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ONEONONE

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

Message from the Chair

The General Practice Section is excited to announce its committee restructuring plan for the upcoming year, and to introduce you to the new chapter chairs who will be playing a critical role in the restructuring process.

The Section's Executive Committee has voted to establish regional chapters within New York State based on Judicial Departments. The restructuring is designed to encourage greater local involvement in the General Practice Section throughout the entire state. Each chapter will be run by a chair (or co-chairs), who will be establishing subcommittees based on members' interests and concerns. Through these new local chapters, meetings will be held in your area regarding matters of importance to you, your practice and your local area.

These local chapters will provide you with a variety of different opportunities, including CLEs, speaking events, networking and social events, and publications. Some chapters may organize subcommittees based on topic or practice area (for example, an administrative or criminal law subcommittee), while others may be organized based on the chapter's objectives (for example, a publications subcommittee). This restructuring will provide you with an exciting opportunity to get involved with organizing a new part of the General Practice Section, and will allow you to have a leadership role within your local chapter. Regardless of subcommittee organization, look forward to the opportunities for speaking engagements and publications concerning topics of importance to your practice and local area.


Lewis Tesser

The chapter chairs for the First Department are Paige Zandri and Timothy Nolen. Ms. Zandri is a solo practitioner whose practice focuses on family law. Mr.

Inside

NYSBA

Nolen is an Associate at Tesser, Ryan & Rochman, LLP, whose practice focuses on business and commercial litigation, and administrative law. The First Department Chapter's first meeting was held on November 19, 2013, and the Chapter will be holding meetings on the third Tuesday of each month. The next meeting is scheduled for March 18, 2014.

The chapter chair for the Second Department is Emily Franchina of Franchina & Giordano, P.C. Ms. Franchina's practice, which is based out of Garden City, New York, focuses on elder law and estate planning. Ms. Franchina is excited to help grow the General Practice Section within the Second Department.

The chapter chairs for the Third Department are Joel Pierre-Louis and J. Gerard McAuliffe. Mr. Pierre-Louis is based out of Colonie, New York, and works for the Dormitory Authority of the State of New York. Mr. McAuliffe is a solo practitioner based in Johnstown, New York, who has served as the Fulton County Public Defender. The Third Department Chapter is looking forward to promoting the General Practice Section's opportunities within the Third Department, and is considering organizing subcommittees based on judicial districts in order to encourage involvement throughout the large geographical area covered by the Department. The Third Department Chapter is also excited about collaborating with county bar associations and members of Albany Law School to organize events for younger attorneys (including speaking engagements and Law Day activities).

The chapter chairs for the Fourth Department are Stephanie Calhoun and Steve Bengart. Ms. Calhoun is an attorney with the New York State Office of the Attorney General in its Buffalo, New York office, and Mr. Bengart is a member of Bengart & DeMarco, LLP, a Tonawanda, New York firm. The Fourth Department Chapter is excited to address local issues in the Fourth Department and organize networking activities. They are considering working with the Erie County Bar Association to organize events.

The chapter chairs are excited about this new opportunity to reshape the General Practice Section, and look forward to working with all of you in the months ahead! This restructuring is a great opportunity for you to get involved in brand new chapters and assume leadership positions.

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:

Elder Law: Anthony J. Enea, Esq., immediate Past Chair of the Elder Law Section, reviews all of the various steps necessary to plan for retirement and to organize one's financial investments and contacts.

From Egg Creams to Politics: Former New York State Attorney General Robert Abrams reminisces over growing up in the Bronx, politics (first as an Assemblyman then as Attorney General), and his legal career.

Administrative Law: Our Section's Chair, Lewis Tesser, presents an excellent layout on the procedural and substantive law concerning Article 78 proceedings against agencies and their effect upon subsequent cases. The article analyzes both defensive and offensive collateral estoppel in these situations.

Transitions: A Lawyer and His Photography: The now-retired attorney Richard Golden has provided our readers with a selection of his photographs from recent exhibitions. Mr. Golden writes about his transition from law into his new labor of love, the art of photography.

Martin Minkowitz

Confidentiality Agreements: Melvin Katz and Stuart B. Newman, partners at the law firm of Salon Marrow Dyckman Newman & Broudy LLP, discuss the use of confidentiality agreements (also known as "NDA"s or non-disclosure agreements) in the context of corporate transactions.

Discovery Practice: Analyzing the growing field of e-discovery, Jamie Weissglass and Rossana Parrotta of Huron Legal provide an article regarding the duty to preserve electronically stored information (ESI) so as to avoid the risks of spoliation claims in litigation.

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

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http://www.nysba.org/GP

Letter to the Co-Editors

Gentlemen:

I am writing to call your attention to an article that appeared in the Fall, 2013 edition of the NYSBA General Practice Section Newsletter, *One on One* (Vol. 34 No. 1, page 8). The article entitled "Large Deductibles and the Aggregate Trust Fund: Good News in the 2013-2014 New York State Executive Budget," by Walter Taylor, is inaccurate and should be retracted.

Possibly Mr. Taylor's article was written and submitted on the assumption that Governor Cuomo's 2013-2014 executive budget would be adopted unchanged by the Legislature. However, the portion of the budget that is the subject of the article was in fact rejected by the Legislature. The requirement that permanent partial disability benefits be commuted to present value and paid into the Aggregate Trust Fund by private insurers is still in effect.

Mr. Taylor (and others) may certainly advocate for what they view as the benefit of closing the Aggregate Trust Fund (although a more impartial piece would observe that the presumed cost savings would result from slashing indemnity benefits for permanently disabled workers whose benefits were already reduced by the imposition of artificial time limits). However, it is a disservice to the readers of the newsletter to depict an insurance industry wish list as a legislative fait accompli, particularly where the opposite has already occurred.

Robert E. Grey

Managing Partner
Grey & Grey, LLP

Chair
New York Workers' Compensation Alliance

Are You Ready for the Elder Years?

By Anthony J. Enea

As attorneys we are all too often preoccupied by the lives and problems of others. On a daily basis we go from one client to another, utilizing all of our strength, energy and intellectual resources with the hope of providing our clients with the best legal services possible. Their problems and concerns are inevitably always on our minds. Unfortunately, our profession leaves us little time to focus on our own personal affairs, especially those related to our aging. The demographic studies done of the membership of the New York State Bar Association (NYSBA) reflect that our membership is rapidly aging. The largest demographic group of attorneys is those over the age of 55 years. Believe it or not, if you are 55 or older you qualify to be a member of NYSBA's Senior Lawyers Section.

"[O]ur profession leaves us little time to focus on our own personal affairs, especially those related to our aging."

It is my hope that this article will encourage you to take a step back and assess whether you have taken some of the most basic steps in organizing yourself for the elder years. The following are my suggestions for your consideration.

A. Physically organize your affairs. Locate and organize into separate folders/binders all of the most important legal documents you have executed, such as your original Last Will and Testament, Trust(s), Advanced Directives (Powers of Attorney, Health Care Proxies, etc.), deeds to your properties, mortgages and notes, insurance policies (life, health, disability, home, long term care, malpractice), bank and investment records, income tax returns, passports, birth certificates and military discharge records, etc.

Organizing these documents will surely be a time-consuming process; however, it will be a process that allows you to revisit many matters you may not have paid attention to for a number of years.

Once you have physically organized these documents, I would suggest that you let your spouse and/or loved ones know where they are located. I would also suggest that you not place your Last Will and Advanced Directives in a Safe Deposit Box unless someone other than yourself has a key and is authorized signatory on the box;

B. Review and update your existing Last Wills, Trusts and Advance Directives to ensure they are up to date and reflect your present financial circumstances and wishes. The Last Will you prepared when you were newly married with minor children may not be reflective of your current state of affairs and/or wishes. For example, your existing Last Will and the titling of your assets may not allow for appropriate estate tax planning on your death or the death of your spouse. Additionally, the individuals you selected as the Executors and/or Trustees 25 to 30 years ago may not be the same individuals you wish to act in that capacity now.

An extremely important document to have as one ages, which is often not properly drafted, is the Durable Power of Attorney (POA). It is most important that the Power of Attorney be Durable (survive your subsequent incapacity) and be sufficiently broad enough to allow the agent to take all steps necessary to protect and preserve your assets in the event of your incapacity. The Power of Attorney you signed appointing your spouse to act as your agent at a house closing may not be the one you need and want if you suffer a debilitating illness. In my opinion, you should have a Durable Power of Attorney with as many powers (including broad gifting powers) as humanly possible. Many Guardianship proceedings would be avoided in their entirety if a sufficiently broad POA was in existence.

C. Organize and review all existing insurance policies. We often know that we have purchased life, disability and long term care insurance, but, it may be years since we assessed the adequacy of the coverage and the policies. For example, do you have life insurance that is term, universal and/or whole life? Is the death benefit sufficient to meet the current needs of your family and/or loved ones in the event of your demise? From an estate tax and planning perspective, it may be wise to have the policy owned by a irrevocable life insurance trust, so that it is not part of your taxable estate. You also may not want your 21-year-old child receiving a million dollars outright upon your death. Generally, most insurance professionals are willing to provide a no-cost review of one's existing policies. Additionally, because of the existing low interest rate environment, the policy may not be meeting its projected rate of return, which may significantly impact the cash value projections made when you purchased the policy.

D. Organize and list the names, addresses and telephone numbers of all the professionals you are currently utilizing for your family and/or loved ones. Upon your incapacity or demise the last thing you want your family to deal with is trying to track down your attorney, CPA and/or insurance professionals. Additionally, you should advise your family and/or loved ones as to the professionals you would recommend they contact upon your incapacity or demise. You obviously do not want someone you despise handling your estate.

E. Organize the names, addresses and telephone numbers of your physicians, therapists, pharmacies and other health care providers. At a time of crisis having this information in one spot will be invaluable.

F. Inventory, organize and keep at least 8 years of your financial and bank records. Many families are unsure and unable to locate all of the bank and financial accounts their loved ones have at a time of illness or death. Additionally, if you need to apply for Medicaid to cover your possible stay in a nursing home (which would cost you approximately $15,000 per month if you are not eligible for Medicaid and don't have long term care insurance) you will need the last 5 years of all bank and investment account statements and records.

G. Review what steps if any you have taken to protect your life savings in the event you and/or your spouse/significant other need long term care in the future. Clearly, no one plans to have a stroke or heart attack and/or develop Parkinsons, Alzheimer's or dementia. It's not part of the commercial with you and your loved one walking down the beach hand in hand enjoying the glorious days of your retirement. Unfortunately, things don't always go as planned. I am often reminded by one of my associates of the Jewish saying that "Man plans, God laughs."

Planning for the potential need of long term care is an endeavor that requires foresight and recognition of the fact that it is possible that you may suffer a debilitating and chronic illness. The purchase of long term care insurance should be strongly considered. There are many new products that are available that are a hybrid of life insurance and long term care insurance. Additionally, utilization of a Medicaid Asset Protection Trust should be high on the list of available planning options, especially as you get closer to the age of 65.

H. Review and assess your retirement goals and plans. Retiring from the practice of law as a single practitioner or as a member of a small firm requires an organized plan and strategy. While many of us want to go out with our boots on, doing so without having a plan in place for the transition of your practice and files to other attorneys will create significant havoc for your clients, your estate and family.

I. Review and assess any pension, social security and annuity benefits you are entitled to. Review potential IRA and/or qualified annuities and their minimum required distributions.

J. Review and organize your burial arrangements. The purchase in advance of a burial plot(s), mausoleum, crypt, etc., while it may sound morbid, will generally alleviate a great deal of stress from your family and loved ones upon your demise.

I regularly find myself extolling the virtues of organization and planning to my associates and staff. As we approach the "elder years" it's important that we apply those organizational virtues to our own personal and professional lives. As Winston Churchill once said, "Let our advance worrying become advance thinking and planning."

Anthony J. Enea, Esq. is the Managing Member of Enea, Scanlan & Sirignano, LLP with offices in White Plains and Somers, N.Y. He can be reached at (914) 948-1500 or at A.enea@esslawfirm.com. He is the Immediate Past Chair of the Elder Law Section of the New York State Bar Association and is the recipient of the "Above the Bar Award" as the leading elder care attorney in Westchester County. He is AV Rated Preeminent and has been designated as a "Super Lawyer" and "Best Lawyer." He is also fluent in Italian.

From Egg Creams to Politics

By Bob Abrams

I proudly tell everyone that I'm a boy from The Bronx. My roots in The Bronx are at the core of who I am and produced the value system that guided my life and career.

When I was born, my parents lived at 1165 Simpson Street in the South Bronx. They moved to Pelham Parkway when I was a toddler, and I lived and grew up in a six-story apartment building, 2125 Holland Avenue, just off of Lydig Avenue. It was the same block as the local elementary school I went to: P.S. 105. I have the most positive feelings and recollections of each of the public schools I attended, from kindergarten through 6th grade at P.S. l05, for seventh and eighth grades at P.S. 34 in Van Nest, and my four years at Christopher Columbus High School. I can still reel off the name of every teacher I had in each of those schools. I still remember scores of names of my classmates in those schools. My teachers were terrific. They were very dedicated, and they imparted the important fundamentals of a good education. I developed strong bonds of friendship with my classmates. Every time I meet someone I went to school with, we have such a great time recalling people and incidents from our school days. I still remember the words of the school songs. At Columbus, I spent four great years. I was the manager of the basketball team, coached by Moe Davitch and Roy Rubin. We had great players, like Angelo Lombardo and Jerry Paulson, who went on to star at Manhattan College, with Jerry winning the MVP Award at the Holiday Festival at Madison Square Garden and later going on to play in the NBA for the then Cincinnati Royals. At CCHS (Christopher Columbus High School), I made many friends who helped elect me to leadership positions in the Junior and Senior Arista and the G.O. (General Organization), which was the student government.

My parents owned and worked in a luncheonette/candy store in my neighborhood at 2000 Holland Avenue, across the street from the old Bronxdale Swimming Pool. They worked long hours in the store to provide for me and my younger sister, Marlene. I worked in the store, making egg creams, cherry cokes, malteds, and sundaes, and selling newspapers, magazines, cigars, cigarettes, greeting cards, school supplies, yo-yos, and balsa wood gliders. I carried cases of soda from the basement for my Dad to stock the soda cooler, mopped the floor, and waited on customers at the counter and the few small tables.

When The Bronxdale Pool closed down, the building was converted into a TV antennae factory, and the employees there, as well as those from the Delicia candy factory up the block on Antin Place near Wallace Avenue, would come to our store for sandwiches at lunchtime. Delicia also had a night shift, and so after school I'd come to the store to help my Dad serve those Delicia employees who would come for 7:00 p.m. dinner. We'd serve the customers, clean up, close the store, and walk home together.

My parents didn't have the resources to send me to sleep-away camp, so I spent several summers at the vacation playground summer program run by the Board of Education at P.S. 105. We did handicrafts, lanyards, tumbling, ping pong, basketball, and more. I was on the softball team, and we played different schools throughout the summer in a tournament—a la P.S. 89, 102, 96, 106.

"My roots in The Bronx are at the core of who I am and produced the value system that guided my life and career."

I spent untold hours in the P.S. 105 schoolyard playing softball, stickball, and Lefty Grove. I was so addicted to sports that I would shoot hoops well into the night because the lamppost on Holland lit up the court. That schoolyard was also a special sight on many Sundays, when softball teams from other neighborhoods came to play. There would be hundreds of spectators watching these hard-fought games. When I was 9 or 10, I'd sell cold bottles of soda to the spectators and participants. The bottles would be placed in pails of ice to keep the soda cold. A dime got you a cold soda with a 3-cent profit going to me.

After Columbus, I attended Columbia College for four years. For most of my first year, I commuted by subway, but then I got a room in the dorms and lived on campus. I sold magazines for the Columbia Student Magazine Agency, delivered the *Columbia Daily Spectator* each day, and worked two hours every day in the John Jay Dining Hall to pay for expenses. During the summer, I was a waiter at a hotel in the Catskill Mountains, the Hotel Zeiger (later renamed the EI Dorado) and another summer at Grand Lake Lodge in Lebanon, Connecticut in order to pay for my college tuition.

