, enforcement by way of Contempt, though rarely granting immediate relief, in my experience remains the most practical and effective enforcement mechanism to compel payment.

By no means can it be implied that moving for, and actually having a party held in Contempt, is an easy task. On the contrary, it is a highly technical and formalized application to the Court whose procedural requirements must be followed to the letter if due process is to be satisfied, and the application granted.

Though CPLR Articles 51 and 52, working in conjunction with Judiciary Law article 19, authorize the Courts generally to exercise Contempt powers, Article 6 of the Surrogate's Court Procedure Act ("SCPA") governs Contempt proceedings in the Surrogate's Courts, specifically SCPA 606 and 607 in conjunction with Judiciary Law Article 19.

With the dual powers of fine and imprisonment, enforcement by Contempt is very much a coercive tool for compelling payment, but as indicated above, one that is very technical, if not arcane.

It is important to note that only the violation of an Order or a Judgment can lead to the finding of Contempt, meaning one must first Settle and later Enter a Decision with the Court where compliance has not occurred.[1]

Initially, the Petitioner must, via in-hand personal service, serve a certified copy of the Order or Judgment upon the Contemnor.[2] Substituted service is not sufficient, a requirement that invites obvious practical problems as a party who refuses to comply with the directive of the Courts will undoubtedly have no issues about evading service at every opportunity.

Subsequent to service of the Certified Order or Judgment, if the judgment debtor still has not complied with the Order or Judgment, which he or she probably has not, the application to hold the individual in Contempt must be brought before the Court by an Order to Show Cause. Notably, the Order to Show Cause must include, in at least an 8-point bold font, the language: "WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT" in order to even be considered by the Court.[3] Additionally, the face of the Order must also include the language: "The purpose of this hearing is to punish you for a Contempt of Court. Such punishment may consist of fine or imprisonment, or both, according to law."

In many cases, the Petitioner is forced to seek enforcement by Execution before moving for Contempt. However, where the Contemnor is a fiduciary of an Estate, and the violation relates to an Order or Judgment

germane to the Estate, the requirement for the Petitioner to first attempt Execution can be waived by the Surrogate.[4] Be sure to request this waiver in the underlying Affirmation and / or Affidavit in support of the application itself. Although the Court may grant such a waiver *sua sponte*, showing that Execution will prove futile, ineffective, and be an overall waste of judicial resources, it is an important point to draw to the Court's attention at this juncture.

The Petition itself must be made by a person interested, and the Order or Judgment at issue must direct the payment of a sum of money, or the performance of any act. The Petition itself must establish:

1. A lawful Order or Judgment of the Court has been issued, is in effect, and contains an unequivocal mandate to pay monies;
2. One of the grounds prescribed in the SCPA 606;
3. That the actions of the Contemnor have been calculated to, or actually defeated, impaired, impeded, or prejudiced the rights or remedies of the other side;[5]
4. That a certified copy of the has been personally served on the contemnor;
5. That the contemnor has refused or willfully neglected to obey such order or decree;[6] and
6. Praying that the contemnor be directed to show cause why he should not be punished for contempt.[7]

Most of these elements can be proven with relative ease assuming that compliance with the Order of Judgment has not been met, and harm has been suffered as a result.

Not surprisingly, the third element of Petitioner's burden can be the hardest to establish. Though a bare refusal to comply with the Court's directive can be easily shown, often the Court will require a showing of willful neglect before granting a final Order of Contempt—which will in turn lead to fine and / or imprisonment. Presumably, the application of this higher burden on Petitioner is used in order to ensure that all constitutional considerations are met. After all, deprivation of liberty and / or property is not something to be taken lightly by either the Court, or by the Contemnor. By requiring a showing, and making a finding, of willfulness, the Court inoculates itself against claims of error and abuse of discretion which would undoubtedly be raised on appeal. Commonly, in the absence of direct evidence otherwise, a hearing will be scheduled by the Court to determine if the Contemnor's violation of the Order or Judgment has been willful.

To my knowledge, a definition of willfulness, or a bright line test to determine that the Contemnor acted willfully in refusing to comply with the Order of Judgment at issue, has not been articulated completely by case law. It does not appear that a strict definition, circumstantial presumption, or allowable inference exists that can guide a Petitioner in the task of establishing Contemnor's willfulness.

However, an argument of willfulness will be buttressed by proof that the Contemnor made no serious effort to comply with the Order or Judgment of the Court until the commencement of the contempt proceeding;[8] proof that is often easy to establish. Moreover, the operative case law describing what specifically constitutes the willful refusal / neglect to pay monies can be distilled to the basic rule that: Knowledge of the Order or Judgment (established by in-hand service) + the failure to comply with the directives of the Order of Judgment = willfulness.[9] Although this test may not be the most elegant of interpretations, it concisely summarizes the Court's approach to determining the extent of a Contemnor's willingness.

The level of willfulness in a Contemnor's refusal to comply with a directive of the Court is also an important point in and of itself, as it determines whether Contemnor is to be held in either Civil or Criminal Contempt for the violation. Civil or Criminal Contempt can be found from the same violation of the Court's directive, willfulness having to be found with reasonable certainty to find Civil Contempt, and beyond a reasonable doubt for Criminal Contempt.[10] The distinction between Civil and Criminal Contempt is important not only because it determines the burden of proof on Petitioner for establishing willfulness, but because each is utilized for a different purpose. Civil Contempt is used as a coercive tool to force a Contemnor into compliance with the directive of the Court, designed to compensate the injured party for the loss caused.[11] Alternatively, Criminal Contempt is a punitive measure taken against a Contemnor to punish and deter disobedience of Judicial mandates.[12] This distinction is important not only on academic grounds, but because one can move for concurrent penalties for both Civil and Criminal Contempt. Furthermore, a finding of Civil vs. Criminal Contempt will determine the length of time that the Contemnor can be incarcerated. Oddly, the period of confinement for Criminal Contempt is less than that for Civil Contempt. Criminal Contempt ordinarily carries with it a maximum confinement of thirty days.[13] Alternatively, a Contemnor found to be in Civil Contempt for the omission to perform a duty or act can be confined indefinitely, as his or her release if conditioned on his or her compliance; a Civil Contempt based on a failure to pay a fine of $500 or less carrying with it a maximum sentence of three months, and for a fine above $500 a maximum sentence of six months.[14]

The second, and sometimes overlooked, power of the Court when finding a party in contempt is that of a fine.[15] The power of the fine should not be discounted; an economic levy, either coupled with or separate from confinement, can prove very effective. The power of the fine is most notable where the Court allows for a penalty in the amount of the uncollected money judgment itself.[16] In lieu of the proving actual losses, the statutory fine imposed is set at $250.[17]

Given that the potential periods of incarceration are significant, the Judiciary Law provides several defenses that can be argued to avoid imprisonment.[18] The most common defenses made being 1) an inability to pay, and 2) the inability to endure confinement—usually based upon medical grounds. Predictably, the burden is on the Contemnor to prove either a financial inability, or any defense of sickness. Conclusory statements, allegations, and claims of insolvency unsupported by documentary and independent and verifiable sworn proof will not be sufficient to establish these defenses; i.e., financial records, tax records, sworn doctor affidavits, etc. are needed to meet this burden.[19] Importantly, the Contemnor's inability to pay cannot be caused by his or her own misconduct,[20] such as a series of fraudulent transfers,[21] or as is often the case, involving an errant Executor, where the funds of the Estate have been misapplied and their misappropriation forms the substance of the Judgment itself.[22] Clearly, the Court is cognizant of the lengths that judgment debtors will go to avoid paying their creditors, and the fact that they have little hesitation perpetrating a fraud upon the Court.

If and when the Order to Show Cause is Ordered by the Court, the initial return date will usually be uneventful. However, the Order itself must be served upon the Contemnor no less than ten days prior to the initial hearing, and no more than thirty days prior to the initial hearing.[23]

Thereafter, the Court will issue a Decision regarding the application. Usually, but dependent on the circumstances and level of culpability of the Contemnor, a second hearing will be scheduled on the Court calendar. At this second hearing, the Court will resolve any issues not determined in the Decision, address any questions it may have regarding the willfulness of the Contemnor, and prepare to issue a Final Order of Contempt if warranted. Again, depending on the circumstances of the case, the Court will offer the Contemnor one final time period to cure the Contempt by providing a final limited window for compliance to be made. If the Contemnor fails to comply by the end of the period laid out in the Final Order of Contempt, depending on the terms of the Order itself, the fine will be levied, and a warrant of commitment will be issued.

To enforce the warrant, it must be delivered to a sheriff or local law enforcement so that they can then arrest the Contemnor. Each county has its own procedure and fee schedule for this process. The NYC.gov website[24] has a description of this process for the boroughs in New York City; other counties in the metropolitan area should be contacted directly to ensure compliance with their own unique requirements.

If the Court agrees with the Petitioner and the facts support a finding of Contempt, a warrant of commitment is issued, and if the Contemnor is incarcerated, monies that were previously claimed to be unavailable often appear and are remitted in order to avoid further incarceration—especially in the cases where the Contemnor's release is entirely predicated on compliance with the Court's directives.

Endnotes

1. CPLR 5101.
2. CPLR 5104; SCPA 606 (1).
3. Judiciary Law § 756.
4. SCPA § 606(1)(d).
5. *Farkas v. Farkas*, 209 A.D.2d 316, 618 N.Y.S.2d 787 (1st Dep't 1994).
6. *In re Kahr*, 85 Misc. 2d 363, 366, 379 N.Y.S.2d 638 (Sur. Ct., Albany Co. 1976).
7. *Id.*
8. *In re Cinquemani*, 96 Misc. 2d 531, 409 N.Y.S.2d 192 (Sur. Ct., Bronx Co. 1978).
9. *See generally In re Kahr, supra*; *In re Storm*, 28 A.D.2d 290, 284 N.Y.S.2d 755 (1st Dep't 1967); *McCormick v. Axelrod*, 59 N.Y.2d 574, 466 N.Y.S.2d 279 (1983); *McCain v. Dinkins*, 84 N.Y.2d 216, 616 N.Y.S.2d 335 (1994).
10. *N.A. Development Co. Ltd v. Jones*, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984).
11. *Id.* at 240.
12. *Id.*
13. Judiciary Law § 751.
14. Judiciary Law § 774.
15. Judiciary Law § 753.
16. *Corpuel v. Galasso*, 240 A.D.2d 531, 659 N.Y.S.2d 65 (2d Dep't 1997); *cf. Matter of Barclays Bank v. Hughes*, 306 A.D.2d 406, 761 N.Y.S.2d 278 (2d Dep't 2003).
17. Judiciary Law § 773.
18. Judiciary Law § 775.
19. *Farkas v. Farkas*, 209 A.D.2d 316, 618 N.Y.S.2d 787 (1st Dep't 1994).
20. *In re Garrity*, 149 Misc. 180, 266 N.Y.S. 892 (Sur. Ct., Kings Co. 1933); *James Talcott Factors, Inc. v. Larfred, Inc.*, 115 A.D.2d 397, 496 N.Y.S.2d 27 (1st Dep't 1985).
21. *In re Collins*, 39 Misc. 753, 80 N.Y.S. 1119 (Sur. Ct., Kings Co. 1903).
22. *In re Gall*, 29 NYCiv.Proc.R. 178, 57 N.Y.S. 835 (2d Dep't 1899).
23. Judiciary Law § 756.
24. http://www.nyc.gov/html/dof/html/services/services_enforcement_arrests.

Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich, Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, he is presently on the Executive Committee of the New York State Bar Association's Trusts and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section. Mr. Bashian can be reached at garybashian@bashianfarberlaw.com.

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Ethics Opinion 950

Committee on Professional Ethics of the New York State Bar Association (12/17/12)

Topic: Saving law firm mail in paper or electronic form

Digest: Law firm that retains electronic copies of mail may destroy the original paper mail, except when it finds that particular items must be retained in paper form, if it follows reliable procedures to identify and retain those particular items.

Rules: 1.6, 1.15(d)

FACTS

1. The inquirer is a legal services agency that provides services to members of a union. The Agency is located within the headquarters of the Union.

2. Mail received by either the Agency or the Union is received and processed by a third party vendor. The Agency has confidentiality agreements with the personnel of the Vendor who receive and process mail.

3. The Agency proposes to have the Vendor scan all mail and email it to the appropriate attorneys or other legal service personnel. Also, in some cases, the original "hard copy" of the mail would "automatically" be sent to the addressee. According to the inquiry, this would include documents "for which an original is required," such as "motions, deeds, all client original signature documents, checks, transcripts, title documents [and] all escrow account statements and related documents."

4. In other cases, the Vendor would retain the hard copy of the mail for one month. During that time, lawyers or other legal staff who receive the emailed scan of the mail may click on the item and thereby cause the Vendor to deliver the hard copy of that mail item to the addressee. After one month, if no legal staff has requested retention, the Vendor would destroy the hard copy of the mail in a secure manner, but the scanned copy would be maintained on a secure server indefinitely.

QUESTIONS

5. May the Agency ethically implement a plan to destroy the hard copy originals of certain items of mail, and retain only electronic copies, when legal staff has not requested that the hard copies of those particular items be delivered so as to allow retention?

OPINION

6. Before considering the question asked, we note briefly the issue of confidentiality. "A fundamental principle in the client-lawyer relationship" is that, in the absence of the client's informed consent or except as permitted or required by the Rules of Professional Conduct (the "Rules"), "the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source." Rule 1.6, Cmt. [2]. The attorney not only has an obligation to refrain from revealing such information, but also must exercise reasonable care to prevent its disclosure or use by "the lawyer's employees, associates, and others whose services are utilized by the lawyer." Rule 1.6(c); *see also* Rule 5.3(b) (specifying when a lawyer is responsible for conduct of an associated nonlawyer that would be a violation of the Rules if engaged in by a lawyer).

7. The employees of the Vendor will have access to confidential client information. We have not been given the details of the Agency's confidentiality agreements with personnel of the Vendor. We may point out, however, that those agreements, and the Agency's oversight over the Vendor's adherence to them, must be sufficient to constitute reasonable care in protecting confidential information.

8. The inquiry also does not provide details about the servers on which electronic copies of mail will be kept, and in particular does not indicate whether those servers would be maintained by the Vendor or the Agency. In any event, the Agency must exercise "reasonable care to ensure that the system is secure and that client confidentiality will be maintained," N.Y. State 842 (2010), and some of our opinions provide guidance as to how such care might be exercised.[1]

9. We now turn to the question about destroying hard copies of mail items. In a recent opinion, we discussed ethical requirements to retain documents in their original form. N.Y. State 940 (2012). That opinion was not focused on items of mail; it related to records in general, and we think its principles apply in the more specific context presented here.

Items that must be retained in their original form

10. The inquirer has recognized that certain mail items need to be retained in their original hard copy form. This includes certain items specifically listed in the Rules, such as bank statements, when those items were received as paper copies in the first place. Rule 1.15(d)(1)(viii). It includes other kinds of documents as well, such as promissory notes and deeds. See N.Y. State 940 ¶¶ 9–10 & 13–14 (2012) (noting that whether records must be maintained in their original form will depend on the kind of record involved, and giving examples of documents in this category).

11. The proposed system includes two mechanisms for ensuring that mail is retained in hard copy when necessary. First, the Vendor would "automatically" send relevant legal staff hard copies of mail "for which an original is required." Second, if the Vendor fails to identify such a document, there would be another opportunity to do so when the relevant legal staff reviews the email with the scanned document.

12. The adequacy of these two mechanisms would depend on the details of their design and implementation. It is unclear from the inquiry how the Vendor will identify mail for which an original is required. To the extent possible, the Agency should have a clear and reliable protocol that the Vendor can readily apply, but the inquiry does not describe any such protocol.

13. The inquiry also does not provide full details about the thirty-day opportunity for review by legal staff. It does not indicate, for example, whether there would be any mechanism for extension of the period, or review by another lawyer, when an assigned lawyer is on vacation or fully occupied with some other matter. In the absence of more information about the two mechanisms and their reliability, we cannot opine on the proposed system's adequacy.

Items for which at least copies must be retained

14. As to some other mail items, there will be no ethical requirement to maintain the items in their original paper form, but the inquirer will be ethically required to retain at least copies. N.Y. State 940 ¶¶ 11–14 (2012). The proposed system, which includes a plan to keep electronic copies of all mail on a secure server indefinitely, should satisfy this requirement. In some cases, however, there may be constraints on the kind of electronic storage used.[2]

CONCLUSION

15. A system for retaining hard copies of mail when necessary, and keeping only electronic copies in other cases, may be permissible if the firm implements a reliable method for identifying those items that it is ethically required to be maintained in hard copy.

Endnotes

1. For example, the opinion cited above states in the context of Internet server ("cloud") storage that reasonable care to protect a client's confidential information against unauthorized disclosure may include consideration of the following steps: "Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information"; "Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances"; and "Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored." N.Y. State 842 ¶9 (2010); *see also* N.Y. State 709 (1998).
2. For example, in particular cases, the electronic copies might have to meet standards for future admissibility in evidence, *see* N.Y. State 940 ¶14. And when the item is one listed in Rule 1.15(d), copies must be maintained in a "medium that preserves an image of the document that cannot be altered without detection." Rule 1.15(d)(3).

(56-12)

Ethics Opinion 951

Committee on Professional Ethics of the New York State Bar Association (12/17/12)

Topic: Offering letter writing services through website

Digest: A lawyer may not offer a web-based letter writing service on a broad range of topics unless it is clear that no legal services are rendered and the lawyer prominently disclaims the existence of a client-lawyer relationship on the website.

Rules: 5.7(a) & (c)

FACTS

1. The inquiring lawyer contemplates offering an online letter drafting service; the lawyer would charge a flat fee for the preparation of letters in the following categories: Fund-raising, Commercial/Business, Personal, Acceptance, College, Commendation, Condolence, Congratulations, Cover, Demand, E-mail, Introductory, Letters of intent, Marketing, Notification, Promotional, Reference, Rejection, Resignation, Request, Response, Resume, Application, Sales, Sympathy and Thank-you letters. The draft letters would be prepared by a lawyer and delivered to the client by electronic mail for execution and mailing. The lawyer proposes adding a disclaimer to the website that would advise that he is not dispensing legal advice, no legal representation exists, no attorney-client relationship is formed and the attorney is being hired only for his skills as a writer.

QUESTION

2. May a lawyer offer a letter-writing service which does not dispense legal advice through a website he owns? May the website advertise the fact that the letters are written by an attorney?

OPINION

3. Rule 5.7, entitled "Responsibilities Regarding Nonlegal Services," defines "nonlegal services" to "mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Clearly letters on many of the topics raised by the Inquirer are non-legal, such as Condolence, Sympathy and Thank-you letters. However, the context and content of other letters may address legal rights and responsibilities. For example, a demand letter may be necessary to declare a default under a contract, a letter of intent may create legal obligations or a resignation may have to be addressed in a certain manner to be effective. Therefore, whether the letter writing services qualify as "nonlegal services" for purposes of the Rule will require an examination of each request for a letter.

4. Our concern here is that the inquirer proposes to identify himself as an attorney, and that the letters, including those that could be written by a non-lawyer, will be written by an attorney.

5. Section (a)(1) of Rule 5.7 states that the Rules of Professional Conduct apply if the lawyer or law firm provides nonlegal services to a person that *are not distinct* from legal services being provided by the lawyer or firm. This test requires an examination of the subject of each letter and its context to determine whether the writing constitutes "nonlegal services" that are "distinct from legal services."

6. Comment [1] to Rule 5.7 places the onus on the lawyer to be clear about the nature of the services and the lawyer's role. It is likely that a client of the letter writing service, knowing that the writer is a lawyer, may expect legal advice.

7. In N.Y. State 832 (2009) we addressed an inquiry involving the sale of shelf corporations (a nonlegal service); in paragraph 10 we stated that "[e]ven if the attorney merely identifies himself as a lawyer when selling shelf corporations but does not promise or provide legal services, the risk of confusion is great and purchasers could reasonably believe that they had an attorney-client relationship with the seller." In N.Y. State 557 (1984) we noted that "[w]hile there are many services that may properly be undertaken by lawyers and non-lawyers alike, especially in the fields of taxation and tax planning, when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code."

8. Rule 5.7 (a)(2) and (a)(3) provide that the Rules apply even if the nonlegal services are distinct if the person receiving the services could reasonably believe that the services are the subject of a client-lawyer relationship.

9. Rule 5.7 (a)(4) states that for these purposes "it will be presumed that the person receiving

nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlawyer services…."

10. Here, the inquirer proposes to advise users of the service that no legal advice is being dispensed, that the lawyer is not acting in a representative capacity, that no attorney-client relationship is formed and that the attorney is being hired only for his skill as a writer. Thus, the presumptions under (a)(2) and (3) may be rebutted effectively if the services are clearly non-legal services.

11. However, this analysis does not address the delivery of services which are arguably legal in nature, such as the acceptance letter, the letter of intent, a demand or resignation. Where those examples could raise questions of the legal effect of the document, N.Y. State 832 would control this analysis. As stated in that Opinion: "even if the lawyer provides the disclaimer specified in Rule 5.7(a)(4), it would not be effective if the lawyer actually provided legal advice or other legal services to the customer of the nonlegal business."

12. We believe that a lawyer may offer the services proposed in this inquiry but by identifying him or her as a lawyer, the inquirer creates a substantial risk of confusion in the mind of the client about the legal effect of many of these letters. This likelihood is great enough that the safe harbor provided by (a)(4) would not be effective. Whether the writing of each letter is a legal or non-legal service will require a close look at the circumstances of each letter.

CONCLUSION

13. A lawyer may not provide letter-writing services unless it is clear that the subject matter of the letters do not implicate legal rights, no legal services are rendered and the lawyer prominently disclaims the existence of a client-lawyer relationship on the website.

(51-12)

Ethics Opinion 952

Committee on Professional Ethics of the New York State Bar Association (12/17/12)

Topic: Concurrent representation of lender and buyer in residential real estate closing; payment of buyer's legal fees by lender

Digest: Lawyer may not represent both lender and buyer in residential real estate transaction if part of a series of such transactions in which lawyer regularly represents that lender and lender regularly pays the buyer's legal fees.