After college, I attended NYU Law School for three years. During law school and after graduation, I volunteered to work in Congressional campaigns against The Bronx Democratic machine. The Congressman from Pelham Parkway and some other neighborhoods in The Bronx was Charles Buckley, who also served as the powerful and ironfisted Democratic Leader of

The Bronx. I joined a small band of idealistic reformers who were seeking to oust old line party officials who we felt were guilty of patronage abuses and were unresponsive to local neighborhood needs. I worked on the campaign of Jonathan Bingham who, in 1964 in a stunning upset, beat Congressman Buckley. The next year I was recruited by the local reform Democratic Club, The Bronx Pelham Reform Democratic Club at 708 Lydig Avenue near White Plains Road, to challenge the local Assemblyman, John T. Satriale, who was part of the Buckley machine. It was a David and Goliath race. Satriale was a 17-year incumbent and Chairman of the New York State Assembly Ways and Means Committee, the most powerful committee in the Assembly, and had the support of The Bronx Democratic machine, and I was a 27-year-old kid, two years out of law school, with no money.

What happened in that race was truly miraculous. Many people in the neighborhood rallied to my cause. My 86-year-old grandmother sat on a milk crate for 12 hours a day handling out campaign flyers at the corner of Lydig Avenue and White Plains Road with a big homemade button pinned on her coat that said, "Vote for my grandson Bob Abrams for the Assembly." My mom, dad, sister, college and law school friends, and people from the neighborhood petitioned for signatures and campaigned tirelessly.

A friend from Columbus High School, Jack Abrams, would meet me every morning at 5:30 a.m. and we would go to a different subway stop in the Assembly District each day. Jack would hand out my campaign brochures, and I would reach out my hand and say, "Hi, I'm Bob Abrams, the Reform Democratic candidate, running in the primary for the Assembly." I'd shake thousands of hands in the course of a week. I'd also greet people at the subways when they were coming home from work (although they were tired after a full day's work and a long subway ride home and would be less friendly than in the morning). I'd go to several coffee clotches each night to explain the issues in the race. I ordered 10,000 Chinese fortune cookies and would give them to senior citizens who were sitting on park benches. When they would open the cookie, it said, "Your good fortune will be Bob Abrams for the Assembly." They would chuckle, and so I successfully gained their attention.

All of this hard work and loyal Bronx effort enabled me to score an upset victory on primary night in September 1965 and launched my political career. I won three terms in the Assembly, and then won a primary for Borough President against the regular Democratic organization candidate William Kapelman (who stepped down from a judgeship to make the race). I then went on to win twice more for the Borough President.

My strong Bronx base enabled me to run statewide for the office of New York State Attorney General. I won primaries in 1974 and 1978 for the Democratic nomination for Attorney General, and in 1978 won the general election to become the first Democrat to be elected Attorney General in 40 years. My four terms as Attorney General were the highlight of my career in public office. It was an opportunity to take on some important issues which were critical to the lives of New Yorkers. Being an activist Attorney General enabled me to protect New Yorkers as consumers and investors, to enforce laws protecting people's civil rights and civil liberties, prosecute polluters who were jeopardizing the quality of the air we breathe and the water we drink, and ensure workplace safety. It gave me the chance to advocate these issues on the national stage as President of the National Association of Attorneys General. It was challenging, fun, and rewarding.

Since returning to private life 20 years ago, I have been a partner in the law firm of Stroock & Stroock & Lavan with offices in NYC, Washington, D.C., Miami, and Los Angeles. I have represented clients and have also volunteered time to work with not-for-profit organizations on a pro bono basis. I've been fortunate to have the opportunity to travel to far flung places on the globe to do interesting things—to help countries like Poland, Hungary, and the Czech Republic after the fall of communism to craft new constitutions and develop democratic institutions, to monitor programs providing food and social services for desperately destitute people living in the 15 Republics of the former Soviet Union, and to protect people from dictatorial and extralegal actions in violation of international laws and accords.

None of this would have been possible if I didn't have my basic rootings developed in The Bronx as the wellspring of my political support. It's the place where I grew up and lived for the first 40 years of my life, and it's the place where I married my wife, Diane, on that beautiful Sunday in September of 1974 in The Bronx Botanical Gardens, at the Lorillard Snuff Mill on the banks of The Bronx River. My two daughters, Rachel (36) and Becky (26), have heard me endlessly tell Bronx stories and understand how deeply appreciative I am about being a product of Bronx neighborhood life and the values of family and hard work. They and my four grandchildren will see it on display in November when Bronx friends and family will gather outside my Mom and Dad's old store and see a street sign unveiled that says "Dotty and Ben Abrams Way" as a result of a bill passed by the New York City Council, sponsored by Councilman James Vacca and signed into law by Mayor Michael Bloomberg.

You can take the boy out of The Bronx, but you can't take The Bronx out of the boy.

Collateral Effects of Article 78 Findings on Subsequent Litigation

By Lewis Tesser and Timothy Nolen

The case *Fludd v. Fischer,*[1] a 2012 Western District Court opinion, revisits an issue many litigants face following Article 78 proceedings. The *Fludd* court acknowledged that plaintiffs who pursue suits for damages after losing an Article 78 proceeding run the risk that agencies will invoke defensive collateral estoppel to bar the damages action. But the court was silent on a question less frequently addressed: Can a successful Article 78 petitioner invoke offensive collateral estoppel in a subsequent suit?

Courts have arrived at various results concerning the collateral effect of prior Article 78 determinations. This article examines the cases that have applied offensive and defensive collateral estoppel following Article 78 proceedings, and suggests ways to harmonize the seemingly conflicting results concerning offensive collateral estoppel.

What Is Article 78?

Article 78 of the New York Civil Practice Law and Rules is the prescribed way to challenge New York State[2] and municipal agency actions in court.[3] They are "special proceeding[s]" which result in judgments,[4] but are often referred to as "administrative appeals,"[5] which allow relief that was previously available in the form of a writ of certiorari, mandamus or prohibition.[6]

In an Article 78 proceeding, the Supreme Court reviews administrative decisions and considers whether they were made in violation of a lawful procedure, affected by an error of law, were arbitrary and capricious, or an abuse of discretion. If a determination was the result of a hearing, the proceeding will be transferred to the Appellate Division to determine whether it was supported by "substantial evidence."

There are limitations to Article 78 proceedings. Review is restricted to the grounds delineated in the statute, which usually means that the focus of the courts' attention is on procedure and questions of law.[7] While courts may grant incidental damages,[8] punitive, statutory and consequential damages are unavailable. They are also brought against agencies and agents in their official capacity, so recovery against agents in their individual capacity is unavailable.[9] Finally, many procedural devices available in state court litigation—such as trials or depositions—are extremely rare in Article 78 proceedings.

Collateral Estoppel Generally

Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party."[10] It applies when (1) the issue was necessarily decided in the prior action and is decisive in the subsequent action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litigate it.[11] The proponent of collateral estoppel bears the burden of demonstrating the identicality and decisiveness of the issue.[12] The opponent bears the burden of establishing the absence of a full and fair opportunity to litigate the issue.

Courts emphasize that collateral estoppel is a "flexible doctrine" which defies rigid application.[13] Equitable concerns guide determinations whether to apply collateral estoppel, and the decision "depends on 'general notions of fairness involving practical inquiry into the realities of litigation.'"

Collateral estoppel can be divided into two categories—offensive and defensive—which are applied differently following Article 78 proceedings.

"[T]he court [in Fludd v. Fischer*] was silent on a question less frequently addressed: Can a successful Article 78 petitioner invoke offensive collateral estoppel in a subsequent suit?"*

Defensive Collateral Estoppel

Even following adverse Article 78 determinations, some litigants file suits for damages. Agencies involved in subsequent civil suits often cite prior Article 78 determinations and ask courts to dismiss them.

The case law is replete with examples of defensive collateral estoppel following Article 78 proceedings. In *Williams v. Pepin,*[14] a suit for damages, the Northern District of New York noted that the plaintiff-petitioner raised the same arguments—which were rejected—in a prior Article 78 proceeding concerning violation of his procedural due process rights. The court dismissed the suit, finding that the issue had been decided against the plaintiff who had previously had a full and fair opportunity to litigate it.

In *Parker v. Blauvelt Volunteer Fire Company,*[15] the plaintiff sued for damages alleging violation of his civil rights when he was terminated from his job. Plaintiff was initially unsuccessful in an Article 78 proceeding challenging the dismissal. The Court of Appeals noted that the lower court had found against plaintiff on his allegation of constitutional violations. Because the issue had previously been decided against plaintiff, who had had a full and fair opportunity to litigate it, collateral estoppel barred the suit.

There are many cases where defensive collateral estoppel has been applied following Article 78 proceedings. Petitioners considering a subsequent suit for damages should be aware of the consequences that an adverse determination may have. Even if res judicata does not bar a claim, collateral estoppel poses a substantial risk to the subsequent action.

Offensive Collateral Estoppel

Offensive collateral estoppel is attractive to plaintiffs because it can bar defendants from relitigating issues previously decided against defendants.[16] For example, an Article 78 petitioner who obtains a determination that an administrative agency violated her civil rights may want to use that determination as leverage in a civil suit. But can she?

In contrast to defensive collateral estoppel, courts have been reluctant to apply offensive collateral estoppel following Article 78 determinations. The seminal case is *Gutierrez v. Coughlin,*[17] a short but oft-cited opinion involving a disciplinary proceeding. In *Gutierrez,* an inmate commenced an Article 78 proceeding alleging the commissioner of the Department of Correctional Services failed to conclude a disciplinary proceeding within the required timeframe. The Supreme Court, Wyoming County, decided in favor of the inmate, Roberto Gutierrez, determining that the department violated his due process rights. Gutierrez subsequently filed a civil rights suit, arguing that the department should be collaterally estopped from relitigating the due process violation.

The U.S. Court of Appeals for the Second Circuit relied on two separate grounds for rejecting Gutierrez's offensive collateral estoppel claim. First, a petitioner may not request damages (except incidental damages) in an Article 78 proceeding. Accordingly, the state agents "could not have been held personally liable in such a proceeding, [and] they did not have the same incentive to litigate that state court action." Second, certain defenses—including qualified immunity—were unavailable in the Article 78 proceeding. Therefore, the court refused to apply offensive collateral estoppel.

Relying on *Gutierrez,* it appears the majority of cases have declined to apply offensive collateral estoppel following Article 78 proceedings.[18] As recently as 2009, the Second Circuit has cited Gutierrez to reject it.[19]

However, a limited number of courts have applied offensive collateral estoppel. In *O'Neill v. Johnson,*[20] a suit for damages for civil rights violations, the Northern District of New York considered applying offensive collateral estoppel following an Article 78 determination which found that the defendants violated plaintiff's rights by depriving him of certain benefits. Without citing *Gutierrez,* the court determined that certain issues had been decided in the Article 78 proceeding, and that defendants had been given a full and fair opportunity to litigate them. Accordingly, defendant was barred from relitigating the issue of liability.

In *Sorano v. Taggart*,[21] a police officer prevailed in an Article 78 proceeding challenging her termination as a violation of her due process rights. In a subsequent suit against the city and an internal affairs agent in his individual capacity, the plaintiff invoked offensive collateral estoppel. Again, without mentioning *Gutierrez* and its progeny, the Southern District of New York applied offensive collateral estoppel and found the issue had been previously decided against the defendants who had a full and fair opportunity to litigate it.

There would appear to be a contradiction between *Gutierrez* and *Sorano* or *O'Neill* concerning whether offensive collateral estoppel may apply following Article 78 proceedings. To complicate matters, neither *O'Neill* nor *Sorano* attempt to distinguish *Gutierrez. Rourke v. New York State Department of Correctional Services*[22] provides some guidance. There, in an Article 78 proceeding, the Supreme Court, Albany County, found that requiring petitioner to wear his hair a certain way violated his right to free exercise of his religion.

Petitioner sought to use offensive collateral estoppel on the issue of liability in a subsequent civil suit. The Northern District stated that it "[did] not read *Gutierrez* to have set forth an inflexible rule." Rather, Gutierrez applied the standard collateral estoppel considerations and had simply determined that offensive collateral estoppel should not be applied. In *Rourke,* like *O'Neill* and *Sorano,* the court determined that offensive collateral estoppel should apply since the issues in question had been necessarily decided and the parties had a full and fair opportunity to litigate.

It is unclear whether *Rourke*'s reasoning will gain much traction. *Rourke, O'Neill* and *Sorano* appear to be the only cases wherein the courts have invoked offensive collateral estoppel based on Article 78 determinations, while many cases have cited *Gutierrez* to reject offensive collateral estoppel. A review of the cases suggests that the *Rourke, O'Neill* and *Sorano* courts paid close attention to how vigorously the defendants liti-

gated the Article 78 proceeding. This may have swayed the courts, while the *Gutierrez* court may have been unconvinced that the defendants had vigorously defended themselves. The *Gutierrez* court may also have been influenced by equitable concerns regarding the fairness of awarding damages following a finding of a procedural violation in a summary proceeding.

It is not clear to the authors, however, that the *Gutierrez* court's reasoning that Article 78 respondents do not have the same incentive as civil defendants to vigorously defend their position, is necessarily accurate—agencies should be motivated to ensure the integrity of their proceedings. In any event, despite the seeming divide, it is also worth noting that application of collateral estoppel is always a "flexible doctrine" which defies rigid application.[23] The divide may simply be the product of courts' flexibility.

What appears clear is that it is more difficult to invoke offensive than defensive collateral estoppel here. This may seem unfair to plaintiffs. However, petitioners who prevail in Article 78 proceedings should keep in mind the lessons of *Rourke*, *O'Neill* and *Sorano*, and focus on the extent to which defendants provided a strong defense effort in the Article 78 proceeding—it appears that the stronger the effort, the more likely the court will find that they had a full and fair opportunity to litigate the issue. Moreover, success in an Article 78 proceeding can be a bargaining chip. Agencies that have lost Article 78 proceedings will likely be more willing to discuss settlement if they have already lost to the same party on an issue.

Conclusion

A determination in an Article 78 proceeding can have serious collateral effects on subsequent litigation. Concerns for judicial efficiency and fairness to plaintiffs may be contrasted to the inequities of preventing agencies from contesting liability for damages and imposing liability for minor procedural errors. Unfortunately, there is no clear answer for where the balancing of these equities lies. Although offensive collateral estoppel is difficult to obtain following an Article 78 proceeding, courts appear more likely to consider it if the agency put up a vigorous defense in the previous action.

Endnotes

1. 2012 U.S. Dist. LEXIS 122924 (W.D.N.Y. 2012).
2. Article 78 may not be used to challenge federal agencies. *Armand Schmoll, Inc. v. Federal Reserve Bank*, 286 N.Y. 503 (1941).
3. Article 78 proceedings may not be commenced in federal court. *Verbeek v. Teller*, 114 F.Supp.2d 139 (E.D.N.Y. 2000).
4. See *Matter of Council of City of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 401 (2006).
5. See, e.g., Kassal, "Update: Did the Comparative Appellate Odds Change in 2010?" New York State Bar Journal, 83-Dec NYSTBJ 47 (2011).
6. N.Y. CPLR §7801 et seq.
7. *Khan v. N.Y. State Dept. of Health*, 96 N.Y.2d 879 (2001).
8. N.Y. CPLR §7806.
9. *Leisner v. Bahou*, 97 A.D.2d 860 (3d Dept. 1983).
10. *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999).
11. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455-56 (1985).
12. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-501.
13. *Jeffreys v. Griffin*, 1 N.Y.3d 34, 41 (2003).
14. 2011 U.S. Dis. Lexis 154490 (N.D.N.Y. 2011).
15. 93 N.Y.2d 343 (1999).
16. *Roe v. City of Waterbury*, 542 F.3d 31, 41 (2d Cir. 2008).
17. 841 F.2d 484 (2d Cir. 1988).
18. See *Latorres v. Selsky*, 2011 U.S. Dist. Lexis 154411, *19-20 (N.D.N.Y. 2011).
19. *Hicks v. Low*, 309 Fed. Appx. 472 (2d Cir. 2009).
20. 1996 U.S. Dist. Lexis 16670 (N.D.N.Y. 1996).
21. 642 F.Supp.2d 45 (S.D.N.Y. 2009).
22. 915 F.Supp. 525 (N.D.N.Y. 1995)*; Rourke v. New York State Department of Correctional Services*, 159 Misc.2d 324 (Sup. Ct. Albany Co. 1993).
23. *Jeffreys v. Griffin*, 1 N.Y.3d 34, 41 (2003).