Rules: 1.7(a), 1.7(b), 1.8(f)

FACTS

1. A lawyer regularly represents a certain lender in residential real estate transactions. In each transaction, the lawyer charges the lender a fee of $450 for closing services. The lawyer also typically offers to represent the buyer (the borrower of the mortgage loan) on written consent of both clients, charging the buyer a fee of $275 for that service. The lender has proposed, as a promotion, to provide legal representation to potential borrowers as to closing services in such transactions for a $25 fee. The lender would run newspaper and radio advertisements to promote that offer, and the advertisements would not mention the lawyer or the lawyer's law firm by name. The buyer would pay the lender $25 toward the legal fee, and the lender would add $250 of its own and give the total of $275—the usual fee for representing the buyer—to the lawyer. The lender would also pay the lawyer's $450 fee for representing the lender.

QUESTION

2. On the above facts, may the lawyer ethically represent both the lender and the buyer and accept payment from the lender for the $275 in legal fees the lawyer otherwise would have charged the buyer, with the buyer having paid only $25 to the lender for such services?

OPINION

3. The first question is whether it would violate ethical rules for the lawyer to represent both the lender and the buyer in connection with the closing of the residential real estate transactions at issue.

4. Rule 1.7(a)(1) of the New York Rules of Professional Conduct provides that "a lawyer shall not represent a client if a reasonable lawyer would conclude that…the representation will involve the lawyer in representing differing interests." Rule 1.7(a)(2) precludes representation where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

5. Rule 1.7(b) provides, however, that notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if four conditions are met. Two of the conditions are that the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and that "each affected client gives informed consent, confirmed in writing." (The other two conditions would not be at issue in the context of this inquiry.) The quoted provisions of Rule 1.7 include defined terms.[1]

6. In a typical residential real estate transaction, the interests of the lender and the buyer, who also is the borrower from the lender, overlap in important ways. Both are interested in obtaining good title and protecting the buyer's interests as against the seller. Moreover, the terms of a loan may not be effectively negotiable in the setting of a residential real estate transaction. Thus, representation of the buyer and the lender may often be less problematic than representation of those two parties in the setting of a highly negotiable commercial real estate deal.

7. To say that interests overlap, however, is not to say that they coincide. The lawyer who represents a residential buyer and lender is representing differing interests if only because the buyer is executing a note and a mortgage in favor of the bank. Moreover, while the scope of negotiation between buyer and lender may be limited, those parties may have different interests as to issues to be negotiated between buyer and seller. The buyer may have a greater interest in the way such issues are resolved, while the lender's interest may be simply to close the transaction. We have long seen representation of buyer and lender as raising a conflict, even if sometimes a consentable one. *See, e.g.*, N.Y. State 753 (2002) (lawyer may not represent buyer and lender when negotiation may be needed, but otherwise dual representation may be permissible upon fully disclosing risks and obtaining knowing consent) (citing opinions).

8. On the facts of this case, we believe that a conflict would arise for a second reason as well. The inquiring lawyer regularly represents the lender and may well be eager to maintain that relationship and income stream. The lawyer would thus have a personal business interest in advancing the lender's cause, which would seem to create a significant risk that the lawyer's professional judgment on behalf of the buyer would be adversely affected by that personal business interest. *See* N.Y. State 867 at n.2 (2011) (similar consideration when representing lender and seller).

9. It appears that the proposed joint representation would, therefore, give rise to a conflict of interest both under Rule 1.7(a)(1), because of the prospect of representing different interests, and under Rule 1.7(a)(2), given the risk that the lawyer's personal interests would cause him to favor one client over another.

10. The next question is whether this concurrent conflict of interest may be waived with informed consent under Rule 1.7(b). Under one condition of the waiver provision quoted in paragraph 5 above:

> "Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, such a representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."

Rule 1.7, Cmt. [15]. Here, waiver is available only if the lawyer reasonably believes that he or she could competently and diligently represent both lender and buyer concurrently.

11. Some of our precedents have recognized the possibility of representing a mortgagor and mortgagee, in appropriate circumstances, on consent of both. N.Y. State 438 (1976) (under prior Code of Professional Responsibility, attorney for lender could "represent both the mortgagee and the mortgagor only if the requirements of DR 5-105(C) are met"); N.Y. State 199 (1971) (under Code, consentable "only if it is obvious that [the lawyer] can adequately represent the interest of each"); *see also* ABA Inf. 643 (1963). These opinions, however, reveal little about what would constitute appropriate circumstances in which a lawyer could reasonably expect to represent both lender and buyer adequately.

12. One of our precedents, after noting generally that a lawyer may "sometimes" represent more than one party to a real estate transaction, goes on to consider the case of two lawyers at the same firm representing lender and seller. On the question of consentability, the opinion notes:

> "The typical seller in a residential real estate transaction is relatively unsophisticated when compared to the institutional lender who, by its size, power, and business potential to the law firm, may have an inherently stronger relationship with the lawyer. This imbalance could interfere with the lawyer's ability to provide competent and diligent representation to each affected client, implicating Rule 1.7(b)(1)."

N.Y. State 867 ¶10 (2011) (citation and footnote omitted).

13. The typical buyer in a residential real estate transaction, like the typical seller, would likely be relatively unsophisticated when compared to the institutional lender. This consideration is a factor weighing against the consentability of the conflict in representing lender and buyer, just as it weighed against the consentability of representing lender and seller in N.Y. State 867.

14. The current inquiry presents even stronger factors against consentability. It would be an understatement to say that the lender carries a greater "business potential" for the inquiring lawyer. It is clear from the inquiry that the inquiring lawyer intends to represent the lender on a regular basis, and hopes to gain far more in fees from that lender than from any individual buyer. Even in an individual transaction, the inquiring lawyer's fee for services to the lender is substantially larger than the fee for services to the buyer. Moreover, the lender proposes to pay not only its own fee, but also most of the fee for the services to the buyer, and it proposes to tout this arrangement in a promotional campaign so as to attract buyers in larger numbers. Each of these features could only increase the lender's importance as a client to the inquiring lawyer.

15. Given the proposed arrangements, a lawyer could not reasonably believe that he or she could competently and diligently represent both the lender and the buyer in the transaction. The conflict is therefore nonconsentable.[2]

16. The inquiry also addresses the permissibility of the proposed arrangements for payment of the lawyer's fees. Rule 1.8(f) governs the circumstances in which lawyer who represents a client

may accept compensation from a third party. Such arrangements are permissible only if they meet certain conditions including informed consent and freedom from interference with the lawyer's independent professional judgment. The proposed arrangement could raise questions under this rule for reasons similar to those that lead to our conclusion of a nonconsentable conflict. Additional questions yet may arise from the proposal to have the buyer pay the legal fee not to the lawyer, but rather to the lender, which will "provide" representation. *See* N.Y. Jud. Law § 495 (corporations may not furnish attorneys or counsel or render legal services). We need not reach any of these questions, however, in light of our conclusion that under the circumstances of the inquiry, the lawyer may not represent both buyer and lender.

CONCLUSION

17. In a series of residential real estate transactions involving the same lender, which generates business by paying most of the buyers' legal fees as well as its own, it would be a nonconsentable conflict of interest for a lawyer, who regularly represents the lender in these transactions, also to represent the buyers.

Endnotes

1. Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client...." Rule 1.0(q) defines "reasonable lawyer" in this context as "a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation." Rule 1.0(r) provides that a lawyer "reasonably believes" some matter when "the lawyer believes the matter in question" and "the circumstances are such that the belief is reasonable."

2. Another ethics committee, having occasion to consider a similar question under the prior Code of Professional Responsibility, reached a similar conclusion:

> "The differing interests of a purchaser and a lender in the same real estate transaction typically cannot be adequately represented by the same attorney. As in situations where an attorney acts as both a real estate broker and an attorney, an inherent conflict of interest arises when the attorney's fee depends upon the closing of the transaction. An attorney representing a lender and a purchaser cannot best serve the interest of the purchaser if the attorney's judgment is tainted by his incentive to earn a fee from the lender, which is often contingent on closing…. It is also readily apparent that the lender and the purchaser may sometimes have significantly differing interests in the details and structure of the transaction. As a result, the lawyer's loyalty will be divided, affecting his independent judgment on behalf of the purchaser client or lender client…."

Nassau County 98-10 (citations omitted). The committee found that the differing interests of the two clients "cannot be readily reconciled" and that in a typical real estate transaction, the conflict is not consentable. We do not reach that general question, but address only the facts presented by this inquiry.

(28-12)

Ethics Opinion 953

Committee on Professional Ethics of the New York State Bar Association (1/11/13)

Topic: Bar Association soliciting members for contributions and members making such contributions to pay for portraits of retiring but still serving judges, which will hang in the courthouse to honor such judges

Digest: It is permissible for a Bar Association to solicit contributions and for its members to make contributions for the purpose of defraying the costs of commissioning portraits of retiring judges who will still serve on the bench, where the portraits are a means of honoring the judges and the actual gift is made to the court, not to an individual judge

Rules of Professional Conduct: 3.5(a) and 8.4

Code of Judicial Conduct: § 100.4(D)(5)

QUESTION

1. The inquiring attorney is a member of a local bar association. The bar association wishes to honor a retiring Supreme Court Justice by commissioning a portrait of the Justice which would hang in the courthouse. Despite retirement, the retiring Justice would be likely to continue to serve through certification. The Bar Association would like to solicit its members for contributions to defray the costs of the portrait. May the members properly make such contributions?

FACTS

2. As described above, the bar association would like to ask its members to contribute to the costs of commissioning and hanging portraits of retiring but still serving Supreme Court Justices as a way of honoring the Justices for their service. The portraits would be a gift to the court, not to any individual judge. Each member would determine whether and how much to contribute, with anticipated donations being in the range of $50 to $150. Contributing members would be recognized by announcement in an Association newsletter and / or at a Bar Association function.

OPINION

3. Rule 3.5(a)(1) of the New York Rules of Professional Conduct (the "Rules") states:

> A lawyer shall not: (1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal ***when the recipient is prohibited from accepting the gift or loan***…[Emphasis added.]

4. Rule 8.4(d) & (f) state:

> A lawyer or law firm shall not:
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of ***applicable rules of judicial conduct*** or other law….[Emphasis added.]

5. The starting point of our analysis, therefore, is to ask what restrictions on accepting gifts are placed on judges by the Code of Judicial Conduct. Section 100.4 (D)(5) of the Rules of the Chief Administrative Judge (often referred to as the "Code of Judicial Conduct") provides:

> (5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:
>
> (a) a gift ***incident to a public testimonial***, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;
>
> (b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;
>
> (c) ordinary social hospitality;
>
> (d) a gift from a relative or friend, for a special occasion such as a wed-

ding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under section 100.3(E);

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and if its value exceeds $150.00, the judge reports it in the same manner as the judge reports compensation in Section 100.4(H).

6. First, we note that under the facts described in the inquiry, no tangible gift at all is being made to any judge. An Association member who contributes to the Association to defray expenses for a portrait is making a gift to the Association, not to any individual judge. The Association, in turn, donates the portrait to the courthouse, thus making a tangible gift to the court. That gift is in honor of a retiring judge, but is not made to the judge. All the retiring judge receives is the honor of having the portrait painted and hung in the courthouse. We doubt that such an honor is a "thing of value" within the meaning of Rule 3.5(a)(1). If the portrait is not a "thing of value" to the judge, then contributing funds to help pay for the portrait does not violate Rule 3.5(a)(1).

7. An examination of a series of Advisory Opinions issued by the New York Advisory Committee on Judicial Ethics leads to the conclusion that a retiring Judge would not violate the Code of Judicial Conduct by accepting such an honor. NY Jud. Adv. Op. 06-67 points out that a judge may not solicit gifts, but here there is no solicitation by or on behalf of the retiring Justice.