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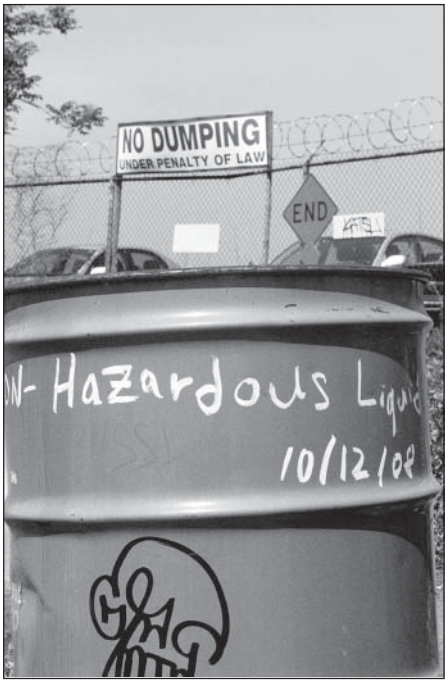
An Ex-Lawyer Calls the Shots

By Richard W. Golden

Many lawyers love to practice and hope never to retire. Some recent law school graduates realize almost immediately that practice is not for them and begin new careers elsewhere. Most of the rest of us probably ask at some point in our professional lives whether there is an alternative to practicing law.

The Editors of *One on One* asked me to address the case in which a lawyer with decades of experience retires from the practice of law, perhaps earlier in life than most of his colleagues, and embarks on a new career. They also asked how, if at all, my legal training and experience carried over into a very different field.



"No Dumping"/"Hazardous Liquids"
Red Hook, Brooklyn (2010)

My own legal career spanned forty years, beginning with entering the University of Chicago Law School in 1967 and ending with my retirement in 2007. All of my practice was as a member of the New York State bar. I began as a litigation associate in an international commercial firm based in Manhattan; during the 28 years prior to my retirement I was an Assistant in the Office of the New York State Attorney General. At the AG's office, I litigated before administrative agencies and the courts and, in my last few years there, reviewed condo and co-op offering plans. Throughout my years practicing, I was fortunate in working with congenial colleagues and to have found the subject matter intellectually stimulating.

As I approached the forty year mark, however, I began to ask myself more and more about paths not taken. Also, seeing births and deaths among family and friends made real the finite nature of each individual's life. The upshot was that I resolved to retire and pursue a new career in photography.

Often, of course, embarking in middle age on a new career without formal training or much experience in that field is likely to be an exercise in vanity resulting in banal work. Despite the odds against success, I was able to move forward for several reasons. My family was supportive and, on a practical level, we wouldn't be dependent on income I earned from my new career. Also, I had been taking photographs for decades, had occasionally succeeded in exhibiting some of them, was familiar with the work being done by others, and hoped that my work would be of interest to at least some people. Perhaps most importantly, by that time in my life I didn't fear failure as much as I might have earlier.

I have been fortunate since retiring from my legal career in finding venues where I could show my work. In March and April 2008, a year after my retirement, the Burrison Gallery in Philadelphia, my hometown, gave me a solo exhibit consisting of twenty-four photographs dealing with the theme of "Water." I had taken almost all of these images in the years prior to retirement. During September to November 2009, I curated and participated in an exhibit at the Central Library of the Brooklyn Public Library consisting of the works of two mid-nineteenth to early twentieth century photographers held in the Library's Brooklyn Collection, supplemented by photographs I had taken recently on the subject "Nature, Seen in Brooklyn Now and Then."

"NYC Correction/Prison/Keep Off"
City Island, Bronx (2010)

"Utopia for Sale"
Riverdale, Bronx (2012)

During January 2011, my work was featured as the inaugural exhibit at the Hadas Gallery, across the street from the Pratt Institute campus. The exhibit's title was "Depth/Balance/Surface," and the twenty-two photographs explored how a work of visual art directs the viewer's eyes within the picture frame. Most recently, in January and February 2013, the Robert Anderson Gallery, at 24 West 57th Street in Manhattan, mounted an exhibition of twenty-nine of my photographs under the caption "Dead Ends: NY." These photographs, taken in all five boroughs from 2010 to 2012, portray what happens in New York where the automobile cannot go.

Ajax Nike Missile
Sandy Hook, NJ (2010)

I am now working on a portfolio showing how New York defended itself starting in colonial times and continuing up to our current post-9/11 era. Emerging from this work is a portrait of evolving architectural styles and military technologies.

I took all six of the photographs chosen by the Editors to accompany this article after my retirement from practicing law. Four come from the "Dead Ends: NY" portfolio and two from the new portfolio. The captions indicate the locations. All of the photographs were shot in color, although publication here is necessarily in black and white.

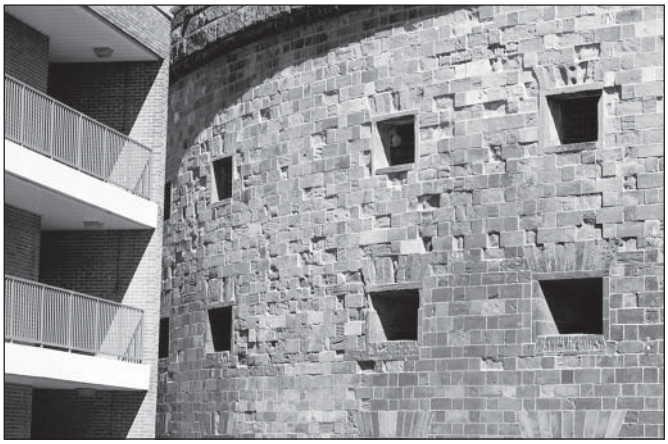
Although creating visual works of art and practicing law are fundamentally different, there are nonetheless underlying ways in which having practiced law helps my present work. Whether writing a brief, preparing for oral argument or planning cross-examination, the lawyer selects the aspects of his case that are likely to be most persuasive to the judge or other decision-maker and presents the case in a manner intended to hold the decision-maker's attention. The same considerations of selecting the subject matter, framing the scene and manner of presentation all come into play when taking photographs. The disciplines exercised in the one field have carried over to the other.

But the differences between these two careers are equally fundamental. For instance, the lawyer's subject matter is usually determined by the client's needs; I have had to determine my subject independently. In addition, one of the pleasures of the legal profession is working as part of a team, and the product is often superior to anything any individual member of the team would have produced working alone. As a photographer, of course, I am the sole initial judge of my own work; many times I have discarded a day's work without even showing it to anyone else. A third difference: preparing for a trial or an oral argument or writing a brief takes time, during which the lawyer may make changes as weaknesses become apparent. When taking photographs, the most important time is the brief moment when the shutter is open. Post-exposure manipulation cannot rescue a flawed initial conception.

Finally, I should emphasize an overarching commonality between a legal career and any career that comes afterwards. Just as my legal career required training, experience and work, so, I have found, does practicing my new profession. The details may be different, but these underlying requirements are the same.

Editor's Note: Richard Golden's e-mail address is photosbygolden@gmail.com. Copyright © by R. W. Golden. All rights reserved.

"Are You Interested in a Buy Out of Your Property and Home?" Yetman Avenue, Staten Island (2013)



Castle Williams and Abandoned Hospital Governors Island (2012)

Sharing the Loss

By Martin Minkowitz

It is well settled, by statute and case law, that every employer is required to insure its employees against losses from injuries or death which arise out of and in the course of their employment. This is the general rule in at least 48, if not all, 50 states. This discussion focuses on the apportionment of benefits between two or more accidents and resulting in disability or death. A sharing of the loss between the two or more events.

The statute provides for apportionment between two or more accidents and resulting in disability or death, where at least one of those accidents is compensable under the Workers' Compensation Law. Therefore, if the disability or death is causally related to a compensable injury, benefits are payable to the claimant. This is so in a death case even if the injury (including an occupational disease) only contributed to the death.[1] It does not have to be the sole cause of the death.

Apportionment is not made where the pre-existing condition is not caused by a compensable injury and the claimant can perform the duties of the job regardless of the non-compensable prior event.[2]

The Board will award benefits, for disability or death, by computing the employee's earning capability at the time of the latter work-related injury. The earning capacity at that time would obviously reflect any loss of earning capacity from a prior disability.

The Court of Appeals has just discussed the issues of apportionment in a case which raised a novel issue. What happens in the case of a death which is not caused by a compensable injury, but the prior disability was compensable. In this case[3] the claimant was disabled by an occupational disease, asbestosis. The death here was primarily caused by a non-work-related thyroid cancer. He might have lived a little longer if he had not had been disabled by the compensable asbestosis, but would have died from the cancer alone. The expert medical testimony was that the cancer in his lungs would have killed him but the death may have been earlier because of the damage caused by the asbestosis.

The employer argued that even if the Board made an award that the compensable disability was a contributing cause of the death, it should only pay that portion of the award that was attributed to the earlier compensable disability for which it was liable. The Court concluded that Section 16 WCL, the provision of the law providing for the awarding for death benefits, does not allow for apportionment of death benefits between work-related and non-work-related causes. While it was noted that this interpretation of the law may cause an unduly "harsh" result for the employer, redress is for the legislature, not the court.

A concurring opinion, however, notes that if the employer had preserved the finding of causation for appeal to the Court of Appeals, it would have considered whether the work-related injury (asbestosis), which was only a minor "contributory factor" to the death, would result in a compensable death claim. It suggested that the existing case law might suggest no, and therefore no benefits should have been awarded.

In conclusion, I believe the employer has raised questions that go to the heart of the Workers' Compensation Law. First, is it fair to burden the employer with the ongoing payments of compensation for a death which was primarily caused by a non-work-related disease, just because the death was accelerated by a prior existing occupational disease? Secondly, if the answer to the first is yes, should the employer be required to pay in such a case for death benefits in the same amount as if it was liable for solely causing the death when, as here, the compensable contributory occupational disease may have been less that 10% of the cause of death, if it could be measured. Perhaps, as the court suggests, the legislature should visit these issues.

Endnotes

1. *See* §§ 15 and 16 WCL and *Imbriani v. Becar Knitting Mills*, 277 A.D.2d 727 (2000).
2. *Bruno v. Kelly Temp Services*, 301 A.D.2d 730 (2003).
3. *Hroncich vs. Con Ed*, 91 A.D.3d 1134; __ N.Y.3d __ (2013).

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Significant Issues Arising Under Confidentiality Agreements (a/k/a Non-Disclosure Agreements)

By Melvin Katz and Stuart B. Newman

Attorneys who specialize in corporate transactions know that the first document drafted in any such transaction is usually a Confidentiality Agreement, sometimes also called a Non-Disclosure Agreement, or "NDA." Two recent cases decided by the Delaware courts have a direct bearing on both the express provisions of Confidentiality Agreements and the obligations imposed on recipients of non-public information pursuant to the Confidentiality Agreement as part of their due diligence process. These cases underscore the fact that a well-crafted NDA may prove to be critical for your client and that it should be drafted and negotiated with the same care and attention a good lawyer gives to the entire transaction.

While this article focuses on Confidentiality Agreements in the context of M&A transactions—transactions contemplating the sale or merger of companies or their businesses—the importance of these agreements in other business settings is not to be overlooked. Confidentiality Agreements, in one or another form, play an important role in such transactions as joint ventures, prospective debt financings or equity investments and protections of trade secrets. The two recent cases and the Confidentiality Agreements at issue in these cases involved prospective sales of businesses. The Delaware courts' application of the law to the facts of each case provides practical lessons for practitioners in drafting such agreements for their clients.

In *RAA Management LLC v. Savage Sports Holdings, Inc.*,[1] the Delaware Supreme Court discussed the legal effect to be given to the "non-reliance" and "waiver" provisions typically included in Confidentiality Agreements. These "non-reliance" and "waiver" provisions are inserted in well-drawn Confidentiality Agreements for the purpose of protecting the provider of the confidential, non-public information (most often, the Seller) from liability for any inaccurate or even misleading representations and other factual disclosures made or furnished by the provider to the bidder until and unless the parties enter into definitive acquisition or merger agreements, by reason of which the provisions of the Confidentiality Agreement are superseded by more explicit representations and warranties negotiated by the parties.

After reviewing the confidential information supplied by the Seller, Savage Sports, pursuant to the Confidentiality Agreement, the prospective Buyer, RAA Management, ultimately determined *not* to purchase the Seller. RAA Management claimed that it independently discovered that Savage Sports had significant unrecorded claims and liabilities although Savage Sports executives had denied the existence of such claims or liabilities prior to the start of the due diligence review of materials furnished by it to RAA Management pursuant to the Confidentiality Agreement. By reason of these subsequent discoveries, RAA Management dropped its pursuit of Savage Sports and sued to recover $1,200,000 in due diligence costs and negotiating fees and expenses incurred in the aborted transaction. RAA Management claimed that had it been aware of these undisclosed claims and liabilities prior to the commencement of its due diligence efforts, they would not have sustained those fees or incurred those expenses.

RAA Management tried to advance the argument that these "non-reliance" and "waiver" clauses did not apply to "fraudulent inducement" by Savage Sports or to information within the "peculiar knowledge" of Savage Sports. The Delaware Supreme Court rejected these contentions, pointing out, among other considerations, that sophisticated parties may not reasonably rely on representations made "outside" of a contract where, as in this case, the NDA contained a provision explicitly disclaiming reliance upon such "outside" representations or information.

"Waiver" and "non-reliance" clauses are, or should be, inserted in Confidentiality Agreements to assure that the disclosing party should not be held liable for the accuracy or reliability of information furnished to the recipient unless the parties enter into definitive merger, acquisition or other transaction agreements. "Waiver" and "non-reliance" clauses in a Confidentiality Agreement are of particular importance in these situations where a transaction is not consummated, but where considerable written and oral information and data are given to the other party both "under" or "outside" the Confidentiality Agreement. These provisions should be kept in mind by practitioners when a client proposing to sell its business enters into Confidentiality Agreements with one or more prospective Buyers.

In this case, the Court made several pertinent statements in support of its rejection of RAA Management's claim, including the following:

(a) The breadth and scope of these "waiver" and "non-reliance" clauses were defined by the parties in their Confidentiality Agreement, indicating that the prospective Buyer, RAA Management, was bound by these clauses as written;

(b) The case involved two sophisticated parties who agreed that the bidder could not rely upon or bring suit by reason of the due diligence information "or any other information provided or prepared by or for the Company" (Savage Sports) if they failed to reach agreement for its sale; and

(c) Sophisticated parties may not reasonably rely upon representations (most often oral) made at the outset of negotiations where the Confidentiality Agreement, as in this case, contains a provision explicitly disclaiming reliance upon such "other information" beyond the four corners of the Agreement, nor can these parties ignore the "waiver" provisions in the Agreement.

The RAA Management case demonstrates the importance of non-reliance and waiver clauses in a Confidentiality Agreement. In addition, the actual language in well-drawn Confidentiality Agreements should, in our view, be drafted expressly to cover all representations and/or other disclosures or "other information" made or provided by the disclosing party "prior to" or "beyond" the scope of the Agreement as well as "during" the due diligence process and to cover "oral" as well as "written" misrepresentations and omissions to disclose material facts.

The second Delaware case, *Martin Marietta Materials v. Vulcan Materials Company*,[2] raises questions of importance for the Seller from the standpoint of the protections that well-drawn Confidentiality Agreements give the Seller in the event that the bidder or prospective Buyer attempts to use the confidential information obtained during the due diligence process for purposes that are in violation of the contractual protections afforded by the Confidentiality Agreement—e.g., if prospective bidders attempt to use the information for hostile bids to acquire the Seller, for anti-competitive purposes or for misuse of trade secrets obtained during the due diligence process.

In *Martin Marietta*, Vulcan Materials and Martin Marietta entered into two Confidential Agreements pursuant to which Vulcan Materials, the prospective Seller, furnished a substantial amount of non-public information concerning Vulcan to Martin Marietta.[3] While the Confidentiality Agreements between the parties lacked a "standstill" provision, the language respecting the purpose of the exchange of the "Evaluation Material" clearly contemplated solely a consensual transaction between the parties. As the negotiations wore on, the respective stock market prices of Vulcan and Martin Marietta moved in the wrong direction from the standpoint of Vulcan. Its management, therefore, lost enthusiasm for the transaction. Martin Marietta, on the other hand, was even more anxious to acquire Vulcan, and it commenced a hostile bid for Vulcan, including an exchange offer and a proxy fight to obtain control of the Vulcan board.

In the course of Martin Marietta's hostile bid, it used certain confidential information obtained from Vulcan pursuant to the above-noted Confidentiality Agreements, and disclosed such information in SEC filings and in other proxy soliciting materials. Martin Marietta used certain of this confidential information to cast Vulcan's management in a poor light, to make its own offer appear attractive to Vulcan stockholders and to pressure the Vulcan Board to accept the offer of Martin Marietta.

The Delaware Chancery Court found that Martin Marietta blatantly violated its Confidentiality Agreement with Vulcan Materials and preliminarily enjoined Martin Marietta from undertaking any further attempts to acquire Vulcan for a four-month period. One of the defenses of Martin Marietta was that it was required to disclose this confidential information in its SEC filings and, therefore, these disclosures came within the customary exceptions in Confidentiality Agreements with respect to required filings with the government or in response to subpoenas, etc. The court did not accept this argument, holding that neither the language nor the intent of the specific Confidentiality Agreement encompassed voluntary filings by one of the parties with the SEC in furtherance of its hostile bid without prior notice to, and opportunity to object by, the other party to the Agreement.

The *Martin Marietta* case illustrates the importance of NDA protections for the prospective Seller in M&A transactions. In addition, there are some practical lessons and drafting suggestions that can be derived from the *Martin Marietta* case.

First, from the standpoint of the Seller, the importance of drafting specific performance and injunctive relief clauses should never be overlooked. They are of considerable importance and, in that connection, the Seller (or other provider of information) should insist that the NDA expressly stipulate the existence of "irreparable harm" in the event that the prospective Buyer (i.e., the recipient of the information) violates the terms of the Agreement. Indeed, the Delaware Supreme Court confirmed that express contractual stipulations with respect to irreparable harm "'*alone* suffice to establish that element for the purpose of issuing…injunctive relief.'"[4]

Second, it would be advisable for the NDA to contain broad express "standstill" provisions. Clearly, if the Seller is a publicly held entity, broad "standstill" provisions prohibiting the Buyer from launching a hostile tender offer or proxy contest, or otherwise attempting to appropriate the business or using the non-public confidential information for competitive purposes, or to misappropriate trade secrets should be included in the Confidentiality Agreement.

Broad "standstill" provisions or their functionally equivalent provisions in Confidentiality Agreements serve an important purpose in the private, as well as the public, company context. For example, it might be difficult to prove that a bidder in an aborted transaction may be using confidential information obtained under a Confidentiality Agreement for competitive purposes. However, it seems that a prohibition against such use in a "standstill" provision in a Confidentiality Agreement might (or in another document executed by the bidder and the issuer) well serve as a deterrent; and, if litigation is required to enjoin such use of the confidential information for competitive purposes, the existence of that clause in a broadly drawn standstill provision will be duly noted and taken into account by the courts.

Third, from the standpoint of a bidder or prospective Buyer, the NDA should expressly provide that the parties may disclose information, as reasonably required in the opinion of its counsel, in SEC or other government agency filings or to comply with Stock Exchange requirements. From the standpoint of the Seller, however, the "notice" and objection procedures in favor, typically, of the Seller should provide that if that Buyer or the other party seeks to disclose all or portions of the confidential information, it should be required to give the Seller notice of such pending disclosure, and the Seller should have a reasonable opportunity to contest, limit or restrict the disclosure or dissemination of that information; and such disclosure restrictions should expressly apply to all public disclosures of the confidential transaction information regardless of whether such disclosure is to be made in response to a subpoena or in connection with SEC or other agency filings or Stock Exchange requirements.

Fourth, the NDA should explicitly state that the confidential information furnished pursuant to the Agreement is in contemplation of a "consensual" or "voluntary" transaction (or agreement) between the parties, that the "permitted use" of such confidential information is limited solely to a consensual transaction approved in advance by the boards of both companies, and that such information should, therefore, not be used for any other purpose, including hostile bids or for anti-competition purposes.[5] Both the Delaware Chancery and Supreme Courts stressed the significance of that language (in different formulations) in the two Confidentiality Agreements that Vulcan and Martin Marietta executed.[6]

There are other valuable lessons to be derived from the *Martin Marietta* decision; most of them, however, apply to bidders who change their approach and decide to go "hostile" after negotiating with the prospective Seller. For example, if you were representing such a client, it would be sound advice to destroy the confidential information acquired under the Confidentiality Agreement once circumstances change and to use a new "clean" professional team to advise the prospective bidder before launching the hostile attack.

Although not covered in this article, in drafting and negotiating NDAs, the practitioner should also focus upon broad definitions of the confidential information furnished pursuant to its terms, and the responsibility of the recipient for the actions of its representatives with respect to the confidentiality of this information. The practitioner should also expressly specify the duration of the confidentiality period.

Above all, remember that in the complex, high stakes universe of the corporate lawyer, when it comes to Confidentiality Agreements, as with all other important agreements, one size does *not* fit all, and a practitioner is well advised to devote adequate time and attention to their terms and provisions.

Endnotes

1. RAA Mgmt., LLC v. Savage Sports Holdings, Inc., 45 A.3d 107 (Del. 2012).
2. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 56 A.3d 1072 (Del. Ch. 2012). This case was first decided by the Delaware Chancery Court in May 2012. The decision was affirmed by the Delaware Supreme Court in July 2012. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 2012 WL 2783101 (Del. July 10, 2012).
3. Confidential information and data are often referred to as "Evaluation Information" in Confidential Agreements.
4. *Martin Marietta Materials, Inc.*, 2012 WL 2783101, at *14 (Del. July 10, 2012) (emphasis added) (quoting Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc., 794 A.2d 1191, 1209 (Del. Ch. 2001)).
5. Typically, however, many Confidentiality Agreements require that if a consensual transaction between the parties does not close within a specified time period, the Buyer or other recipient of the Confidential Information should be required to destroy all such information and data and return all copies thereof to the Seller or the other provider of the Information.
6. Two different Confidentiality Agreements were executed by Martin Marietta and Vulcan. The first was a standard "NDA" which provided that Martin Marietta was obligated to "use Evaluation Materials solely for the purpose of evaluating a Transaction" and "Transaction" was defined as a "possible business combination transaction" between the parties or one of their respective subsidiaries. The second, the Joint Defense Agreement (for anti-trust purposes), defined "transaction" as a "potential transaction being discussed by Vulcan and Martin Marietta" involving a combination of all or certain of their assets or stock. The Delaware Chancery Court concluded that the hostile exchange offer and/or a proxy contest were clearly inconsistent with the consensual contemplated "business combination" language in these two agreements between the parties.

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The Duty to Preserve and the Risks of Spoliation—How Organizations Can Preemptively Limit the Costs of Electronic Discovery

By Jamie Weissglass and Rossana Parrotta

I. Introduction

The best defense against spoliation sanctions is preserving evidence. However, in the era of Big Data, organizations often face a Goldilocks dilemma: preserve too much electronically stored information (ESI) and discovery becomes unwieldy and expensive; preserve too little and face sanctions, which can range from shifting the costs of discovery to adverse inference instructions to dismissal.[1] Moreover, the more data an organization has, the more difficult it is to find needed information; delays in response can lead to noncompliance with court and government agency rules and result in penalties. Consequently, saving everything is risky and not economically feasible. On the other hand, it is clear that failing to retain the right information is equally, if not more, risky. Fortunately, there is a solution that is "just right": developing an information governance and management program that provides for routine, defensible destruction of data pursuant to well-researched and documented retention schedules. Under Rule 37(e) of the Federal Rules of Civil Procedure, federal courts cannot impose sanctions for data lost "as a result of the routine, good-faith operation of an electronic information system." In other words, routine, automatic deletions of electronic records that have met their retention requirements and are not subject to a duty to preserve should not be penalized. The best defense against discovery sanctions therefore starts with comprehensive information governance and litigation readiness programs—that begin well before litigation is on the horizon.

II. Litigation Readiness

Litigation readiness begins with an organization focusing on managing information responsibly. The core of this responsibility is consistently following an information governance and management program that addresses the entire lifecycle of information, from creation or receipt to disposition.

A. Establish a Litigation Readiness Team

First, the organization should establish a team to create and oversee its litigation readiness program. In implementing the program, the team will be responsible for working with the records and information group (RIM) to confirm that there is a defensible records retention policy, establishing procedures relating to preservation of information when there is a duty to preserve, creating and monitoring litigation holds to ensure preservation, and training employees on the program. The team should consist of representatives from the Legal, RIM, IT, and Compliance departments, as well as representation from the business units. The team may also include outside partners, such as e-discovery specialists and third-party vendors that the organization will rely upon in the event of litigation.

B. Assess the Information Landscape

The next task is to identify likely locations of information typically sought in litigation. Many organizations find it helpful to create a data map that memorializes the locations and types of the organization's most commonly requested forms of ESI. In creating the map, the team should not overlook legacy data or emerging forms of information, such as voicemail, social media, and text messages. It should also account for any data stored in the cloud or on mobile devices. If the team cannot determine what is stored in a particular repository, sometimes sampling or cataloging the data may be of some help. As important as creating the data map is maintaining it in what is a very dynamic and constantly changing information management landscape. Data maps can quickly become stale without this vigilance.

C. Create a Defensible Disposal Program

The organization's information governance program should define records retention periods and provide for routine destruction of records, including ESI, whose retention requirements have expired and are not subject to a preservation hold order. The records and information management team typically develops the retention schedule by working with the business unit representatives to identify their information and related systems, as well as the business needs for the records—their purposes and useful life. The records and information management team will then conduct the legal research into the applicable recordkeeping regulations, validated and approved by the team's legal experts. The legal and operational needs for the records are then used to determine the appropriate retention period, and the sensitivity classification of the information determines the method of disposal. It is particularly important to work with IT to understand the disposal of ESI, because often those processes can be automatic. (For example, many organizations have systems that automatically delete emails after a certain period.)

A key procedure to develop is one that addresses records and information of departing employees to ensure responsibilities for on-going retention are defined, and to ensure information is available and accessible. Otherwise, the information may be lost. For example, data can be lost if the former employee's computer is wiped and given to another employee, if a mailbox or the exchange server is shut down, or if a file share that belonged to the former employee is deleted.

Note that the information governance program and records retention policy is regarded as "best practice" and is not something to institute in anticipation of litigation. Instituting a program or changing its rules after learning of a potential dispute may give rise to an inference that the party enacted its policy to facilitate the destruction of evidence.[2]

D. Determine When the Duty to Preserve May Be Triggered

Once the information governance program is in place, it can be helpful for the team to anticipate scenarios when the duty to preserve will be triggered. Preplanning can mitigate the risk of *ad hoc* decisions that could prove inefficient and inconsistent.

Unfortunately, there is no bright-line test to determine when the duty is triggered. Under New York federal and state law, the duty to preserve arises when litigation is "reasonably anticipated."[3] Obviously, initiating litigation, retaining counsel, or receiving a complaint, subpoena, or notice of government inquiry puts a party on notice. But New York courts have established that the duty to preserve can arise well before a party receives notice of a claim.[4] Consider the following common, thought-provoking scenarios:

Does a triggering dispute exist? The "mere existence of a dispute between two parties does not necessarily mean that a party should reasonably have anticipated litigation and taken steps to preserve evidence."[5] Some courts have excused parties from the duty to preserve where they show that claims similar to those in the lawsuit usually do not lead to litigation;[6] other courts disagree.[7]

Who knows about the dispute? Key personnel must be aware that litigation is likely.[8] If only a few employees in a firm or municipality are aware that litigation may be imminent, it will not necessarily trigger the duty. However, if a lawyer receives notice, a higher standard may apply: in one case, receiving a letter terminating an attorney's representation "for some reasons not yet fully defined" established the duty.[9]

Is litigation foreseeable for other purposes? At least one court has found that designating documents as protected work product prepared "in anticipation of litigation" triggers the duty to preserve.[10] The court ruled that if "litigation was reasonably foreseeable for one purpose…it was reasonably foreseeable for all purposes."[11]

What is the regulatory environment? New York courts have found regulations requiring the retention of records sufficient to warn an organization to preserve documents, even if litigation involving those records is not reasonably foreseeable.[12] Similarly, a duty to preserve can arise as early as the inception of a relationship between regulated parties.[13] For example, one court relied on the rules of professional responsibility and ethics opinions in finding the obligation to preserve documents arose when lawyers began to represent a party.[14]

When does the duty end? At some point, the duty to preserve will end and organizations can resume programmatic destruction. Settlement talks do not "vitiate the duty to preserve"; such a standard "ignores the practical reality that parties often engage in settlement discussions before and during litigation…[A contrary] argument would allow parties to freely shred documents and purge e-mails, simply by faking a willingness to engage in settlement negotiations."[15]

Given the range of circumstances that can create reasonable anticipation, when in doubt, parties should err on the side of presuming the duty exists.

E. Determine the Scope of the Litigation Hold

Once the duty to preserve is triggered, the next step is to figure out what data to save. A party must preserve "what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request."[16] This does not mean parties must preserve "every shred of paper, every e-mail or electronic document, and every backup tape."[17] Instead, they must preserve ESI that is relevant and unique; it is unnecessary to retain multiple copies.

The NYSBA's E-Discovery Committee suggests using the following criteria to determine what to preserve: "the facts upon which the triggering event is based and the subject matter of the triggering event; whether the ESI is relevant to that event; the expense and burden incurred in preserving the ESI; and whether the loss of the ESI would be prejudicial to an opposing party."[18]

Some courts outside New York have directed parties to *The Sedona Conference Commentary on Proportionality*, which suggests weighing the burden of preservation against the data's potential value and uniqueness, in setting the scope.[19] Some federal courts also tend toward considerations of proportionality, and a proposed amendment to Fed. R. Civ. P. 26(b) would limit

the scope of discovery to information "proportional to the needs of the case." However, New York courts have not been receptive to this concept. One judge explained that the proportionality "standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle."[20]

As with other aspects of preservation, a conservative approach is best. In consultation with key stakeholders counsel can identify issues likely to arise; they can then pinpoint the types of documents likely to be relevant and the probable key custodians. Before deeming ESI inaccessible because of undue burden, counsel should consider whether the data is available elsewhere; if it is not, courts can override considerations of undue burden where the "requesting party shows good cause."[21]

One of the best ways to limit the scope of preservation and manage costs is to reach an agreement with opposing counsel regarding the scope of discovery. For example, agreement can be reached on issues such as the identity of key custodians, types of information sought, etc. The "meet and confer" process in federal court and in New York Commercial Division cases provides structured venues for discussions with opposing counsel, but counsel can also reach agreements without formally required meetings.

F. Stop the Destruction of Data to Be Preserved

Satisfying the duty to preserve requires organizations to suspend their routine destruction mechanisms.[22] A litigation hold is the communication mechanism typically used to document and inform employees of the need to suspend destruction. It has been held that the "utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent."[23] However, the proper form of litigation holds is an open question: must they be in writing, or will oral holds suffice? There is arguably a mix of opinions on the subject.