8. NY Jud. Adv. Op. 91-50 opines that the Code of Judicial Conduct does not prohibit a judge from accepting a gift of "nominal" value, made as a token of appreciation from a high school student for the judge's efforts in explaining the law to the student during the course of an extended school sponsored visit to the court.

9. NY Jud. Adv. Op. 06-171 concludes that a judge may properly accept a free membership from a bar association, citing the exception in §100.4(D)(5)(a) for "a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice." Here, the hanging of the judge's portrait in the courthouse, if it is a gift to the judge, is "nominal" within the meaning of NY Jud. Adv. Op. 91-50, and it is "incident to a public testimonial" within the meaning of §100.4(D)(5)(a).

10. NY Jud. Adv. Op. 93-42 approves of a town justice accepting a recording system from the district attorney for use in the courtroom. Here, as in that situation, the gift is to the court and not to the judge personally.

11. The Preamble to Part 100 of the Rules of the Chief Administrative Judge states that "[t]he rules governing judicial conduct are rules of reason." That statement, combined with (and illustrated by) the reasoning of the cited opinions from the Commission on Judicial Conduct, leads us to conclude that hanging a retiring judge's portrait in the courthouse would not implicate any improper conduct by the judge being honored with the portrait. Therefore, a lawyer could properly make a contribution to the Bar Association for purposes of defraying the expenses of the portrait without violating Rule 3.5(a)(1).

12. Furthermore, we believe that a gift made to the court rather than to the individual judge, "in connection with a public testimonial," could not reasonably be expected to influence a judge or interfere with the administration of justice. Accordingly, we conclude there is no impropriety in the Association soliciting the described contributions from its members and no ethical violation by a lawyer who makes such a contribution.

CONCLUSION

13. Lawyers who belong to a Bar Association may contribute to the Association for the purpose of defraying the costs of commissioning portraits of retiring judges who will still serve on the bench, where the portraits are a means of honoring the judges and the actual gift (the portrait) is made to the court, not to an individual judge.

(53-12)

Ethics Opinion 954

Committee on Professional Ethics of the New York State Bar Association (1/11/13)

Topic: Law firm succession planning, fee-sharing, offering services to other lawyers

Digest: A firm's offering of succession / contingent planning services to other lawyers is neither an "advertisement" nor "solicitation" under the Rules. One attorney's agreement to refer a matter to another attorney in the event of becoming unable to practice, would not create an association between the two attorneys for purposes of the fee-sharing rule either at the time such agreement is executed or triggered, unless and until the amount of work being transitioned to the second attorney becomes significant. An attorney's successful efforts to cultivate a client relationship are not "services" under the fee-sharing Rule and thus not a legitimate basis for dividing fees proportionately.

Rules: 1.0(a) and (h), 1.5(g), 7.3(b)

FACTS

1. A law firm proposes to offer the following service to solo practitioner "Planning Attorneys": assist them in implementing a contingency, continuity and succession "Plan" in which the planning attorney contracts with an "Assisting Attorney" to perform certain functions for the Planning Attorney in the event of the Planning Attorney's inability to practice.

2. The firm further proposes to target communications regarding the services at attorneys likely to be interested in the planning services.

QUESTION

3. The inquiring firm asks whether each proposed communication would be regulated as an "advertisement" under the Rules, and if so, whether it would be regulated as a "solicitation." If a solicitation, the firm also asks whether it would nevertheless be permissible in certain alternative forms such as in-person, phone or mail.

4. The firm also asks whether the execution of a Plan would thereby create an association between the Planning and Assistant Attorneys so that Rule 1.5(g) is not implicated, or, if not, whether such association would arise if / when the Planning Attorney becomes unable to practice and the Assisting Attorney steps in to assist the client.

5. Finally, the firm asks whether an attorney's successful efforts to "cultivate" a client relationship qualify as "services" under Rule 1.5(g)(1) and are thus a legitimate basis for dividing fees so that the "proportion" takes into account such cultivation efforts.

OPINION

6. Rule 1.0(a), the definition of "advertisement," states that it "does not include communications to existing clients or *other lawyers*." (Emphasis added). Because the contemplated communications would be solely to other lawyers, they would not constitute "advertisements." Rule 7.3(b) states that a "solicitation" is "any advertisement" that meets certain criteria; in other words, it is a communication that not only meets the criteria for being an "advertisement" but also certain additional criteria. "By definition, a communication that is not an advertisement is not a solicitation." Rule 7.3, Cmt. [1].

7. Because Rule 1.5(g) provides that "A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm" the following question arises: would the Planning and Assisting Attorney become "associated in a law firm" for purposes of Rule 1.5(g), upon execution of a Plan or, if not, would they later become "associated in a law firm" when the Assisting Attorney, pursuant to the Plan, takes over a client matter for the Planning Attorney? We conclude that neither scenario, on its own, would give rise to association for purposes of Rule 1.5(g).

8. As we noted in N.Y. State 715 (1999), the term "associated" is not defined. N.Y. City 2007-2 opined that "the touchstones for determining association" for conflict imputation purposes are the nature of the relationship, and, significantly, access to client confidential information. It seems clear that neither a referral, nor an agreement to refer, on its own gives rise to association because such acts do not create a level of affiliation or information access that could reasonably be construed as a "law firm" under Rule 1.0(h). However, if the Planning Attorney and Assisting Attorney were to hold themselves out to the public as a "firm" or were to share each other's client files generally (whether electronically or in paper form), they would more likely be construed as associated for the purpose of Rule

1.5(g). So if the Planning Attorney's inability to practice were to trigger in the Plan a comprehensive merger of the Planning Attorney's firm and the Assisting Attorney's firm, then the two attorneys would become "associated" for purposes of the Rule. Overall, the more time the Assisting Attorney is called upon to assist the Planning Attorney, and the greater the volume of work the Assisting Attorney receives from the Planning Attorney, the higher the likelihood that the two attorneys will become "associated" for purposes of Rule 1.5(g).

9. Finally, regarding an attorney's efforts to "cultivate" a relationship, we conclude that such efforts do not qualify as "services performed by" such lawyer for the purpose of determining a proportional division of fees. It seems clear that the intent of Rule 1.5(g)(1) is, in the event fee-sharing lawyers decide to qualify for fee-sharing through a proportional division, that the division be based on services performed *for the client's benefit*.

10. We note a Kansas Supreme Court case on the issue of fee-sharing, in which that court, construing Model Code of Professional Responsibility Disciplinary Rule 2-107(A), stated that "We are convinced that merely to recommend another lawyer or to refer a case to another lawyer and to do nothing further in the handling of the case cannot be construed as performing a legal service… The service and responsibility referred to in DR 2-107 before a lawyer is entitled to a division of fees, must relate to actual participartion in or handling of the case. The rule would be meaningless if this were not so." *Palmer v. Breyfogle*, 535 P.2d 955, 967 (Kan. 1975).

CONCLUSION

11. A firm's offering of succession / contingent planning services to other lawyers is neither an "advertisement" nor "solicitation" under the Rules. A Planning Attorney's agreement to refer a matter to an Assisting Attorney in the event of becoming unable to practice, would not create an association between the two attorneys for purposes of Rule 1.5(g) either at the time the Plan is e*xecuted or triggered*, unless and until the firms truly merged. One attorney's efforts to "cultivate" a relationship leading to retaining a client are not "services" under Rule 1.5(g)(1) and thus not a legitimate basis for dividing fees proportionately.

(67-12)

Ethics Opinion 955

Committee on Professional Ethics of the New York State Bar Association (1/14/13)

Topic: Of counsel relationship with out-of-state lawyer; reference on letterhead and website

Digest: A law firm may have an "of counsel" relationship with a non-New York lawyer admitted in another jurisdiction and must disclose any jurisdictional limitations on the ability of any lawyer associated with the firm to practice law in this State. The form of such disclosure may be either "not admitted in New York," or "admitted only in XX State."

Rules: 5.1; 7.1; 7.5(a) (4); 7.5(d)

FACTS

1. The inquiring law firm has its main presence in New York State and maintains a smaller office in another state. The out-of-state office is managed by a lawyer admitted in that state and not admitted in New York who has an "of counsel" relationship with the firm. The firm's existing website discloses the admitting jurisdictions of all lawyers in the firm in the positive (e.g., "Admitted in New York," or "Admitted in XX").

QUESTION

2. May a New York law firm have an "of counsel" relationship with a lawyer who is not admitted in New York?

3. If so, how should the relationship and the jurisdictional limitations be disclosed on the letterhead and websites of the law firm?

OPINION

4. The fundamental responsibility imposed on all lawyers when engaging in public communication about the nature of their practice is found in Rule 7.1, mandating that lawyers refrain from making, or participating in the use of, any statements that are false, deceptive or misleading. Letterheads (primarily governed by Rule 7.5) and websites used by lawyers must comply with this Rule. Information that may be set forth is enumerated in Rule 7.1(b); this list is "suggestive of the type of information that may but need not in all cases be included." N.Y. State 704 (1998).

5. A New York law firm may consist of a sole practitioner and may have more than one office. N.Y. State 814 (2007). A lawyer or law firm may also have partners based in offices outside New York. Opinion 814 reminds lawyers of the obligation contained in Rule 5.1(a); the New York based lawyer must adequately supervise the work of all lawyers in the firm and make sure procedures are in place to insure the practice is conducted in a professional and ethical manner.

6. The range of relationships among lawyers practicing under a firm is broad and has grown in variety over the years. The Rules do not discuss each of the possibilities but do contain a limitation on the use of the "of counsel" designation. Rule 7.5(a)(4) states in part, "A lawyer or law firm may be designated ''Of Counsel'' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." Whether the relationship meets the "continuing relationship" test is fact-specific and no additional information is provided in this inquiry. Thus, as long as the inquiring firm is satisfied that the "continuing relationship" test is met, it may have an "of counsel" relationship with a lawyer.

7. Our prior opinions have recognized that a New York law firm may include lawyers not admitted to practice in New York. In N.Y. State 704, we held that a law firm with New York and non-New York lawyers could practice in New York without violating New York ethical obligations. N.Y. State 814 also permitted a partnership with a lawyer admitted in another jurisdiction. That Opinion also stated, "[n]othing in the Code, however, states that partnership is the only permissible professional relationship between a New York lawyer and an out-of-state lawyer or firm." Also, in N.Y. State. 864 (2011), we recognized that a New York lawyer could affiliate and share fees with a lawyer not admitted in New York. Based on these Opinions the answer to the first question is yes; a New York law firm may have an "of counsel" relationship with a lawyer not admitted in New York.

8. The second question raised by this inquiry is also addressed by Opinion 814. Beginning again with the fundamental principle—that none of the information or lack of it, be false, deceptive or misleading—the New York firm's letterhead

and website does not need to disclose the precise nature of the relationship of the out-of-state lawyer to the New York firm. However, Rule 7.5(d) does prohibit a relationship "among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions." As noted in Opinion 814, this Rule "does not state expressly, however, how such limitations shall be expressed."

9. This inquiry posits that the New York firm has its main office in New York and a much smaller one in XX State. Thus it would be sufficiently clear to use either statement of limitation, "admitted only in XX" or "not admitted in New York" N.Y. Opinion 434 (1976). To comply with Rule 7.5(d), it is important to use such limiting terminology as "not admitted" or "admitted only." Either phrasing is sufficient to convey the jurisdictional limitations on the lawyers in, or associated with, the New York firm.