While at least one federal court held that the failure to issue a written litigation hold constituted gross negligence,[24] the Second Circuit rejected that position.[25] New York state courts have also declined to follow that stance. For example, one court found "the functional equivalent of a litigation hold" where a company's policy was "to retain all information relevant to the claims and litigation."[26] Furthermore, it ruled "a directive to refrain from purging documents is unnecessary and unwarranted…[and] would risk confusion regarding the policy and practice to preserve all documents in all formats for all files."[27]

At least one New York court has supported tailoring a litigation hold's form to the organization's size.[28] The court noted that in smaller organizations, "issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be."[29]

Even so, the best practice is to issue a clearly written litigation hold, to provide tangible evidence of a party's good-faith attempt to meet its discovery obligations.[30] Litigation holds should describe the subject matter and relevant date ranges, instruct recipients to preserve ESI until notified otherwise, and provide a contact person in case of questions.[31]

In preserving ESI, it is important for the legal department to collaborate with IT in stopping automatic destruction and in issuing the legal hold. Discussions should cover the types of data that may be implicated and the names of key custodians. If any of these types of data are subject to automatic destruction, IT should halt that process for those categories of data. Some organizations find it useful to adopt a "triage" approach—immediately addressing data for the most critical custodians while continuing to identify additional relevant information. In addition to stopping automatic destruction and issuing a legal hold, counsel can consider whether there is the need for IT to collect any data immediately; for example, if certain employees may not follow the directive to preserve data.

Identifying the sources of data early can also help determine whether collecting that data may place an undue burden on the organization, necessitating discussions with opposing counsel or motions to the court for protection.

G. Ensure Compliance With the Litigation Hold

Issuing a litigation hold is not the final word in meeting the duty to preserve. Organizations should take affirmative steps to ensure compliance throughout the organization; leaving preservation up to lay employees without adequate guidance is asking for trouble. Counsel too, should work to ensure compliance.[32]

Some organizations require employees to sign an acknowledgment that they have read, understood, and agree to the terms of the litigation hold. Tracking the distribution of the holds as well as any employee acknowledgements is important in demonstrating the organization's efforts to ensure preservation.

In addition, organizations should reissue and update litigation holds periodically to ensure their effectiveness.[33] It is also counsel's responsibility to remind custodians of their duty to preserve, communicating directly with key players.[34] Again, keep in mind that documentation of these reminders may be important in establishing the company's good faith effort to preserve evidence.

In fact, it is a best practice to record every step of the litigation hold process to ensure defensibility, including the reasoning for determining when the duty to preserve was triggered and decisions for what data to preserve. If the scope of the litigation shifts, not only should the litigation hold be updated to reflect new claims, date ranges, and custodians, but the reasoning for doing so should be memorialized. It is also important to record critical dates, including when the initial hold and reminders are issued. Although litigation holds are typically privileged, courts have required their production when spoliation has occurred.[35]

To help ensure consistency in following litigation hold procedures, the team may want to consider litigation hold software, which can build in rules consistent with a retention policy and document employees' receipt and acknowledgement of the hold and reminders.

H. Educate Employees and Monitor Compliance

A litigation readiness program is only as good as the degree to which its policies and processes are adhered to. Because employees are on the front lines, they may be the first to become aware of circumstances giving rise to potential litigation. Therefore, they should be coached to approach management or legal counsel as soon as they learn of any risk. The litigation readiness team can establish a training program that simply explains the company's discovery process, legal hold policies, and document retention protocol. To reinforce the training, the team may want to share examples of the negative ramifications of failing to follow policy.

III. Conclusion

A proactive litigation readiness program can move an organization from a reactive to a proactive stance. When controlled in a systematic, consistent fashion, the disposal of ESI in compliance with the organization's retention policy can enhance defensibility, reduce the likelihood of spoliation claims and sanctions, and save significant expense. Furthermore, better information management leads to more efficient searches for information, faster decision making, and better compliance with recordkeeping rules. In sum, litigation readiness programs that incorporate strong information governance will lead to controlled discovery costs and minimize the risks of unwelcome budget surprises.

Endnotes

1. *Fitzpatrick v. Am. Int'l Grp., Inc.*, 10 Civ. 142 (MHD) (S.D.N.Y. May 29, 2013) (footnotes and citation omitted); *QK Healthcare, Inc. v. Forest Labs., Inc.*, No. 117407/09 (Sup. Ct., N.Y. Co. May 13, 2013).
2. *See*, for example, *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D.Tex. 2010) (where one former employee claimed emails were destroyed pursuant to an email destruction policy at the new competing entity, the court held that, even if that was true, because any such policy was selectively implemented, the Rule 37 safe harbor would not apply).
3. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("*Zubulake IV*"); *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 36, 939 N.Y.S.2d 321, 324 (1st Dep't 2012).
4. *Voom HD Holdings*, 93 A.D.3d at 40 (citation omitted).
5. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006).
6. *See, e.g., Star Direct Telecom, Inc. v. Global Crossing Bandwidth, Inc.*, No. 05-CV-6734T (W.D.N.Y. Mar. 22, 2012) (finding it unreasonable to anticipate litigation where data showed that "out of approximately 3,800 billing disputes filed during 2005 and 2006, only three customers (including the plaintiffs) commenced litigation").
7. *Field Day, LLC v. County of Suffolk*, No. 04-2202 (S.D.N.Y. Mar. 25, 2010) (rejecting the argument that a defendant's duty to preserve was triggered only when it received notice of a claim because "it receives thousands of claims a year while the percentage of notices that result in actual lawsuits is small").
8. *Toussie v. County of Suffolk*, No. CV 01-6716 (JS) (ARL) (E.D.N.Y. Dec. 21, 2007) (citing *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).
9. *DiStefano v. Law Offices of Barbara H. Katsos, PC*, CV 11-2893 (JS) (AKT) (E.D.N.Y. Mar. 29, 2013) (citation omitted).
10. *Siani v. State Univ. of N.Y. at Farmingdale*, No. CV09-407 (JFB) (WDW) (E.D.N.Y. Aug. 10, 2010).
11. *Id.*
12. *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001).
13. *FDIC v. Malik*, 09-CV-4805 (KAM) (JMA) (E.D.N.Y. Mar. 26, 2012).
14. *Id*. (noting that the defendants failed to contest this assertion).
15. *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 40, 939 N.Y.S.2d 321, 327 (1st Dep't 2012).
16. *Zubulake IV*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).
17. *Id*.
18. NYSBA E-Discovery Comm., *Best Practices in E-Discovery in New York State and Federal Courts* (2011), http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=58331 (hereinafter "NYSBA Best Practices").
19. The Sedona Conference, *The Sedona Conference Commentary on Proportionality* (2013), https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Proportionality.
20. *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (citation omitted).
21. Fed. R. Civ. P. 26(b)(2)(B).
22. *915 Broadway Assocs. LLC v. Paul, Hastings, Janofsky & Walker, LLP*, No. 403124/08 (Sup. Ct., N.Y. Co. Feb. 16, 2012); *see also Kravtsov v. Town of Greenburgh*, No. 10-CV-3142 (CS) (S.D.N.Y. July 9, 2012) (finding the failure to suspend the automatic deletion of video recordings at least grossly negligent).
23. *Heng Chan v. Triple 8 Palace, Inc.*, No. 03 Civ. 6048 (GEL) (JCF) (S.D.N.Y. Aug. 11, 2005); *Einstein v. 357 LLC*, No. 604199/07 (Sup. Ct., N.Y. Co. Nov. 12, 2009).
24. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456, 471, 476-77 (S.D.N.Y. 2010).
25. *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012).
26. *Estee Lauder Inc. v. One Beacon Ins. Grp., LLC*, No. 602379/05 (Sup. Ct., N.Y. Co. Apr. 15, 2013).

27. *Id*.
28. *Orbit One Commc'ns, Inc. v. Numerex Corp*., 271 F.R.D. 429, 441 (S.D.N.Y. 2010).
29. *Id*.; *see also Steuben Foods, Inc. v. Country Gourmet Foods, LLC*, No. 08-CV-561S(F) (W.D.N.Y. Apr. 21, 2011) (finding "series of oral communications" from counsel to senior staff in a company of 400 employees sufficient to avoid sanctions).
30. NYSBA Best Practices.
31. *Id*.
32. *915 Broadway Assocs. LLC v. Paul, Hastings, Janofsky & Walker, LLP*, No. 403124/08 (Sup. Ct., N.Y. Co. Feb. 16, 2012) ("Counsel must oversee compliance with the litigation hold.").
33. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433-34 (S.D.N.Y. 2004).
34. *Id.*
35. *See, e.g., Tracy v. NVR, Inc.*, No. 04-CV-6541L (W.D.N.Y. Mar. 26, 2012).

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Ethics Opinion 961

Committee on Professional Ethics of the New York State Bar Association (3/13/13)

Topic: Can a retiring attorney sell a law practice and retain the right to receive a portion of fees for legal services that will be provided after the sale date?

Digest: A retiring lawyer may sell his or her law practice contingent upon receipt of a percentage of legal fees collected by the purchaser for services provided after the sale where the payment is in proportion to the services performed by the selling lawyer prior to the sale or fairly represents the value of the "goodwill" of the retiring lawyer. A provision requiring payment of fees for business that the selling lawyer refers to the buying lawyer after the sale is not permitted.

Rules: 1.5(g); 1.5(h); 1.17; 5.4; 7.2.

QUESTIONS

1. May a retiring lawyer sell his or her law practice contingent on receiving a percentage of the legal fees earned for legal services provided after the date of sale with respect to each of the following categories of client matters:

   a. Existing clients with pending actions and a retainer agreement that provides for a contingent fee upon amounts collected;

   b. Existing clients with claims contemplated in future years after the date of sale of the law practice and a retainer agreement that provides for a contingent fee upon amounts collected;

   c. New clients who retain the purchasing attorney after the date of the sale, where the new client is a separate entity but has common principals with existing clients of the selling attorney as of the date of sale and a retainer agreement that provides for a contingent fee upon amounts collected; and

   d. New clients who retain the purchasing attorney after the date of the sale, with no common principals with selling attorney's existing clients, but where the new client is referred to the selling attorney by other attorneys and in turn referred by the selling attorney to the purchasing attorney?

OPINION

2. This inquiry requires us to address a tension between two rules in New York's Rules of Professional Conduct (the "Rules"): Rules 1.5(g) (Fees and Division of Fees) and 1.17 (Sale of Law Practice). Rule 1.5(g) provides, in relevant part, that "[a] lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation."[1] Rule 1.17 (a) provides that "[a] lawyer retiring from the private practice of law…may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice." The tension arises from the phrase "including goodwill" in Rule 1.17(a). "Goodwill" is the intangible asset of an enterprise that arises from the reputation of a business and its relations with its customers.[2] In a law firm context, goodwill reflects, among other things, "the likelihood that satisfied existing clients will use the firm again when new matters arise" and "the likelihood that new clients will come to the lawyer or firm because of the firm's reputation." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* ("*Simon's*") 764 (2013 ed.).

3. By its nature, the inclusion of "goodwill" in a sale of a law practice entails a payment on account of legal fees that the buyer is expected to receive in the future. There is no question that the parties to the sale could attempt to assign a present value to that flow of fees and include that value in a lump-sum purchase price. That kind of indirect link between legal fees to be earned by a lawyer and the payment to another lawyer is not prohibited by Rule 1.5(g). But it can be very difficult to assign a present value to an on-going book of business of a law practice, and even more difficult to estimate what value will flow from *new* business that may come to the law practice on account of the reputation and contacts built up by the selling lawyer over time. And young lawyers who are the typical buyers of law practices often do not have access to capital to provide upfront payments for goodwill in any case. The question presented is the extent to which lawyers can structure the payment for the law practice as a payout over time measured by the actual fees earned by the practice after the sale.

4. We conclude that Rule 1.17 must be viewed as an exception to Rule 1.5(g)—that is, that the payment for "goodwill" that is explicitly permitted by Rule 1.17 permits a payment that is made

in the future after the fees that reflect "goodwill" are earned. We reach this conclusion for several reasons. First, we think that Rule 1.17 should be viewed as the more specific of the two rules—targeted as it is to a particular setting in which lawyers might wish to share fees—and thus subject to the interpretive principle favoring the more specific rule over the more general. Second, a lump-sum payment for goodwill is intended to be economically identical to the present value of the actual fees earned over time. The rules should be as transparent and rational as possible, so in the absence of a strong reason to the contrary, parties to a sale of a law practice should be able to use a method of payment that is the economic equivalent of one that is clearly permitted.

5. Third, we note that Rule 1.5 itself contemplates payments of fees over time in the closely analogous setting of a lawyer who leaves or retires from a law firm and receives a payment for his or her interest in the firm in the form of a separation agreement or retirement package. Rule 1.5(h) states, without qualification, "Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement." Likewise, Rule 5.4(a)(1) permits law firms to agree with lawyers in the firm to share legal fees with the estate of a lawyer in the firm, or with anyone else, "over a reasonable period of time after the lawyer's death." If a lawyer leaving a law firm, or the lawyer's estate, may receive a portion of future fees earned on account of the goodwill of the firm that the lawyer helped to build up, we see little reason why a lawyer retiring from a solo practice should be barred from structuring a payment similarly. Comment [1] to Rule 1.17 fortifies this analogy. It states, "Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice, *as may withdrawing partners of law firms.*" (Emphasis added.) Indeed, equalizing the treatment of retiring members of law firms and retiring sole practitioners was the principal purpose of the Rule permitting sales of law firms.[3] One of the impetuses for adopting Rule 1.17 was the previous practice of "quickie partnerships," whereby a solo practitioner would take on a junior partner for a short period before retiring under a retirement package that provided for an extended payout.[4]

6. Fourth, we note that the possibility that "goodwill" could be measured either by a lump sum payment or by a payout of a portion of future fees was well recognized in ethics opinions predating the adoption of versions of Rule 1.17 around the country. *See*, *e.g.*, ABA 266 (1945) (barring sale of "good will" "whether by payment of a lump sum or by an agreement to pay a stated percentage of the future receipts, gross or net, from his clients"); N.J. Opinion 48 (1964) (advising that a sale of "good will" was prohibited whether measured by a lump sum approximating the selling lawyer's net income for one year or by paying one third of all net profits from pending cases and any other work for former clients of the retiring lawyer for three years). There is thus good reason to conclude that when Rule 1.17 was adopted, it embodied an understanding that that the sale of goodwill that was to be permitted could be accomplished by either means.

7. We recognize that there are counter-arguments to these points. One could conclude that the express exception for fees paid as part of a separation or retirement agreement, when there is not one for sale of a law practice, means that fees may not be shared in the latter context. We are not persuaded by that counter-argument, however, because, as noted above, we perceive no reason for making that distinction, particularly in light of the policy underlying the Rule to equalize the treatment of retirements from law firms and sales of law practices.

8. We also recognize that the purposes of the prohibition on fee sharing are implicated, at least in part, by any provision for fee sharing after sale. For example, one purpose of the prohibition is to limit the risk of outside influences on a lawyer's independent judgment. A lawyer with an economic interest in a matter who is not sufficiently involved in the work and does not take responsibility for it may press the lawyer handling the matter to cut corners or settle too early. *E.g.*, *Simon's* at 165 (noting risk that even under Rule 1.5(g), a referring lawyer might "pressur[e] the working lawyer to settle or to go to trial or to skimp on costs and expenses to avoid reducing the ultimate fee"). But these policies have often been tempered by other considerations, as demonstrated by the exceptions for retirement plans, separation agreements and agreements for sharing fees with the estate of a lawyer in a law firm.[5]

9. We are also aware that Comment [11] to Rule 1.17 states, "Lawyers participating in the sale or purchase of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client." That could be taken to refer to the rule on division of fees, Rule 1.5(g). But we note that the Comment then lists several "[e]xamples" of such Rules—

Rules 1.1 (competence), 1.7 (conflicts), and 1.6 and 1.9 (confidentiality)—but not Rule 1.5(g). We note that other states have expressly referred to that Rule in their comments to their analogous rule. *E.g.*, Florida Bar Rule 4-1.17 Comment (concluding that the fee-division rule will not apply to fees from matters pending at time of sale but must be satisfied with respect to fees from matters that arise subsequent to the sale).