CONCLUSION

10. A law firm may have an "of counsel" relationship with a lawyer admitted only in a jurisdiction other than New York but does not need to disclose the precise nature of that relationship on its letterhead or websites.

11. The law firm must disclose any jurisdictional limitations on the ability of any lawyer associated with the firm to practice law in New York State. The form of such disclosure may be either "not admitted in New York," or "admitted only in XX State."

(11-12)

Ethics Opinion 956

Committee on Professional Ethics of the New York State Bar Association (1/14/13)

Topic: Communication with unrepresented party; taking deposition of unrepresented party; deceptive / and / or fraudulent conduct at client's request.

Digest: It would be misleading for a lawyer to depose an unrepresented party to a lawsuit, who is not aware of the lawsuit without disclosing that the lawyer's client's interests are adverse to the unrepresented party. The lawyer cannot provide advice to the unrepresented party but is required to tell the party to obtain counsel.

Rules: 1.0(i), 1.2(d), 1.4 (a), 1.16(c), 4.2, 4.3, 8.4(a)(c)(d)

FACTS

1. The inquirer is an attorney who commenced a lawsuit on behalf of his client. The lawsuit names two parties as defendants, Party A and Party B. Party A has been served with the lawsuit; Party B has not been served, nor is Party B aware of the pending lawsuit.

2. The client has asked the inquirer to depose Party B before serving the complaint. In order to facilitate this, the client will bring Party B to the inquirer's office. The inquirer believes that since Party B is unaware of the lawsuit Party B may testify to Party B's disadvantage.

3. The inquirer asks whether it is ethically permissible to take Party B's deposition when in fact Party B is not aware that Party B is a named defendant to the lawsuit.

4. The inquirer also asks whether taking the deposition under the circumstances suggested by his client would render Party B's testimony inadmissible.

QUESTION

5. Do the New York Rules of Professional Conduct (the "Rules") prohibit an attorney from deposing, at his client's request, a party who is unaware that the party is a named defendant in a pending lawsuit?

OPINION

6. The question of whether the lawyer is permitted to conduct a deposition under the above described circumstances requires a two-step analysis: 1) whether the communications between the inquirer and the party to be deposed could lead to a misunderstanding and 2) whether the interests of Party B, the prospective deponent, are adverse to the client. As part of that analysis, the Rules' prohibition against a lawyer's engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation" must also be considered.

7. This Committee does not opine on questions of law, and therefore will not opine on whether any deposition testimony taken of Party B would be admissible in court.

8. Apparently, in order to gain some sort of advantage the client has asked the inquirer to depose Party B without disclosing to Party B the existence of a pending lawsuit against Party B. Clearly the conduct requested by the inquirer's client could lead to a misunderstanding on Party B's part about the purpose of the deposition.

9. The Rules contemplate the possibility that lawyers may have communications with persons with interests adverse to their clients, both those represented by counsel as well as unrepresented persons.

10. Rule 4.3 sets forth the rule for lawyers communicating with unrepresented persons and provides as follows:

> "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

11. Comment [1] of Rule 4.3 further states:

> "An unrepresented person might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client, and where necessary, explain that the client has interests opposed to those of the unrepresented person."

12. In this instance, in accordance with Rule 4.3, the lawyer must explain the lawyer's role to the unrepresented person. Specifically, that the lawyer represents the client and that Party B's interests are adverse to the client's interests. Further, because the inquirer also knows that Party B's interests are adverse to the client the lawyer should advise the unrepresented Party B to obtain independent counsel.

13. This conclusion is consistent with prior ethics opinions concerning what information a lawyer may communicate to an unrepresented party. In some cases, in order to be sure that the unrepresented party understands the need for counsel, lawyers have been directed "to give non-controvertible information about the law to enable the other party to understand the need for independent counsel." N.Y. State 728 (2000). *See also* N.Y. State 477 (1977), N.Y. City Bar Op. 2009-02 (2009).

14. In the above analysis we have assumed that Party B is unrepresented. If in fact, Party B is represented by counsel, and the inquirer is aware of the representation, then Rule 4.2 would dictate the inquirer's communications with her.

15. Rule 4.2(a) states:

> "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."

16. As such, if the inquirer knows that Party B is represented by a lawyer, then the inquirer is prohibited from communicating with Party B, including taking her deposition, without her lawyer's consent.

17. The inquiry, however, adds another dimension to the attorney's obligation because the inquirer's client seems to be asking the inquirer to depose Party B under false pretenses and the inquirer must also be mindful to avoid engaging in deceptive or fraudulent conduct.

18. The inquirer has indicated that the client will ask Party B to come to the inquirer lawyer's office under the false pretense that Party B will be assisting the client when in fact such assistance will be provided at Party B's expense as the client obtains information to build a case in support of the client and against Party B.

19. Pursuant to Rule 8.4(c) of the Rules of Professional Conduct, a lawyer is prohibited from engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation." Accordingly, the proposed conduct without the above-mentioned disclosure would be prohibited by Rule 8.4(c) as it involves deceit and misrepresentation.

20. Further, the inquirer's actions in conducting such a deposition under the suggested pretense would also violate Rule 8.4(a) if the lawyer knowingly aids or assists his client in violating or attempting to violate the Rules. Specifically Rule 8.4(a) provides that a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another."

21. Rule 1.4(a)(5) states: "A lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law."

22. We are not privy to what the client would tell Party B to bring Party B to the inquirer's office to be deposed or even if the client would tell Party B about the proposed deposition. Whether or not the proposed conduct rises to the level of fraud is a question of fact beyond the scope of this committee; however, we believe it is prudent to alert the inquirer to the definition of fraud in Rule 1.0(i) and the prohibition against assisting a client in conduct the lawyer knows is fraudulent.

23. Rule 1.2 (d) of the New York Rules of Professional Conduct (the "Rules") states that:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

24. The lawyer must advise his client that the proposed conduct, without the aforementioned disclosure, would be in violation of the Rules. The inquirer should advise the client that the inquirer will have to disclose to Party B, as stated above, the lawyer's role in the matter and will need to advise Party B to retain counsel.

25. If the client persists in demanding that the lawyer proceed with a proposed course of conduct that is fraudulent, the inquirer must exercise his right to withdraw from representing the client pursuant to Rule 1.16(c)(13), which provides that "a lawyer may withdraw from representing a client when the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules." *See also* Rule 1.16(b)(1) (requiring withdrawal when lawyer knows or reasonably should know that the representation will result in a violation of the Rules or of law).

CONCLUSION

26. It would be misleading for the inquirer to depose Party B, an unrepresented party, without disclosing that the lawyer is not neutral and that Party B's interests are adverse to the inquirer's client. In addition, because Party B's interests are adverse to the interests of the inquirer's client, the inquirer would be required to inform Party B of the right to obtain counsel. The Rules also require that the inquirer advise his client that taking the deposition without the above disclosures to Party B would be prohibited by the Rules.

(45-12)

Ethics Opinion 957

Committee on Professional Ethics of the New York State Bar Association (1/14/13)

Topic: Nonprofit organization offering legal services and seeking grants to subsidize the legal services programs

Digest: A lawyer for a bona fide nonprofit organization may furnish legal services to beneficiaries of the organization as part of the organization's programs as long as the agency is complying with Judiciary Law § 495. However, the lawyer must obtain each client's consent for him to be compensated by the agency, the lawyer must not permit the organization to direct, regulate, or otherwise interfere with the lawyer's independent professional judgment in rendering legal services for clients, and the lawyer must protect the clients' confidential information. As long as the programs satisfy these criteria, the lawyer may assist the agency in seeking grants to support the agency's legal services programs.

Rules: 1.8(f), 5.4(c) & (d), 5.5(b), and 7.2(b)

FACTS

1. The inquiring attorney is a salaried employee of a bona fide nonprofit credit counseling agency that is not a law firm. He has inquired whether he may ethically participate in two legal services programs that his employer would like to offer: (1) filing for bankruptcy protection for clients who are unable to do so outside of the agency because of their financial situation, and (2) advising seniors concerning whether they should join supplemental needs pooled income trusts previously established by a separate 501(c)(3) agency under the applicable provisions of the New York State Social Services Law by entering into "joinder" agreements.
2. The credit counseling agency presently advises debtors on whether they will benefit from payment plans with the debtors' creditors. The agency would like to add legal services to enhance the agency's role in providing financial solutions, primarily to assist the elderly or others in need of social security assistance. Since this market is underserved, the agency intends to assist individuals with Representative Payee services as well as to form a bill pay service for those who are incapable of handling their own finances or who lack assistance of others. The agency has not established any fee arrangement for the proposed services. However, in light of the agency's mission, the agency plans to keep fees to a minimum so that it can serve those who cannot afford private representation but are not sufficiently indigent to qualify for free legal aid. The agency plans to seek grant funding opportunities to assist it in subsidizing the legal services programs.
3. If the proposed programs are implemented, the inquiring lawyer will furnish legal services to the agency's clients. Each client for whom legal services are provided will sign an engagement letter that specifies that the agency itself will not give legal advice or represent clients and that the client-lawyer relationship is only between the client and the attorney. The agency's board of directors will adopt a policy prohibiting the agency from controlling the lawyer's representation of clients.

QUESTIONS

4. May a lawyer employed by a nonprofit credit counseling agency assist the agency in offering legal services programs?
5. May a lawyer employed by a nonprofit credit counseling agency assist the agency in seeking grants to support the agency's legal services programs?

OPINION

Legal Services Offered by a Nonprofit Organization

6. Rule 5.4(d) prohibits a lawyer from practicing with or in the form of an entity authorized to practice law *for profit* if a nonlawyer owns any interest in the entity, is a member, corporate director or officer of the entity, or has the right to direct or control the professional judgment of the lawyer. However, Rule 5.4(d) does not extend to nonprofit organizations.
7. New York Judiciary Law § 495 prohibits corporations from practicing law, but New York Judiciary Law § 495(7) carves out exceptions for (1) organizations that offer prepaid legal services, (2) nonprofit organizations that furnish legal services as an "incidental activity" in furtherance of some other "primary purpose," and (3) organizations whose primary purpose is to furnish legal services to indigent persons. Judiciary Law § 496 requires organizations exempt under § 495(7) to report and annually update the following information to the Appellate Division: a statement describing the nature and purposes of the organization, composition of the governing body, type of legal services offered, and names and addresses of any attorneys employed by the organization.
8. Therefore, nonprofit organizations authorized to practice law under Judiciary Law §§ 495(7) and 496 and organizations that offer prepaid legal services and furnish legal services to the indigent

are not subject to Rule 5.4(d)'s prohibition against lawyers working at an entity where a nonlawyer is "a member, corporate director or officer thereof."

9. The credit counseling agency is a nonprofit organization operated primarily to provide financial counseling to those in need of assistance. Its services include credit counseling, budget planning, debt management plans, bankruptcy counseling and advocacy of pooled income trusts established by others. In furtherance of these activities, the agency proposes to furnish legal services to help clients seek bankruptcy protection and to review joinder agreements that will enable seniors to join existing pooled income trusts. If the agency's legal services constitute "incidental activities" in furtherance of some other "primary purpose," the agency is exempt from the prohibitions of Judiciary Law § 495 by virtue of subdivision (7). In *Paskowski v. DiBenedetto*, 184 Misc.2d 34, 705 N.Y.S.2d 521 (Family Court, Rockland County, 2000), the court held that a legal services program established by a nonprofit community organization to provide emergency housing and outreach programs to victims of domestic violence is exempt under Judiciary Law § 495(7) because it offers legal counseling to those who use the shelter's services.

10. Similarly, the credit counseling agency that employs the inquiring attorney wishes to offer legal solutions that follow from their other services: representation of a client in a bankruptcy proceeding and in reviewing and advising the client concerning the joinder agreements that they must sign to join existing pooled income supplemental needs trusts. This Committee does not render opinions on questions of law such as the interpretation and application of Judiciary Law § 495, but for purposes of this opinion we will assume that the agency that employs the inquiring attorney is not violating § 495. If the agency is violating § 495, then the inquiring attorney may not assist the agency in offering or providing legal services because he would be assisting a nonlawyer (the agency) in the unauthorized practice of law, in violation of Rule 5.5(b) ("A lawyer shall not aid a nonlawyer in the unauthorized practice of law").

11. Even if a nonprofit organization is in compliance with Judiciary Law § 495, however, lawyers working for the organization are still required to comply with the applicable Rules of Professional Conduct. Three rules are especially relevant here. Rule 1.8(f) provides that a lawyer shall not accept compensation (or anything else of value) from a third party for representing a client unless "(1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6." Rule 5.4(c) prohibits a lawyer from permitting a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services. And Rule 7.2(b)(4) permits a lawyer to be employed or paid by a "bona fide" organization to furnish legal services to others, so long as (*inter alia*) there is no interference with the lawyer's exercise of independent professional judgment.

12. The Code predecessors of Rule 1.6 and 5.4(c) were applied in N.Y. City 1997-2, which concluded that a lawyer employed by a social services agency to represent clients must provide independent and competent representation and preserve client confidences in accordance with the ethics rules, without allowing it to direct or regulate the lawyer's independent professional judgment. We agree with that aspect of Opinion 1997-2.

Seeking Grant Funding Opportunities

13. The agency proposes to seek grant funding opportunities to assist it in paying for the legal services programs. As noted above, Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless the client gives informed consent, there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship, and the client's confidential information is protected as required by Rule 1.6. Rule 1.8(f) does not prohibit the agency from seeking grants to support the proposed legal services programs as long as the grants are not tied to any particular client's legal services, the grantors do not interfere with the lawyer's exercise of professional judgment, and neither the lawyer nor the agency reveal client confidential information in the grant applications or in any communications regarding how the grant money is being used.

CONCLUSION

14. A lawyer for a bona fide nonprofit organization may furnish legal services to beneficiaries of the organization as part of the organization's programs as long as the agency is complying with Judiciary Law § 495. However, the lawyer must obtain each client's consent for him to be compensated by the agency, the lawyer must not permit the organization to direct, regulate, or otherwise interfere with the lawyer's independent professional judgment in rendering legal services for clients, and the lawyer must protect the clients' confidential information. As long as the programs satisfy these criteria, the lawyer may assist the agency in seeking grants to support the agency's legal services programs.

(47-12)

Ethics Opinion 958

Committee on Professional Ethics of the New York State Bar Association (2/4/13)

Topic: Lawyer's acceptance of a finder's fee for introducing clients to other clients

Digest: A lawyer may accept a finder's fee for introducing clients and prospective clients to prospective investors, whether clients or not, provided that, in doing so, the lawyer complies with the Rules of Professional Conduct, including those governing protection of confidential information, avoidance of conflicts, business transactions with clients, competent advice on the applicability of privileges in the course of performing the non-legal services, and adherence to the rules on excessive fees

Rules: 1.0(j), 1.1(a), 1.4(a), 1.4(b), 1.5(a), 1.5(b), 1.5(c), 1.5(e), 1.6(a), 1.7(a), 1.7(b), 1.8(a), 1.9(a), 1.18(b), 5.7(a), 5.7(c)

QUESTION

1. The inquiring lawyer asks whether a lawyer may accept a "finder's fee" for introducing potential investors (including existing, former or prospective clients) to a client or prospective client seeking capital for a start-up business.

FACTS

2. It is not uncommon for lawyers to introduce current, former, and prospective clients to each other in the ordinary course of business, for both general and specific purposes, in intimate gatherings and large ones. Such networking is part of the commerce of the law, and yet important ethical issues hover over the practice. Asking for separate compensation for the practice sharpens these issues.

OPINION

3. We start with Rule 5.7, which governs a lawyer's responsibilities regarding non-legal services. Rule 5.7(c) says that, for purposes of the Rule, "nonlegal services" shall mean those services "that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." We do not opine either on the legality of match-making exercises—investment advisors and brokers who engage in similar activities are usually subject to regulatory systems—or on what constitutes the unauthorized practice of law. Nevertheless, common experience teaches that the act of introducing one client to another for a purely business purpose is not a "legal service" in the classic understanding of that phrase, but instead a "nonlegal service" that lawyers commonly perform, and that nonlawyers do so too, without fear of sanction for want of a law license. Subject to the caveats below, we conclude that the Rules of Professional Conduct permit such an arrangement.

4. Rule 5.7(a) says that, when a lawyer provides non-legal services to clients or other persons, then the lawyer is subject to the Rules of Professional Conduct if (1) the non-legal services are not "distinct" from the legal services the lawyer otherwise provides to the client or prospective client, or (2), even if distinct, the recipient of the services "could reasonably believe that the nonlegal services are subject to the attorney-client relationship." Rule 5.7(a) (1)-(2); *see* N.Y. State 860 (2011). The main difference between the two is that, if the non-legal services are distinct from the legal services but susceptive of client confusion about the existence of an attorney-client relationship, then the lawyer must explain in writing that the services are not legal services and hence not subject to the protections attaching to an attorney-client relationship. Rule 5.7(a) (4). The latter is true whether or not the lawyer intends to perform the non-legal services through the lawyer's firm, as appears to be the inquirer's situation, or through a separate entity that the lawyer owns or controls. *Id.*; *see* Rule 5.7(a)(3).

5. The inquiring lawyer intends to offer legal services to start-up enterprises seeking venture capital which the lawyer hopes to represent. The introductions for which the lawyer would be paid a finder's fee are therefore part and parcel of the lawyer's business plan. This is not uncommon. "Providing legal representation to a client who wishes to buy or sell a business entity may naturally lend itself to assistance by the law firm in helping to locate a seller or a buyer for the client. Through social, business, or professional connections, a lawyer may know of a potential buyer or seller to introduce to a law firm client. Assistance by a law firm in locating a buyer or seller of a business entity for a law firm client is a service related to the lawyer's representation of the client." Ohio 2003-1 (2003).

6. In such circumstances, the lawyer is providing both legal and non-legal services to clients and prospective clients, but services inextricably intertwined with the lawyer's legal practice. The

lawyer hopes that, by matching a client to a prospective investor, the introduction will lead to a transaction in which the lawyer will earn a legal fee. This factor, together with the fact that the lawyer intends to act through the lawyer's firm and presumably law office, relieves us of the need to tarry on the question whether the non-legal services are "distinct" or not. The matchmaking services are clearly not distinct, and so the Rules of Professional Conduct fully apply to the activities. In our view, at least five of those Rules are of special importance to the inquirer's proposed course of action.

7. The first is the duty of confidentiality owed to clients, former clients, and prospective clients under, respectively, Rules 1.6(a), 1.9(a), and 1.18(b). In introducing a current, former, or prospective client to another client, the lawyer presumably must disclose confidential information about each that the lawyer is ordinarily bound to protect. The lawyer may not do so without the informed consent of the party who owns the information. This tutorial must start with the client in search of investors, and then, separately, must be repeated to any prospective, existing or former client the lawyer intends to approach. The lawyer must take care to explain to all the full ramifications of disclosing this information to another party, *see* Rule 1.0(j) (defining "informed consent"); Rule 1.4(b) (requiring a lawyer to explain a matter to the extent reasonable to allow the client to make an informed decision), and must exercise independent professional judgment on the protections, if any, needed to safeguard the information, *see* Rule 1.1(a) (lawyer must represent a client competently). Although not typically required for the disclosure of confidential information, a writing explaining the implications may advisably be included in the other written disclosures likely to be required in these circumstances.

8. The more acute considerations arise under a second set of Rules, those governing conflicts of interests. In its Opinion 98-03, the Illinois State Bar Association articulated the conflicts confronting a patent lawyer who, in that inquiry, proposed to pair client-inventors with client-investors / promoters. The Committee noted that the "firm's choices of individual investors to match with particular promoters could be influenced by the firm's own interest in maximizing its return on a transaction. Further, once a suggested match is made the firm will probably be involved in negotiating the ultimate business arrangement and drafting the necessary documents, which would involve the firm in representing two clients whose interests are adverse. Finally, if the firm will have a financial stake in the transaction as its fee for services [*i.e.*, the finder's fee], the firm's interests could conflict with one or both clients." While warning that "it will not be possible for a lawyer to 'reasonably' believe that" every multiple representation is appropriate, the Committee nevertheless concluded that a lawyer could proceed if the lawyer met, among other things, the requirements of Rule 1.7(a).

9. The conflicts concerns will vary with the circumstances, all the permutations of which are beyond the scope of this opinion to address. One obvious possibility is that the lawyer enters into the finder's fee arrangement with the client seeking capital (say, Client A), which is the only client the lawyer intends to represent in any ensuing transaction. In this instance, the first step is to obtain the consent of both Client A and the proposed investor (Client B), confirmed in writing, if Client B is an existing client or a former or prospective client from which consent is required under the applicable Rule. This consent must make clear that the lawyer's duty of loyalty in the transaction is owed only to Client A, accompanied by such disclosures as may be necessary to obtain informed consent, among them the extent of the lawyer's relationships with Clients A and B, and terms and conditions of the lawyer's interest in the finder's fee, including whether payment of the fee is contingent upon closing of a transaction.

10. If the lawyer obtains informed consent from each, then the principal concern is Rule 1.7(a)(2). That Rule asks whether a "reasonable lawyer would conclude" that a "significant risk" exists that the lawyer's "own financial, business, property or other personal interests"—namely, the payment of the finder's fee—will adversely affect the lawyer's independent professional judgment. If, for example, the payment of a finder's fee is contingent upon the consummation of a transaction, this creates a personal and financial interest for the lawyer to close the deal apart from the payment of the lawyer's legal fee. Depending on the relationship between the amounts of the two fees at stake, the finder's fee could create a risk that the lawyer, in negotiating the transaction for Client A, will sacrifice independent professional judgment on the client's behalf in protecting Client A's legal interests in the deal. This scenario does not materially differ from a fee arrangement, permissible under the Rules in civil matters, providing for a success fee or premium in the event the transaction is successfully completed, one at times payable in equity or as a percentage of the transaction price.

If a reasonable lawyer would conclude that, as in the success fee or premium scenario, no such significant risk exists that the lawyer will elevate personal interests over professional ones, then the lawyer may undertake the representation subject to the other requirements set forth below.