10. We note as well that ethics opinions in two other states with broadly similar rules concluded that payments for goodwill may not be formulated as payments of a portion of future fees unless the requirements of the fee-splitting rule are satisfied. Iowa Opinion 96-05 (1996) (structuring payment for purchase of law practice as a percent of revenues from services rendered by purchasing attorney held improper under Iowa analogue of Rule 1.5(g)); Philadelphia Opinion 96-1 & Supp. Opinion 96-1 (purchaser may pay seller a percentage of revenue over a five-year period *if* requirements of Pennsylvania analogue of Rule 1.5(g), requiring notice to clients of fee splitting, are satisfied). Neither opinion contains an analysis of the issue. *But see* Kansas Opinion 93-14 (concluding, in the absence of a rule analogous to Rule 1.17, that Kansas rule permitting referral fees permits selling lawyer to receive a portion of future fees even if selling lawyer does not work on the matter).[6]

11. While we approve in concept that goodwill in a sale of a law practice under Rule 1.17 may be measured by future fees as actually earned, we believe that there are necessarily limits to such arrangements. The extent of fee sharing must bear a reasonable and bona fide relationship to the value of the "goodwill" involved. Even the most well-known lawyer's reputation and connections fade over time. Any provision for fee sharing must therefore be limited in amount and in time. The parties might agree, for example, that the selling lawyer will receive 20% of the seller's net income for three years. If that is a reasonable estimate of the value of the "goodwill" of the practice, then Rule 1.17 permits it.

12. Turning to the types of provisions suggested by the inquirer, we have no hesitation in concluding that a portion of the fees earned from matters pending at the time of the sale (beyond those fees attributable to the work the selling lawyer did on the matter before the sale),[7] and (b) new matters for the seller's existing clients, can fairly be said to reflect the selling lawyer's reputation and client connections. Provision (c) would require fee sharing as to matters for entity clients that retain the purchasing lawyer after the date of the sale where the entity is controlled by "common principals" of existing clients. Because the relevant question is the effect of the selling lawyer's reputation on the minds of the persons making the decision which lawyer to retain, these nominally "new" clients should be treated like new matters for existing clients that are the subject of scenario (b).

13. Provision (d) would require fee sharing with respect to new clients who have been referred by the selling lawyer. While the fact that a new client may have approached the selling lawyer after the sale may be due to the lawyer's reputation, we are concerned that permitting sharing of fees if the selling lawyer refers the business to the buying lawyer implicates the different set of policies barring payments for referrals under Rule 7.2. A retired lawyer should not be given a monetary incentive to refer new business to the buying lawyer, in particular without consideration of which lawyers would be the best for the job. *Restatement (Third) of the Law Governing Lawyers* § 10 Comment d (2000). Put another way, we do not see a payment for business referred after the sale as simply a convenient method of measuring the value of the goodwill of the practice, but rather more as a payment for the new service of making the referral, and such a payment is barred.

14. One further point to address, although we do not definitively decide it, is whether a retired lawyer could receive fees from matters handled by the buying lawyer not as payment for work done prior to the sale under the first clause of Rule 1.5(g)(1), and not as payment for "goodwill" under Rule 1.17(a), but by assuming joint responsibility for the representation in a signed writing to the client under the second clause of Rule 1.5(g)(1).[8] A Comment to this Rule says, "'Joint responsibility' for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. *See* Rule 5.1 [referring to the obligations of partners and other lawyers in a firm to supervise other lawyers in the firm]." Rule 1.5, Cmt. [7]. The question is whether a retired lawyer can ever take "joint responsibility" for a matter.

15. The Comment's citation of Rule 5.1, and its reference to "ethical responsibility…as if the lawyers were associated in a partnership," suggest that the selling lawyer would need to supervise, at least to some extent, the work of the buying lawyer. *But see* N.Y. County 715 (1996) (concluding, prior to adoption of Comment [7], that the joint responsibility required by the predecessor

rule "is financial and does not create an ethical obligation of the referring lawyer to supervise the activities of the receiving lawyer"); *Aiello v. Adar*, 750 N.Y.S.2d 457 (Sup. Ct. Bronx Cty. 2002) ("the rule does not create an ethical obligation to supervise the receiving attorney's work"). There is at least a question whether such supervision would be consistent with retirement for purposes of Rule 1.17. The term "retirement" contemplates that the attorney will completely cease practicing law for compensation. Nassau County 2-12 (2012).[9] But we do not resolve this issue in response to the present inquiry, because the inquirer (presumably as would be the case for many retiring lawyers) does not seek to take joint responsibility for the work of the buying lawyer. We do not foreclose the possibility that, under some factual circumstances, a retiring lawyer could meet those requirements. *See* Rule 5.1(c) ("the degree of supervision required is that which is reasonable under the circumstances").

CONCLUSION

16. Under Rule 1.17, a retiring lawyer selling a law practice may collect fees (above the fees in proportion to the services performed by the selling lawyer before the sale), as described in provisions (a) to (c) raised by the inquirer, if those fees fairly reflect the value of the selling lawyer's "goodwill." The retiring lawyer may not condition future referrals on payment of a portion of the fees earned from the referred matters (provision (d)).

Endnotes

1. The remaining requirements of Rule 1.5(g) are: "(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive."
2. Collins Dictionary ("an intangible asset taken into account in assessing the value of an enterprise and reflecting its commercial reputation, customer connections, etc."); Oxford Dictionary (US English) ("the established reputation of a business regarded as a quantifiable asset, e.g., as represented by the excess of the price paid at a takeover for a company over its fair market value"); Dictionary.com ("an intangible, saleable asset arising from the reputation of a business and its relations with its customers, distinct from the value of its stock and other tangible assets").
3. The initial report of the Special Committee to Review the Code of Professional Responsibility, proposing adoption of what became Rule 1.17, stated that the amendment was "designed principally to address the disparate treatment of sole practitioners and members of law firms with respect to the 'good will' of their respective law practices. Under existing legal and ethical principles, retiring members of law firms and estates of deceased law firm members have been able to receive benefits, including an allotment for that lawyer's share of the firm's good will, while sole practitioners and their estates cannot obtain the same benefit. The proposed amendments will eliminate this inequality...."

   NYSBA Special Comm. to Review the Code of Prof. Resp., *Proposed Amendments to the New York Lawyer's Code of Professional Responsibility* 1 (Sept. 26, 1995). *See also* American Bar Association, Report to the House of Delegates 8A for the ABA 1990 Midyear Meeting at 4 (Feb. 1990) ("ABA 1990 Report") ("The rule also puts sole practitioners in a financial position equal to members of firms regarding the value of the 'good will' of the practice."); American Bar Association Center for Prof. Resp., *The Development of the ABA Model Rules of Professional Conduct, 1982-2005: A Legislative History* 368 (2006) (the rule was intended to "put[] sole practitioners in a financial position equal to members of firms regarding the value of the 'good will' of the practice").
4. *Simon's*, *supra*, at 761 ("Once the partnership was formed, the retiring lawyer could ethically introduce his new young partner to all of the clients, and could enter into a partnership agreement under which the retiring lawyer would receive a generous portion of future fees."); Dennis A. Rendleman, "The Evolving Ethics of Selling a Law Practice," 29 GP Solo no. 4 (July/Aug. 2012) (*available at* http://www.americanbar.org/publications/gp_solo/2012/july_august/evolving_ethics_selling_law_practice.html) ("Thereafter, Old Practitioner might become 'of counsel' or withdraw from practice entirely, while the name remains a part of the firm and a continuing financial benefit flows to Old Practitioner."). *See also* ABA 1990 Report at 4 ("In order to ensure that unfinished client matters would be taken care of and to avoid losing compensation for the 'good will' of the law practice, some solo practitioners entered into 'quickie' partnerships prior to leaving the practice. Often, clients do not benefit from such hastily assembled arrangements.").
5. Rule 5.4(a)(3) provides an additional exception, permitting sharing of fees with nonlawyer employees pursuant to compensation or retirement agreements based in whole or in part on a profit-sharing arrangement.
6. Our Committee has once before considered whether a retiring lawyer could receive a stream of fees from future business. We concluded that the lawyer could not do so, but in that case the lawyer was moving to the judiciary and we based our conclusion entirely on the Code of Judicial Conduct. We said that the arrangement "would provide an inducement to the judge to assist the acquiring firm in retaining the favor of former clients" in violation of Canons prohibiting the appearance of impropriety and certain financial and business transactions with lawyers likely to come before the court. N.Y. State 699 (1997). We did not mention the rule against fee splitting.
7. Fees for work done prior to the sale are not for goodwill, but simply for services delivered by the selling lawyer. That sharing of fees is expressly permitted by Rule 1.5(g).
8. Note that when proceeding under either portion of Rule 1.5(g)(1), the lawyer must disclose to the client that a division of fees will be made, including the share that each lawyer will receive; the client must have agreed to the division of fees in an agreement confirmed in writing; and the total fee must not be excessive. Rule 1.5(g)(2), (3).
9. In the context of lawyers' biennial registration requirements, 22 N.Y.C.R.R. § 118.1(g) defines "retired" as follows: "An attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law." In turn, the regulation defines "practice of law" as "the giving of legal advice or counsel to, or providing legal representation for, a particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere."

(64-12)

Ethics Opinion 962

Committee on Professional Ethics of the New York State Bar Association (3/18/13)

Topic: Payments to a witness for travel expenses and attorney's fees

Digest: A lawyer may arrange a client's payment of reasonable travel expenses and legal fees of a witness if such payment is not prohibited by law and is not contingent on the witness's testimony or the outcome of the case.

Rule: 3.4(b)

FACTS

1. The inquirer represents the proponent of a will who seeks the testimony of a witness to authenticate that will. Although the witness lives within the state, the witness resides several hours from the courthouse of the county where the probate proceeding is pending. In addition, the witness has requested that her counsel be present during the testimony.

QUESTIONS

2. May the lawyer for the proponent of a will ethically arrange the client's payment of travel expenses (air fare and hotel accommodations) for an in-state witness who has been asked to testify on behalf of the proponent?

3. May the lawyer for the proponent of a will ethically arrange for the client's payment of the legal fees of the in-state witness who has requested that her attorney be present for the examination?

OPINION

A. Payment of travel expenses

4. The Surrogate's Court Procedure Act §1404(5) states that the testator's estate shall ordinarily pay for the costs of the initial production and examination of the first two attesting witnesses within the state and, if necessary, a witness without the state who is closest to the county in which the probate proceeding is pending.

5. The Civil Practice Law and Rules ("CPLR") contains provisions on witness compensation. CPLR §8001(a) ("Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city."); CPLR §8001(b), (c) (additional fees in certain circumstances); CPLR §2303 ("Any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.").

6. Rule 3.4 of the New York Rules of Professional Conduct (the "Rules") is instructive in this matter. It states in part as follows:

> "A lawyer shall not:…
>
> "(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:
>
> "(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or
>
> "(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses."

7. Comment [3] to Rule 3.4 states that the above-quoted proscription "applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness's reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness' testimony or the outcome of the case is prohibited."

8. Prior opinions set forth the rationale underlying the predecessor to Rule 3.4(b), which was "to prevent compensation that would have a tendency to lead to the 'production of fraudulent evidence and to the giving of falsely colored testimony as well as to [the prevention of] outright perjury.'" N.Y. State 668 (1994) (citing N.Y. State 547 (1982)), *cited in Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013). "We must attempt to draw the line between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the

truth seeking process because it tends to 'influence' witnesses to 'remember' things in a way favorable to the side paying them." N.Y. State 668 (1994).

9. Rule 3.4 proscribes witness inducements that are "prohibited by law." While we do not opine on legal questions, we note case law indicating that "the fee set forth in CPLR 8001(a) is a minimum fee," *Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013) (citing commentary that "payment of more than the $15 daily fee is not precluded under either the law or code of ethics," but holding that in some circumstances high fees may warrant a jury charge); *In re Feinberg*, 2012 WL 4748323 (Sur. Ct. Queens Co. 2012) ("Although a witness need not be paid more than the statutory attendance fee and mileage, there is nothing that expressly prohibits voluntary payments in excess thereof").

10. The only other prohibition in Rule 3.4(b) applies to payments contingent upon testimony or outcome. *See* N.Y. State 714 (1999) ("What is reasonable, and therefore permitted, should first be considered in terms of what is expressly forbidden under the [predecessor rule], namely, the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."). No such contingency is intended or explicit under the terms of the inquiry made to us, nor do we think that any implicit contingency may be inferred from the terms of that inquiry.

11. The ABA ethics committee concluded that under Model Rule 3.4, a lawyer is permitted to "compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction." ABA 96-402. The opinion also indicates that the lawyer should explain the basis of compensation, stating that such compensation would not violate the Model Rules "[a]s long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony," *id*., or to reimburse "travel expenses, including lodging when an overnight stay is required," *id*. n.3. Finally, the "amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony." *Id*.; *see Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013) (although statutory fee "is only the minimum that must be paid to a subpoenaed fact witness, that does not mean that an attorney may pay a witness whatever fee is demanded, however exorbitant it might be").

12. We agree with the implication of ABA 96-402 that reasonable payment for travel expenses can, consistently with the policy of the rule, ease the burden of testifying witnesses without tending to influence their testimony. Such amounts should be considered "reasonable related expenses" within the meaning of Rule 3.4(b)(1). Accordingly, a lawyer's payment of such expenses on behalf of a client, though in excess of statutory fees, is not improper.

13. Although we cannot provide a bright line amount that on its face would be deemed to be an unreasonable payment to the witness, we can find some guidance: "As long as the reimbursement does not exceed the witness's actual out-of-pocket expenses and does not fall outside the standard types of expenses (*e.g.*, travel, lodging, meals), it should generally be considered reasonable." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 892 (2013 ed.); *cf*. *Caldwell v. Cablevision Sys. Corp.*, 86 A.D.3d at 52 (as to distinction between paying for lost time and paying for testimony, noting that payments that "are unreasonably high or disproportionate to the value of the time actually spent testifying can give rise to an inference that the payment was actually a fee for testifying, which carries with it the possibility that the witness will be unconsciously inclined to give testimony favorable to the party who has paid him or her"), *aff'd*, *Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013).

B. Payment of legal fees

14. The witness has requested that her counsel be present during her examination. In order to determine whether the inquirer may arrange payment of the witness's legal fees, we again must consider whether, under Rule 3.4(b) and its policies, such payment should be considered compensation for reasonable expenses related to attending, testifying, preparing to testify or otherwise assisting counsel.

15. Another ethics committee, interpreting the predecessor to Rule 3.4, has addressed the question whether a lawyer could advance legal fees to a witness for purposes of an informal interview of that witness. The opinion pointed out that there are "a number of reasons why a witness

may wish to be represented by counsel in an interview or in formal discovery proceedings," and saw "little risk that the presence of counsel to a witness will interfere with or hinder the truth seeking process." N.Y. County 729 (2000). In particular, the committee opined that the payment of counsel fees could not reasonably be expected to influence the witness's testimony, because such a payment "is of no use to the witness outside of the litigation." The opinion concluded that the legal fees were (in the words of the predecessor rule) "[e]xpenses reasonably incurred in attending or testifying," and that the lawyer could properly advance such expenses. *Id*.

16. We believe that although N.Y. County 729 was interpreting a predecessor rule, its reasoning and result are equally applicable to the very similar text and policies of Rule 3.4(b). Reasonable payment for legal fees should, like payment of travel expenses, ease the burden of testifying witnesses without tending to influence their testimony. Accordingly, reasonable legal fees may be "reasonable related expenses," payment of which is permitted by Rule 3.4(b)(1).

CONCLUSION

17. It is ethically permissible for an attorney, on behalf of the proponent of a will, to pay a witness's reasonable expenses related to testimony, including reasonable travel expenses such as air fare and accommodations, and also the witness's reasonable legal fees, as long as such payments are not contingent upon the witness's testimony or the outcome of the matter.

(70-12)

Ethics Opinion 963

Committee on Professional Ethics of the New York State Bar Association (3/19/13)

Topic: Duty to report false evidence offered by, and apparent criminal conduct by, actual or prospective client

Digest: A civil legal services attorney is not required to report to a tribunal (a) inaccuracies in an application filled out by an actual or prospective client and contained in the record of an administrative tribunal, or (b) the actual or prospective client's apparent criminal failure to register his current address as a sex offender.