11. A considerably more problematic possibility is that the lawyer proposes to introduce the capital-seeking Client A to another of the lawyer's clients, Client B, and to represent both Clients A and B in the transaction. In this scenario, the lawyer not only has a personal interest conflict, but a competing and ongoing loyalty conflict as well. The amount of the fee, the payer of the fee, and the circumstances in which the fee is payable are all among the factors relevant to whether a reasonable lawyer would conclude that a single lawyer could competently and diligently represent each party. In negotiating a transaction the successful conclusion of which determines whether the lawyer will receive the finder's fee, for instance, it may well be that the lawyer's personal financial interest in consummating any transaction may unduly influence the lawyer's professional duty to discharge independent judgment on behalf of both clients. In a predecessor to its Opinion 98-03, the Illinois State Bar Association expressed grave doubt that a lawyer could ever reasonably conclude that these various competing interests could be reconciled. Illinois Opinion 94-21. We share this skepticism, and also have serious questions about the prudence of such a course of action, but we do not foreclose the possibility that highly sophisticated clients, particularly those accustomed to negotiating the major deal terms between principals in which the lawyer's role is akin to a scrivener, could provide informed consent to an arrangement in which a lawyer entitled to a finder's fee could represent each party in drafting the documents effecting the transaction. *Cf.* N.Y. State 438 (1976) (allowing joint representation of lender and borrower with their informed consent if a disinterested lawyer would believe the lawyer can competently represent both); N.Y. County 615 (1973) (allowing representation, with informed consent, of buyer and seller who had already agreed upon the principal terms and conditions of sale); N.Y. State 162 (1970) (allowing lawyer to represent both buyer and seller with their consent if their interests are not actually or potentially differing); N.Y. State 38 (1966) (representation of buyer and seller "should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it"); Connecticut Inf. Opinion 91-14 (1991) (lawyer may draft sales contract between two longstanding clients when each side agrees and lawyer does not negotiate material terms). *But see* Florida Opinion 97-2 (1997) (unwaivable conflict to represent both sides in closing of a transaction); Maine Opinion 106 (1990) (under prior rules, not "obvious" that lawyer could represent both sides in a transaction).

12. In addition to the concurrent client conflict issues, a third Rule of importance here is Rule 1.8(a), for we consider the agreement between the lawyer and the client for a finder's fee to be a business transaction with the client to which the regulations of that Rule fully apply. Rule 1.8(a) requires a twofold inquiry. The first is whether the transaction itself is one in which the lawyer and client have differing interests *and* in which the client expects the lawyer to exercise the lawyer's independent professional judgment on the client's behalf. Here, the answers to those questions are likely to be evident: the lawyer and client plainly have differing interests in the size and payment terms of the finder's fee, and, because both contemplate that the lawyer will represent the client in the transaction to which the fee appends, the client is likely to expect that the lawyer will be mindful of the client's interests in addressing the terms of the finder's fee. Consequently, under Rule 1.8(a), the lawyer must assure that the terms are fair and reasonable to the client and fully disclosed in a writing that includes not only the deal's essential terms and the lawyer's role in shaping them, but also the desirability of the client seeking independent legal advice on the finder's fee arrangement. N.Y. State 913 (2012).

13. A fourth concern is that, because the matchmaking activity of the lawyer, though a nonlegal service, is plainly not "distinct" from the lawyer's legal services, the provisions of Rule 5.7(a)(4) do not apply. These provisions require a written instrument to the client explaining that the protection of the lawyer-client relationship does not exist with respect to the rendition of non-legal services. Nevertheless, no assurance exists that a court would grant the protections of the attorney-client relationship to the purely non-legal activity of introducing one client to another solely for business purposes. Rules 1.1(a) and 1.4(a) & (b) require a lawyer to represent a client competently and to advise the client of considerations relevant to the client's decision-making about the representation. These Rules mandate that the lawyer alert the client to the risks that the lawyer's prospecting activities and attendant discussions may not enjoy the full protections of the attorney-client relationship. Such disclosure may well accompany the writ-

ing that Rule 1.8(a) requires in connection with business transactions with a client.

14. A fifth Rule that the finder's fee arrangement implicates is Rule 1.5(a) governing legal fees. Whether a finder's fee transaction may be deemed "fair and reasonable" under Rule 1.8(a) is analytically distinct from whether the fee may be "excessive" under Rule 1.5(a), though in the end the relevant considerations are substantially similar. We recognize that a fee for a non-legal service such as introducing clients to each other is not the intended object of Rule 1.5(a), but at least when those non-legal services are manifestly not distinct from the lawyer's legal services, we conclude that the lawyer's overall compensation for a particular transaction should fall within the scope of Rule 1.5(a). The principal general limit on a lawyer's compensation in that Rule is that a lawyer may not accept a fee the amount of which, upon review of the facts, would leave a reasonable lawyer "with a definite and firm conviction that the fee is excessive." Among the facts that Rule 1.5(a) identifies as relevant are the time, labor, and skill required; the novelty and difficulty of the services requested; the lawyer's inability, by reason of the representation, to represent other clients; the amount at stake and the results the lawyer achieves; the fee typically charged for comparable services in the locality where the lawyer practices; the time period in which the lawyer must complete the assignment; the lawyer's experience and reputation; and whether the fee is fixed or contingent. In considering whether a lawyer's fee in a transaction is excessive, the lawyer must take account of the totality of the transaction, including the finder's fee, in assessing whether the lawyer's compensation in the matter is excessive.

15. We reach these conclusions with little aid from opinions in other jurisdictions. Apart from the Illinois opinions cited above, which address a situation closest to the inquiry before us and reach a similar result, Opinion 2003-1 of the Ohio Supreme Court's Board of Commissioners and Discipline focused on a fact pattern akin to ours. There, the issue, among others, was whether a lawyer who introduces either a buyer or a seller of a business to a client may represent that client in the deal and be paid a fee based on a percentage of the transaction price, to our mind a proxy for a finder's fee. With some of the caveats we listed above, the Board concluded that the arrangement was permissible as long as the fee was payable by the initial client—that is, the lawyer could make the arrangement with a buyer / client or a seller / client, but could not receive such a fee from, for example, an investment / buyer group while also representing the seller in the same transaction. In this latter instance, under the now-abandoned "obviousness" standard of DR 5-105(C), the Board, which considered the relationship with the investment / buyer group as indistinguishable from a lawyer-client relationship, joined with other jurisdictions cited above that, no matter informed consent, a lawyer may not properly represent both the buyer and the seller in the same transaction.

16. Our research has uncovered other jurisdictions that proscribe the receipt of a "finder's fee" in situations very different from those before us. In each of these opinions, the committees addressed whether a lawyer may receive a fee from a non-lawyer third party for referring clients to that party to perform non-legal services. Thus, in South Dakota Opinion 96-6 (1996), the committee opined that a lawyer could not receive a fee for referring the lawyer's clients to an asset management firm. In Iowa Opinion 98-6 (1998), the committee held that a lawyer could not receive a fee from an investment advisory firm for referring clients to that firm. In North Carolina Opinions 2000-3 and 2006-2, the committee believed that a lawyer could not receive a fee for referring clients to a financing company. In Florida Opinion 70-13, the committee said that a lawyer could not accept fees from a bank for encouraging clients to deposit money there. To be sure, these opinions raise the concern we outline above concerning the impact of the lawyer's personal financial interest in a transaction on the lawyer's independent professional judgment, but to be paid by a non-client to refer clients for such services is not comparable to the receipt by a lawyer of a fee from a client to perform a service for that client closely related to the lawyer's rendition of legal services for that client. *Cf.* N.Y. State 845 (2010) (lawyer / broker may share broker's commission with lawyer who referred matter provided lawyer / broker does not represent party to transaction).

17. In the wake of the adoption of Rule 5.7 expressly permitting a lawyer to perform both legal and non-legal services, this Committee has consistently opined that "Rule 1.7 applies with undiminished force in circumstances where a lawyer's conflicting personal interest arises from a separate, nonlegal business or activity permitted by Rule 5.7." N.Y. State 886 (2011); *accord* N.Y. State 891 (2011). Nothing in this opinion is intended to alter that conviction; indeed, we stress

that a lawyer entering into a finder's fee arrangement must fully comply with the dictates of Rule 1.7 as we elaborate above. In so concluding, we are fully mindful of earlier opinions of this Committee, many of them described in our Opinion 752 (2002), that categorically prohibit a lawyer from performing certain non-legal services and legal services for the same client in the same matter. As we said there:

> In a number of opinions that this committee has issued over the years, we have opined that in certain circumstances a lawyer also engaged in a nonlegal business cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. Brokerage businesses are a salient example. We held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker "because of the possible conflict between his client's and his own personal interest." N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y. State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success). The rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. We have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981)…. N.Y. State 619 (1991). *See also* N.Y. State 595 (1988), N.Y. State 621 (1991), N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

18. We remain committed to this view. As Opinion 752 recognized, however, certain non-legal services rendered in connection with legal services do not merit such categorical treatment, such as those discussed in N.Y. State 687 (1997) (lawyer-broker can sell insurance to a client where advice about the purchase of insurance products is "merely tangential" to the legal representation); N.Y. State 711 (1998) (same); *see also* N.Y. State 832 (2009) (activity incidental to the rendition of legal services). The non-legal services that we have previously deemed incompatible with the simultaneous rendition of legal services even with informed consent—the real estate broker, the insurance broker, abstract title examiner—are incontestably "distinct" from the provision of legal services, and activities to which the Rules of Professional Conduct do not neatly conform. Such is not the case here. The current inquiry does not require us to determine whether informed consent is curative of a lawyer performing *every* conceivable non-legal service that is *not* "distinct" from the legal services the lawyer plans to render in the same transaction. Here, we address only the matter before us. We do not believe that, under Rule 1.7, a client's payment of a finder's fee to a lawyer representing that client in a transaction—a transaction brought about by the lawyer's introductions to the client in the course of rendering legal services—invariably creates such an insurmountable personal financial conflict that informed consent, together with the other limitations we have set forth, can never allow the lawyer to proceed with the arrangement. Accordingly, we conclude that, in the context of non-legal services that plainly are *not* meaningfully distinct from the legal services the lawyer renders in the same transaction, but instead are incidental to the rendition of those legal services, a lawyer may permissibly accept a fee for introducing a client or prospective client to someone interested in making an investment in that person's (or entity's) business venture.

CONCLUSION

19. A lawyer may accept a finder's fee for introducing current, former or prospective clients to prospective investors, whether current, former or prospective clients or not, provided that, in doing so, the lawyer complies with the Rules of Professional Conduct, including those governing protection of confidential information, avoidance of conflicts, business transactions with clients, competent advice on the applicability of privileges in the course of performing the non-legal services, and the limits on excessive fees.

(29B-11)

Ethics Opinion 959

Committee on Professional Ethics of the New York State Bar Association (2/21/2013)

Topic: Contacting formerly represented party to determine if he or she has new counsel

Digest: A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself

Rules: 4.2, 4.3

FACTS

1. The inquiring lawyer represents a client in a litigated matter. The inquirer states that he knows that an adverse party's lawyer has withdrawn from the representation and has withdrawn from the bar as a result of a pending investigation.

QUESTION

2. May a lawyer who knows that an adverse party's lawyer has withdrawn from the representation contact the adverse party to determine if he or she has retained new counsel or plans to act pro se?

OPINION

3. Rule 4.2 of the Rules of Professional Conduct, also known as the "no contact" rule, prohibits a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the prior consent of the other lawyer. Rule 4.3, on the other hand, allows a lawyer to communicate on behalf of a client with a person who is not represented by counsel, as long as the lawyer does not state or imply that the lawyer is disinterested and, if the unrepresented person has interests that could reasonably be in conflict with the interests of the lawyer's client, the lawyer does not give legal advice to the unrepresented person, other than the advice to secure counsel.