Rules: Rules 1.6(a), (b)(2); 1.9(c); 1.18; 3.3(a), (b)

FACTS

1. A person contacted a civil legal services agency for representation on an unspecified administrative law matter and met with an employee of the legal services agency. The person gave the legal services agency a written consent to view the administrative record.
2. The legal services agency supplied the administrative tribunal with the person's written authorization for the legal services agency to review the administrative record, and the inquiring attorney reviewed the administrative record.
3. The administrative record contains the person's signed written application. The application contains the following statement:

   > "You declare under penalty of perjury that all the information on this summary is true and correct to the best of your knowledge. Anyone who knowingly gives a false or misleading statement about a material fact in an application…commits a crime and may be sent to prison or may face other penalties, or both."

4. On the application, the person admitted having been convicted of a felony, and gave an address at which he stated he had resided for ten years.
5. During a telephone conversation between the inquiring attorney and the person, the person revealed that he had served time in the New York State prison system for rape. However, the legal services attorney was unable to find the person's name in the New York State Department of Corrections and Community Supervision ("DOCCS") information database. The attorney then conducted an internet search for the person's name, which showed that the person is also known by a name different from the one on his application. The newly discovered name yielded a hit on both the DOCCS site and the New York State sex offender registry. The latter indicated that the person is a level-three sex offender (indicating a high risk of repeat offense and a threat to public safety), with ongoing reporting responsibilities. The person's photo on the sex offender website, dated approximately one year ago, has been positively identified by the legal services agency employee who initially met with the person.
6. The address given to the legal services agency by the person is in a different county than the address contained in the sex offender registry (which the website says is up to date). An offender is required to report a new address within ten days of moving, check in every ninety days, and report his whereabouts to local law enforcement after any move. Failure to report is a felony.
7. After the person failed to appear at the legal services agency for two appointments and failed to return telephone calls, the agency determined not to represent him going forward, and it never filed an appearance on behalf of the person before the administrative tribunal. However, the administrative matter remains pending.

QUESTION

8. Does the legal services attorney have an ethical obligation to report to the administrative tribunal the conflicting information about the name and address of the person who sought representation?
9. Does the legal services attorney have an ethical obligation to alert local police or the sex offender registry as to the whereabouts of the person who sought representation?

OPINION

10. The duties of an attorney to a particular person may vary depending on whether the attorney formed an attorney-client relationship with the person. The person who sought representation from the legal services agency was at least a "prospective client," defined in Rule 1.18(a) of the New York Rules of Professional Conduct (the "Rules") as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." The person may eventually have become a client. Whether the prospective client relationship blossomed into a full-fledged attorney-client relationship is a matter of substantive New York contract law,

see, Toussaint v. James, 2003 WL 21738974, at *8 (S.D.N.Y. 2003); *Gottlieb, Rackman & Reisman, P.C. v. Marusya, Inc.*, 2004 WL 3188074, at *1 (Civ. Ct. N.Y. Co. 2004); Rules Scope ¶ [9] ("principles of substantive law external to these Rules determine whether an client-lawyer relationship exists"). This Committee does not have jurisdiction to opine on questions of substantive law.

11. If an actual attorney-client relationship developed, then the person is now a former client because the legal services agency has declined to represent him any further. An attorney owes a duty of confidentiality to a former client under Rule 1.9(c), which in turn cites to Rule 1.6. Rule 1.6(a) prohibits the attorney from knowingly revealing confidential information unless a countervailing obligation or exception requires or permits the disclosure. Rule 1.6(a) defines confidential information as follows:

> "'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.…"

12. The information learned about the person in question here was "gained during or relating to the representation" and would "likely be embarrassing or detrimental to the client if disclosed." It is therefore "confidential information" under Rule 1.6(a).

13. Even if the interactions never blossomed into an attorney-client relationship, the person in question was nevertheless a "prospective client" within the meaning of Rule 1.18(a) because the person contacted the legal services agency seeking representation, met with an agency employee to discuss the possible representation, and spoke about it with the inquiring attorney by telephone. (Rule 1.18(e) excludes certain categories of people from the definition of prospective clients, but those exceptions are not relevant here.) Accordingly, the inquiring attorney owes some degree of confidentiality to the person because Rule 1.18(b) provides as follows:

> "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client."

14. The inquiry raises interesting questions about the duty of confidentiality to a prospective client where no actual attorney-client relationship develops, including whether the inquiring attorney is permitted to disclose the person's other name to the administrative tribunal, or is permitted to alert local police or the sex offender registry as to the person's current address. But we do not address those questions because the inquiring attorney has not asked us whether he is *permitted* to disclose that information—he has asked only whether he is *mandated* to disclose that information. We therefore analyze the questions of mandatory disclosure, and do not reach questions relating to permissive disclosure. As we now explain, the inquiring attorney has no mandatory disclosure duty.

A. Is there a duty to disclose to the administrative tribunal?

15. The only provisions in the New York Rules of Professional Conduct that require a lawyer to disclose confidential information are found in Rule 3.3 ("Conduct Before a Tribunal"). The relevant sections provide as follows:

> "(a) A lawyer shall not knowingly:
>
> "(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
>
> "(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. …
>
> "(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> "(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

16. For purposes of this inquiry, we assume that the information given by the actual or prospective client to the administrative tribunal, as to his true name and address history, was false.

17. Rule 3.3(a)(1) does not apply here. It applies to a false statement of material fact or law previously

made to the tribunal "by the lawyer." Here, the false statements were made not by the lawyer, but rather by the client or prospective client. Rule 3.3(a)(1) therefore does not require the inquiring attorney to correct the false statements.

18. Rule 3.3(a)(3) likewise does not apply. The main thrust of Rule 3.3(a)(3) is to prohibit an attorney, in conduct before a tribunal, from offering or using evidence that the lawyer knows to be false. Here, although the lawyer made some preliminary inquiries as to the administrative matter, he never filed an appearance in that matter. Because the lawyer did not and will not represent the person before the tribunal, he did not and will not "offer or use" the false information on the person's application.

19. At first glance, the second sentence of Rule 3.3(a)(3), taken in isolation, might appear to apply. It says that "[i]f…the lawyer's client…has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." But this sentence cannot be read in isolation. It must be read together with the opening clause of Rule 3.3(a)(3), and it clarifies that a lawyer's duties under the rule apply even when the lawyer has offered the false evidence through a client or witness, and even when the lawyer learns of the falsity subsequent to the admission of that evidence. Here, the lawyer has not offered false evidence in any of these ways. It would not make sense to require a lawyer to take reasonable remedial measures regarding proceedings before a tribunal in which the lawyer has never appeared on behalf of the client.

20. There is a second reason that Rule 3.3(a)(3) may not apply. This provision is triggered when a client has offered material "evidence" which the lawyer comes to learn is false. The term "evidence" presumably refers to documents and testimony submitted to a tribunal to persuade it to reach a decision on the merits. In some contexts, therefore, an "application" may not constitute evidence, within the meaning of this Rule, unless and until it were offered to the tribunal as part of formal proceedings. We do not opine on this in the present context, however, as the inquiry does not reveal the nature of the application or the administrative proceeding.

21. Rule 3.3(a)(1) and (3) therefore place no obligation upon the attorney.

22. Similarly, Rule 3.3(b) requires corrective action by an attorney who learns of a client's intended or past criminal or fraudulent conduct even where the attorney has had no active role in the misconduct, but only if the lawyer "represents a client before [the] tribunal." Here, the legal services agency has declined to represent (or to continue to represent) the person, and it never filed a notice of appearance. Because the inquiring attorney has not represented the client before the administrative tribunal, Rule 3.3(b) is inapplicable as well.

B. Does the attorney have a duty to disclose to the police or the sex offenders registry?

23. The inquiring attorney has learned that the client has apparently committed the felony of failing to report a new address within ten days of moving, as is required of sex offenders. Rule 1.6(b)(2) permits an attorney to reveal or use confidential information to the extent that the lawyer reasonably believes necessary to prevent the client from committing a crime, but as explained by this Committee in N.Y. State 866 at ¶26 (2011):

> "Rule 1.6(b)(2) does not permit disclosure of confidential information concerning a completed or past crime; it applies only to confidential information necessary to prevent a continuing or otherwise future crime."

24. Whether the alleged crime is a continuing or future crime is a question of law, *see*, *e.g.*, *Willette v. Fischer*, 508 F.3d 117 (2d Cir. 2007) (rejecting State's contention that "the change-of-address violation was a 'continuing violation, with each day potentially giving rise to a new charge'"). We do not opine on such legal questions. N.Y. State 866 at ¶26 (2011) ("Whether the [client] has committed a crime…, and whether that crime is a continuing one, are questions of law beyond the jurisdiction of this Committee.").

25. In any event, Rule 1.6(b)(2) is strictly permissive—it does not *require* a lawyer to disclose anything. Thus, the inquiring attorney has no duty to disclose address information to the police or to the sex offender registry.[1]

CONCLUSION

26. The attorney has no mandatory disclosure obligations.

Endnote

1. This reasoning also applies to the actual or prospective client's false statements on the application to the tribunal. Even if submission or use of that false application were to constitute a crime, neither Rule 1.6(b)(2) nor any other Rule *requires* a lawyer to disclose a client's intention to commit a crime, much less the client's commission of a past crime.

(36-12)

Ethics Opinion 964

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

Topic: Virtual law office; office address; advertising, business cards and letterhead

Digest: Advertising for legal services may not identify a mail drop as the sole address, and must include the street address of the lawyer's principal office; a lawyer's business cards and letterhead may use a mail drop as the sole address, provided they are not being used as advertising and use of the address is not misleading.

Rules: 1.0(a); 7.1(h); 7.5(a); 8.4(c)

FACTS

1. Inquirer conducts a general practice, with an emphasis on immigration law, primarily on-line or by other electronic means of communication. Inquirer meets with clients and others only by appointment, usually by telephone or Skype or at the client's or other person's location and only rarely at her home, where her files, communications tools and desk are located. Inquirer does not wish to receive mail or drop-in clients or third parties at her home. She plans to use a commercial mailbox service address as her mail address and would prefer not to identify her home address in any advertising she may undertake or on her business cards and letterhead, using instead only her mailbox address.

QUESTIONS

2. May a lawyer use a commercial mailbox service address as the only office address listed in advertisements, omitting the address of her physical office?

3. May a lawyer use a commercial mailbox service address as the only office address listed on business cards and letterhead, omitting the address of her physical office?

OPINION

A. May lawyer advertising include a mailbox service address instead of an office address?

4. Rule 7.1(h) provides, in pertinent part, that "[a]ll advertisements shall include…the principal law office address…of the lawyer or law firm whose services are being offered." This seems unambiguously to require a physical office address. Moreover, this understanding of the requirement is consistent with prior interpretation and the history of the Rule.

5. In 2002, when the Code of Professional Responsibility was in force, this Committee construed the term "office address" in DR 2-101(k), the precursor of Rule 7.1(h), to mean a physical street address at which the principal office of the lawyer or firm is located. The Committee noted that this was the accepted meaning of the term prior to advent of the Internet, and reasoned that the requirement of an office address continued to serve several useful purposes that would not be similarly served by electronic addresses.[1] The Committee concluded that advertising for legal services "may not list a website or email address as the sole address, but must also include the street address of the lawyer's office." N.Y. State 756 (2002).

6. In the advertising rules adopted by the Appellate Divisions in 2007, DR 2-101(k) was carried forward as DR 2-101(h) with the modification of "office address" to read "principal law office address," as the corresponding Rule 7.1(h) reads today. We think this 2007 modification served to underscore the intent of the Appellate Divisions that all lawyer advertisements were to disclose the address of an office where the lawyers were present and available for contact, and where personal service or delivery of legal papers could be effected.

7. That the same language was carried forward in *haec verba* in the Rules of Professional Conduct adopted by the Appellate Divisions in 2008, effective April 1, 2009, despite the fact that the requirement was not in the rules proposed by the New York State Bar Association, reinforces our view that the Appellate Divisions intended no change in the prior mandate, and that the current Rule 7.1(h) still requires that advertising include the street address of a principal law office.

B. May business cards and letterheads include a mailbox service address instead of an office address?

8. Lawyers are explicitly *permitted* to use business cards and letterheads giving "addresses," which of course includes the traditional kind of office street address. Rule 7.5(a)(1) (business cards); Rule 7.5(a)(4) (letterhead). The inquiry poses the question whether lawyers are *required* to include such office addresses on any cards and letterheads that they may use.

9. Rule 7.5 provides that a lawyer or law firm may use "professional cards" (*i.e.*, business cards) and

letterheads "provided the same do not violate any statute or court rule and are in accordance with Rule 7.1" on advertising. As noted above, Rule 7.1(h) requires that advertisements include the physical address of the lawyer's principal office. We see no exception from the mandate of Rule 7.1(h) for advertisements that are in the form of business cards or letterhead. If a business card or letterhead were to constitute an advertisement, it would be required to include the lawyer's principal office address.

10. "Advertisement" is defined as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm," though not including "communications to existing clients or other lawyers." Rule 1.0(a). "Not all communications made by lawyers about the lawyer or the law firm's services are advertising." Rule 7.1, Cmt. [6].

11. When a business or professional card or letterhead is used in the ordinary course of professional practice or social intercourse without primary intent to secure retention—*e.g.*, simply to identify the lawyer—it does not constitute advertising.[2]

12. In that circumstance, Rule 7.1(h) imposes no burden on the lawyer to include her principal law office address or, for that matter, any address. *See* N.Y. State 936 (2012). Nor would Rule 7.5 impose any such requirement, because as noted above, its provisions are entirely permissive as to the use of professional cards and letterhead that give addresses; in contrast to Rule 7.1(h), they do not require the inclusion of a lawyer's or law firm's principal law office address or any address.

13. Of course it is also possible that a lawyer could design or use cards or letterhead in atypical ways. If such cards or letterhead were given or sent to someone other than an existing client or another lawyer, and primarily in furtherance of an effort to secure retention of the lawyer or law firm, then the card or letterhead would constitute advertising.[3] In that case, Rule 7.1(h) would require it to include a principal law office street address.[4]

14. To say that the more customary uses of cards and letterhead do not constitute advertising does not end the inquiry, because there are ethical constraints other than those that apply to advertising. A lawyer may not use a mailbox service address (or any other content of a card or letterhead) to mislead.[5] For example, a mailing address that is in a community other than the one in which the lawyer's physical office is located, or that appears to be a physical address when it is in fact only a mail drop, could be misleading if not adequately explained.[6] If use of a business card or letterhead were to constitute "conduct involving dishonesty, fraud, deceit or misrepresentation," it would be prohibited under Rule 8.4(c).

CONCLUSION

15. Advertising for legal services may not identify a mail drop as the sole address, but must also include the street address of the lawyer's principal office.

16. A lawyer's business or professional cards and letterhead may use a mail drop as the sole address, provided they are not being used as advertising and use of the mail address is not misleading.

Endnotes

1. These purposes included facilitation of "a prospective client's ability to make an intelligent selection of a lawyer"; of contact by the lawyer's "clients, adversaries and other interested parties"; of a client's ability to find and meet with the lawyer "at a known physical location"; and of "the personal service or delivery of legal papers and other correspondence where that mode of delivery is elected." N.Y. State 756 (2002).

2. *See* N.Y. State 936 (2012) (applying Rule 7.1 to letterhead only when the letterhead is used in a communication that constitutes an advertisement); *cf.* Rule 7.1, Cmt. [8] (communications for marketing or branding are not necessarily advertisements, and items like legal pads or coffee mugs printed with firm contact information are not advertisements within rule "if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter"); N.Y. State 937 (2012) (communications intended to raise general brand awareness are not advertising even if there is an underlying motivation to increase a lawyer's business).

3. *Cf.* N.Y. State 937 (2012) (cautioning that if promotional items "were marked with more than the firm logo—if for example they included slogans or more information about the firm"—then they could constitute advertising subject to Rule 7.1).

4. Alternatively, the letterhead might not itself constitute advertising but could appear on a letter with advertising in its text. In that case as well, the advertisement (though not necessarily the letterhead) would be required to include the lawyer's office address.

5. While Rule 7.1(a)'s proscription of misleading statements in advertising may not apply to traditional business and professional cards that are not advertisements, "there are also other more general rules governing use of misleading statements." N.Y. State 936, *supra* (citing Rules 4.1 and 8.4(c)).