4. Rule 4.2 does not authorize contact with the opposing party if the lawyer "knows" that the opposing party is represented by counsel. In N.Y. State 663 (1994) we discussed when the lawyer "knows" that a client who previously was represented by counsel, or a client who states that he is represented by counsel, is no longer so represented. In that case, the actions of the opposing party and his putative counsel cast doubt on the existence of an attorney-client relationship. Consequently, we suggested that the lawyer must undertake a "complete and thorough inquiry" to determine the ultimate fact of existing or continuing representation, which might include contacting the putative lawyer to determine the status of the representation. Where the lawyer knows that the opposing party's counsel has resigned from the representation or is no longer a member of the bar, the lawyer has reason to believe that the opposing party is not represented by counsel. Rule 4.3 thus authorizes the lawyer to communicate with the opposing party to ascertain whether he or she has obtained new counsel, or plans to represent himself or herself. Consistent with Rule 4.3, in any such communication with the opposing party, the lawyer should take care not to give legal advice.

CONCLUSION

5. A lawyer who knows that an adverse party's lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself.

(69-12)

Ethics Opinion 960

Committee on Professional Ethics of the New York State Bar Association (2/26/13)

Topic: Conflict of interest; prospective clients

Digest: Lawyer may ethically represent a client seeking payment of fees for repair services rendered to a prior prospective client, who had earlier sought advice from the lawyer regarding the damage that was subsequently repaired by the client, unless the lawyer learned confidential information from the prospective client that would be significantly harmful to the prospective client

Rules: 1.6, 1.9, 1.18

QUESTION

1. After a homeowner has consulted with a lawyer about potential claims against the seller of a home that turned out to need substantial repairs, but the homeowner has not retained the lawyer, may the lawyer represent a contractor in an action against the homeowner to recover the unpaid balance for the repair services?

FACTS

2. A homeowner (the "homeowner") visited an attorney who is a sole practitioner to discuss potential claims against the person who sold the homeowner his home. The homeowner told the attorney that, after the closing, the homeowner discovered substantial structural damage throughout the home, which required repairs by a contractor. The homeowner did not discuss anything concerning the contractor who performed the repair work. The attorney advised the homeowner concerning potential claims against the seller of the home, but the homeowner never retained the attorney and never contacted the attorney again. The attorney did not bill for the homeowner's visit.

3. Over a year later, the attorney was approached by a contractor (the "contractor"). During the initial interview, the attorney learned that this was the contractor who had repaired the structural damage at the homeowner's residence. The contractor told the attorney that the homeowner did not fully pay the contractor. The contractor desires to retain the attorney and file a lawsuit against the homeowner for the balance due.

APPLICABLE RULES

4. Our analysis begins with Rule 1.18(c) of the New York Rules of Professional Conduct (the "Rules"), which prohibits a lawyer who possesses *confidential information* learned during a consultation with a prospective client from representing a party with interests *materially adverse* to those of a prospective client in the *same or a substantially related matter* if the attorney received information from the prospective client that could be *significantly harmful* to that person in the matter, unless either (i) the attorney obtains informed consent from both parties (*i.e.*, both the new client and the former prospective client), confirmed in writing, or (ii) adequate screening procedures are implemented pursuant to Rule 1.18(d).

OPINION

Confidential Information

5. The protection afforded to prospective clients under Rule 1.18(c) is contingent upon the lawyer's receipt of confidential information. N.Y. City 2006-2. Under Rule 1.18(b), a lawyer may not use or reveal a prospective client's information unless Rule 1.6 or other Rules permit the lawyer's use or disclosure or the information has become generally known. Rule 1.18(b); Rule 1.9(c); Restatement Third The Law Governing Lawyers, § 15(1) (a) (2000); Simon's New York Rules of Professional Conduct Annotated 688 (2012 ed.). Rule 1.6(a) protects "information gained during or relating to the representation of a client, whatever its source," "including information that is protected by the attorney-client privilege and information that could reasonably lead to the discovery of confidential information." *See also* Rule 1.6, Cmt. [4A] which states that information relates to the representation "if it has any possible relevance to the representation," N.Y. State 723 (1999) (indicating that a lawyer may not be disqualified due to possession of general information concerning a former client's "financial exposure, corporate or financial structure, workplace rules, settlement policies, and the like, …unless there are peculiar aspects of the current representation making such information particularly relevant"). Furthermore, information is not generally known just "because others come to learn that information." N.Y. City 2005-3.

6. In the consultation with the homeowner, the lawyer likely obtained confidential information protected by Rule 1.6, and thus Rule 1.18(b), because the homeowner disclosed information

regarding the nature and extent of internal damage to the residence and the homeowner's personal knowledge thereof. Information regarding the homeowner's knowledge of the damage to the residence and the extent thereof could be relevant in an action to recover fees for repair of such damage, particularly in determining the nature of the services rendered and the value thereof.

Materially Adverse

7. The homeowner and the contractor's interests are materially adverse because the contractor seeks recovery directly from the homeowner for the balance due for repairing the residence. See N.Y. State 761 (2003).

Substantially Related

8. Matters are "substantially related" if they involve the same transaction or legal dispute or, if under the circumstances a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Rule 1.9, Cmt. [3]. This includes "knowledge of specific facts gained in a prior representation that are relevant to the matter in question," Rule 1.9, Cmt. [3]; N.Y. State 628 (1992), and confidential information "that would be useful against the former client in the present representation." Simon's New York Rules of Professional Conduct Annotated 419 (2012 ed.). We have recognized that even where different facts are implicated, the matters are substantially related where both matters involve the same issues. N.Y. State 761 (2003); N.Y. State 723 (1999). As stated in N.Y. State 723 (1999), there likely is a substantial relationship between matters "where the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client," and where the lawyer obtained confidential information "that should be used against the former client in the current representation." Conversely, we have stated that where there is no likely use of previously obtained confidential information in the new matter, no substantial relationship exists. N.Y. State 628 (1992) (finding no substantial relationship between matters regarding a theft in a restaurant parking lot and a slip and fall in the restaurant because confidential information learned regarding former client's financial exposure or corporate structure not relevant in the subsequent matter).

9. The facts presented do not enable the Committee to determine whether any confidences received from the homeowner are relevant to the contractor's claim for non-payment or to any potential counterclaim by the homeowner against the contractor.

Significantly Harmful

10. Even if confidential information is obtained and it is only somewhat harmful, the information does not disqualify the lawyer from representation against the prospective client. Simon's New York Rules of Professional Conduct Annotated 690 (2012 ed.). This additional qualification is distinct from the automatic prohibition under Rule 1.9 regarding actual former clients. N.Y. City 2006-2 (stating that "[t]he 'significantly harmful' test sets the bar lower than in the case of a lawyer opposing a former client"). Thus, if the information imparted to the lawyer by the homeowner would not be significantly harmful to the homeowner, the lawyer could undertake the matter for the contractor.

Written Informed Consent or Screening Mechanisms

11. The prohibition under Rule 1.18 regarding prospective clients is not absolute. The lawyer or firm may be able to represent a subsequent client if the lawyer (i) obtains informed written consent from both the prospective client and the subsequent client, or (ii) establishes adequate screening mechanisms. Rule 1.18(d). However, there can be no screening here as the lawyer is a sole practitioner.

12. To waive the conflict under Rule 1.18, the lawyer must satisfy the requirements for "informed consent" and "confirmed in writing," as defined by Rule 1.0(j) and Rule 1.0(e), respectively. To the extent such consents are obtained, the lawyer may represent the contractor in an action against the homeowner.

CONCLUSION

13. A lawyer may ethically represent a contractor seeking payment due from a homeowner who previously sought the lawyer's advice regarding potential claims against a third party for damage that the contractor subsequently repaired, unless the information imparted to the lawyer by the homeowner would be significantly harmful to the homeowner in the contemplated action by the contractor and informed written consent is not obtained from both the homeowner and the contractor.

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Hui Zeng

General Practice Section Committees and Chairpersons

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 & Rochman, LLP
509 Madison Avenue, 10th Floor
New York, NY 10022
ltesser@tesserryan.com

Election Law 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
CBS Inc.
51 W. 52nd Street
New York, NY 10065
zabella@gmail.com

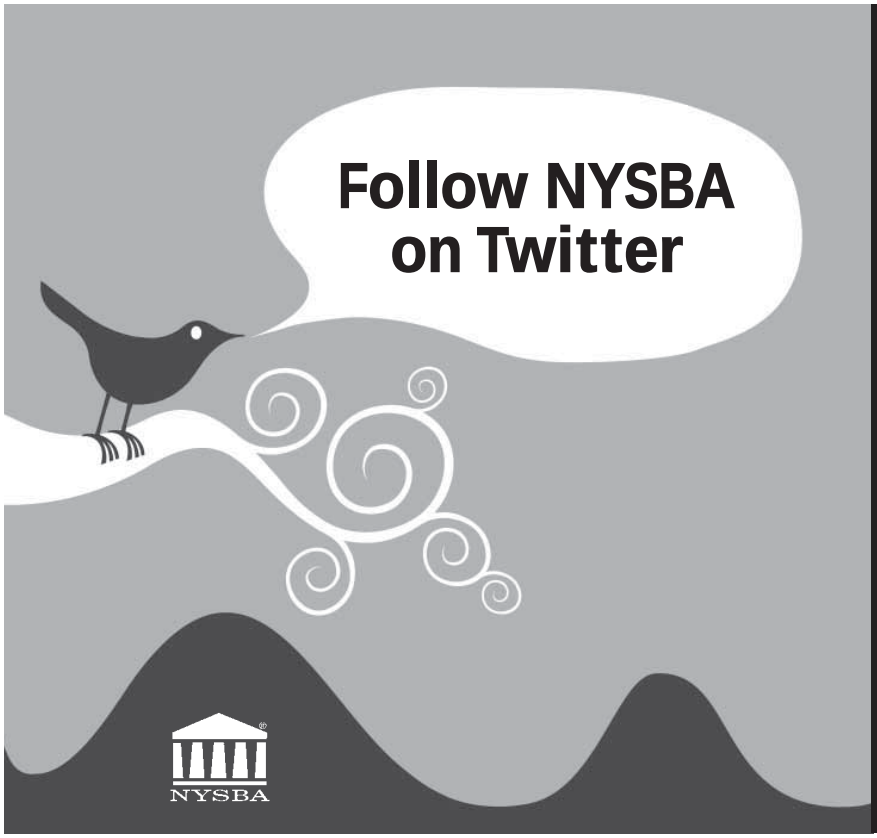
Membership and Member Service Issues
John J. Roe III
Roe Taroff Taitz & Portman LLP
1 Corporate Dr., Suite 102
Bohemia, NY 11716
j.roe@rttplaw.com

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

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
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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NEW YORK STATE BAR ASSOCIATION
GENERAL PRACTICE SECTION
One Elk Street, Albany, New York 12207-1002

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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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Section Officers

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

Chair-Elect
Richard A. Klass
16 Court Street, 29th Floor
Brooklyn, NY 11241
richklass@courtstreetlaw.com

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

Treasurer
Joel E. Abramson
Joel E. Abramson PC
271 Madison Avenue, 22nd Floor
New York, NY 10016
jea.law@gmail.com

Visit Us on Our Web Site:
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