6. *See* N.Y. State 881 (2011) (opining that listing spouse's law firm address on letterhead, without appropriate arrangements or disclaimers, would be misleading); N.Y. State 546 (1982) (opining that letterhead may list a branch office open only several days per month, if accompanied by appropriate disclaimer indicating limited hours, but noting that it would be deceptive and misleading "to list a 'mail drop' as a branch office…without some appropriate explanation").

(2-13)

Ethics Opinion 965

Committee on Professional Ethics of the New York State Bar Association (4/10/13)

Topic: Conflicts of interest

Digest: A Town attorney who has given a Town building inspector legal advice about issuance of a certificate of occupancy for a building may, ordinarily, appear for the Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit for that building. If there were unusual circumstances that would involve the attorney in representing differing interests, then the attorney could not represent the Board absent appropriate client consent.

Rules: 1.7; 1.13(a), (d)

FACTS

1. The inquirer was retained by a Town to provide services as Town Attorney. In that capacity, the inquirer provided legal advice to the Town building inspector concerning issuance of a certificate of occupancy for a building to be constructed by Property Owner A pursuant to a building permit issued by the Town. Property Owner B, a neighbor of Property Owner A, had objected to issuance of the building permit to Property Owner A and appealed that issuance to the Town Zoning Board of Appeals, which denied the appeal. Property Owner B has commenced an Article 78 proceeding against the Zoning Board of Appeals. The Zoning Board of Appeals wants the inquiring attorney to appear for it in the Article 78 proceeding.

QUESTION

2. May an attorney appear for a Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit, although the attorney has given a Town building inspector legal advice concerning issuance of a certificate of occupancy for the building in question?

OPINION

3. A lawyer for a governmental organization, like a lawyer for a private organization, represents the organization as an entity and does not thereby automatically represent any of its constituent individuals. *See* New York Rules of Professional Conduct ("Rules"), Rule 1.13(a) & Cmt. [9]. However, the lawyer may be engaged to represent one or more such constituents as well, subject to the provisions of Rule 1.7 on conflicts of interest. *See* Rule 1.13(d).

4. Thus, a lawyer providing services to constituents of a governmental entity does not necessarily represent those constituents in their own right, but rather may be providing the services solely in the course of representing the entity. In particular, a Town attorney may provide legal services to constituents like a building inspector and a Zoning Board of Appeals,[1] but such services may nonetheless be rendered in the course of representing the town rather than those constituents.[2] Whether in a given case the attorney for an entity represents only that entity or also some of its constituents "can depend on the circumstances and may be a question of fact," and it will ultimately depend on legal considerations beyond the scope of the Rules. Rules Scope ¶ 9; *see* Rule 1.13, Cmt. [9] (referring specifically to government entities). Such matters are not within our jurisdiction, and we do not opine on them.

5. Rule 1.7(a)(1) provides that except when allowed by appropriate client consent, "a lawyer shall not represent a client if a reasonable lawyer would conclude that…the representation will involve the lawyer in representing differing interests…."

6. Insofar as the lawyer provides services to various constituents in the course of representing the Town as an entity, there will be no representation of differing interests, but only a representation of the interests of the Town. A lawyer may represent a single client in multiple matters without risk of representing differing interests. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 266 (2013 ed.) (Rule 1.7(a)(1) can create conflicts for any lawyer or law firm "that has more than one client").

7. We also consider the situation that would arise if the inquirer's proposed appearance in the Article 78 proceeding were to involve a representation of the Zoning Board of Appeals in its own right. In that case, there could theoretically be representation of differing interests, but that is not to say that such differing interests would actually exist.

8. When we previously considered such a situation, we found the existence of differing inter-

ests unlikely. We opined that "the duties owed to the town board by the office of the town attorney, as well as the preeminent authority of that board, usually will be of no ethical relevance to the assistant's service as counsel to the zoning board of appeals; and, under normal circumstances, there would be no impropriety in an assistant town attorney accepting assignment to act as counsel to the zoning board of appeals." N.Y. State 501 (1979). That opinion was decided under the prior Code of Professional Responsibility, but we perceive no difference in the current Rules of Professional Conduct that would lead to a different result.

9. On the other hand, if in fact there were differing interests, then the attorney could not represent the Zoning Board of Appeals absent appropriate client consent under Rule 1.7(b). Situations in which differing interests could arise are conceivable. Indeed, N.Y. State 501 concerned an Article 78 proceeding brought against a zoning board of appeals not by a property owner but by the Town Board. We noted that when "the relationship between the two boards has become antagonistic to the point where one seeks to institute suit against the other, the theoretical harmony of their relationship must give way to the reality of their conflicting interests," and we concluded that "counsel fully independent from the office of the town attorney should be retained to represent the zoning board of appeals." *See also* Rule 1.7(b)(3) (conflict may not be cured by client consent when attorney represents two clients before a tribunal where one is asserting a claim against the other).

10. The current inquiry, however, does not involve any proceeding brought by the Town against the Zoning Board of Appeals. Nor is there any other respect in which the facts of the inquiry contain any suggestion of differing interests that could take this situation out of the ordinary rule.

CONCLUSION

11. Under the facts of the inquiry, an attorney who gave legal advice to the Town Building Inspector as to issuance of the certificate of occupancy for a building may appear for the Town Zoning Board of Appeals in an Article 78 proceeding involving issuance of a building permit for that building.

Endnotes

1. "The zoning board of appeals is an agency of the town and the assistant town attorneys are generally obliged to act in a manner consistent with the broad scope of the duties impressed upon the office of the town attorney. Those duties include rendering legal advice to the town's zoning board of appeals." N.Y. State 501 (1979) (citing 21 Op. State Compt. 322 (1965) (duties of town attorney include acting as legal advisor to all town officers) and 1973 Atty. Gen. (Inf.) 208 (interpreting Town Law § 20[2] to require town attorney to render legal advice to all town boards)).
2. *See* 21 Op. State Compt. 322 (1965) (duties of a town attorney include acting as legal advisor to all town officers "in their official capacities"); *cf.* N.Y. City 2004-03 ("unless circumstances indicate otherwise, a government lawyer representing an official named solely in his or her official capacity would still, in effect, be representing the client agency alone, and, unless circumstances indicated otherwise, the government lawyer would deal with the named official as a constituent of the agency rather than as someone personally represented by the government lawyer").

(72-12)

Ethics Opinion 966

Committee on Professional Ethics of the New York State Bar Association (5/21/13)

Topic: Private practice of law by town court clerk

Digest: A town clerk wishing to represent a private client in a matter pending in another town court may be limited by law and court rules, but is not automatically prohibited from such representation by the rules of legal ethics even if the client also has a matter pending before the clerk's court. If the clerk has substantive responsibilities for the pending matter and is thus in a position to influence the tribunal, then the representation may be prohibited by Rule 1.11(f)(2) unless the clerk informs the judge of the relationship so that the judge may take appropriate action. If the clerk does not participate in the pending matter or has solely ministerial duties, then the clerk would be able to represent the client, if not barred by any personal-interest conflict, but may not use the clerk's public office to try to influence either of the town courts in favor of the client.

Rules: 1.7(a), 1.11(d), 1.11(f)

FACTS

1. The inquiring lawyer, a court clerk in a town court ("Town Court A"), would like to represent a client who has a matter pending in another town court ("Town Court B"), when the same individual has a matter pending in Town Court A. The court clerk does not represent the client in the matter pending in Town Court A.

QUESTION

2. May a lawyer who is a court clerk in Town Court A represent a client who has a matter pending in Town Court B, when the same individual has a matter pending in Town Court A?

OPINION

3. There may be legal provisions governing government officers, and court rules that govern conflicts of interest of court clerks arising from outside activities.[1] The Committee provides guidance only on the application of the Rules of Professional Conduct (the "Rules"). The application of legal provisions and rules of court is beyond the Committee's jurisdiction, and we do not address those regulatory schemes. Rather, we assume for purposes of this opinion that all relevant court rules allow the lawyer/clerk to represent private clients as contemplated, and that the representation is not prohibited by law, such as local government ethics codes. We also assume that the client's matters in Town Court A and Town Court B are not related.

4. As an ethical matter, a lawyer in the position of the inquirer must, when engaging in private practice, avoid any impermissible conflicts with the lawyer's duties as a court clerk. We consider the Rules that delineate such conflicts.

5. We believe the Rule most likely to be implicated is Rule 1.11(f)(2), which provides: "A lawyer who holds public office shall not…use the public position to influence, or attempt to influence, a tribunal to act in favor of…a client." While the term "public office" is not defined, we believe, based on the Rule's text and underlying principles, that it would apply to court clerks. *Cf*. Rule 1.1l, Cmt. [4] (applying to situation in which lawyer represents a government agency and another client successively):

> "A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service."

Although the comment relates to a government employee who at times represents the government as well as a private client, the same concerns would apply where the lawyer does not represent the government, but is a court clerk who might be in a position to assist a private client. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 610 (2013 ed.) (stating that Rule 1.11(f) covers lawyers who are not serving as lawyers during their government service).

6. The applicability of Rule 1.11(f)(2) does not mean that in all cases, the inquirer would be precluded from representing the private client in Town Court B. If the inquirer's duties as a court clerk would not include any duties in connection with the client's matter before Town Court A (and if the inquirer did not seek in any way

other than the performance of assigned duties to influence Town Court A), then the Rule would not prohibit representation of the private client in the matter before Town Court B.

7. Moreover, that representation may be permissible even if the inquirer had very limited duties in connection with the client's matter before Town Court A. If the inquiring clerk's duties are solely ministerial, such as assigning docket numbers to cases, then we believe the clerk would generally not be in a position to influence the tribunal in Town Court A to act in favor of the client represented by the clerk in Town Court B.

8. However, if the clerk's responsibilities include providing research or advice, or otherwise assisting the judge handling the matter, then the clerk may well be in a position to influence the tribunal, implicating Rule 1.11(f)(2).[2] In such a circumstance, we believe the representation of the client before Town Court B would be prohibited unless the clerk were to inform the judge in Town Court A before whom the client's matter is pending of the clerk's proposed relationship with the client, so that the judge may take appropriate action, including ensuring that the clerk does not participate in the case and is not in a position to exert any influence.

9. We note two further restrictions that would apply even when the inquirer's representation of the client in Town Court B would be permissible under the analysis above. First, Rule 1.11(f)(2) would prohibit the clerk not only from using his or her public office to try to influence Town Court A, but also from using it to try to influence Town Court B.

10. Second, Rule 1.7(a)(2), which governs personal-interest conflicts, applies to lawyers in government.[3] Although the facts as submitted do not suggest such a conflict, the inquirer should be mindful of this rule. The inquirer could not represent the client in Town Court B, except with that client's informed consent, when a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial, business, property or other personal interests, including, in this case, the lawyer's government employment.

CONCLUSION

11. The lawyer's ability to represent private clients may be limited by law or court rules, such as the Chief Judge's Rules Governing Conduct of Nonjudicial Court Employees. We do not opine on the applicability or import of any such restrictions.

12. No ethical rule invariably prohibits a town court clerk who is a lawyer from accepting a private client in a matter pending in another town court, even if the client also has a matter pending before the clerk's court. The clerk may represent the client if the clerk does not participate in that matter pending before the clerk's court, or participates in ways that are solely ministerial. If the clerk has substantive responsibilities for such matters and is thus in a position to influence the tribunal, then the clerk may not represent the private client unless he or she informs the judge of the relationship with the client, so that the judge may take appropriate action, including ensuring that the clerk does not participate in the case and is not in a position to exert any influence. In any event, the clerk may not represent the client if barred by a personal-interest conflict, and may not use his or her public office to try to influence either town court to act in favor of the client.

Endnotes

1. *See* Rule 1.11, Cmt. [1] (lawyer currently serving as a public officer or employee "may be subject to statutes and government regulations regarding conflicts of interest"). For example, the Chief Judge has adopted "Rules Governing Conduct of Nonjudicial Court Employees," 22 N.Y.C.R.R. §§ 50.1 - 50.6. *See, e.g., id*. § 50.1 ("Code of ethics for nonjudicial employees of the Unified Court System"); § 50.6(a) (practice of law by full-time employees); § 50.6(d) (practice of law by part-time employees). However, we do not address the applicability or import of those provisions in the circumstances of this inquiry.

2. Moreover, if the clerk's personal involvement were "substantial," another provision could be implicated. Under Rule 1.11(d)(2), a lawyer currently serving as public officer or employee may not negotiate for private employment with any person who is involved as a party in a matter in which the lawyer is participating personally and substantially, except as may otherwise be expressly provided by law. If negotiating to be retained constitutes negotiating "for private employment" under this Rule—a question we need not reach in light of our analysis above—then this Rule would be relevant as well.

3. *See* Rule 1.11, Cmt. [1] ("A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7.").

(40-12)

Ethics Opinion 967

Committee on Professional Ethics of the New York State Bar Association (6/5/13)

Topic: Lawyer advertising

Digest: A blog written by an attorney, the primary purpose of which is not retention of the attorney, is not an advertisement.

Rules: 1.0(a) & (c), 7.1(k)

FACTS

1. The inquirer is a columnist who is also an attorney licensed in New York. The inquirer has become an employee of a corporation that promotes work-life balance. In that capacity the inquirer will write a blog that will be titled "The [Inquirer's Name] Esq. Blog." The blog will not address legal topics but will include posts about work-life balance.[1]

QUESTION

2. Is the inquirer's blog an advertisement and thus subject to the retention and preservation requirements of the attorney advertising rules?

OPINION

3. Rule 7.1 of the New York Rules of Professional Conduct contains extensive requirements relating to advertising by attorneys. Rule 7.1(k) provides: "Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved" at specified times.

4. Rule 1.0(c) defines "computer-accessed communication" as "any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto." A blog disseminated over the internet is clearly a "computer-accessed communication" as defined in Rule 1.0(c).

5. However, the restrictions in Rule 7.1 apply only to "advertisements" as defined in the Rules, and in particular, Rule 7.1(k) applies only to those computer-accessed communications that constitute or contain such advertisements. Rule 1.0(a) broadly defines "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." In this instance there is no question that the blog is a public communication made by a lawyer. Another element of the definition is that the communication be "about that lawyer."[2] It seems reasonable to assume that some of the posts will be about the blog's author, so we assume for purposes of this inquiry that this test is also met. The remaining question is whether the primary purpose of the blog "is for the retention of the lawyer."

6. The Comments to Rule 7.1 indicate that not all communications by and relating to a lawyer constitute an advertisement. For example, marketing and branding items such as pencils or legal pads with a firm name do not constitute advertisements if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter. Cmt. [8]. Sponsorship of cultural or sporting events, with dissemination of information about the lawyer limited to specified narrow categories, is also not considered advertising. Cmt. [10]. In an opinion on whether a lawyer could offer a prize to join the lawyer's social network, this Committee noted:

> "To fall within the definition of 'advertisement,' the communication offering the prize must be for the 'primary purpose' of the inquirer's retention. The fact that business development might be the inquirer's ultimate goal in offering the prize would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer's personal social circle, with the aim of meeting potential new clients."

N.Y. State 873 (2011). Even when communications from lawyers contain information about the law, they are not necessarily advertising.[3]

7. Since the inquirer's blog will not discuss legal matters and it appears that the inquirer does not intend to solicit clients for a law practice, the blog will not be considered an advertisement even though its name indicates that the author is an attorney.

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

CONCLUSION

9. A blog written by an attorney that does not discuss legal topics and whose primary purpose is not the retention of the lawyer is not an advertisement, and would thus not be subject to the retention and preservation rules for lawyer advertising, even though the title of the blog makes clear that the author is an attorney.

Endnote

1. For purposes of this opinion we have slightly changed the facts of the inquiry.
2. Alternatively, if the correct reading of Rule 1.0(a) is that communications otherwise within the definition are advertisements if they are made by a lawyer or law firm "about that lawyer['s] or law firm's services," then there would be an additional reason, beyond those in the body of this opinion, to conclude that the blog is not an advertisement.
3. For example, "[t]opical newsletters…or blogs intended to educate recipients about new developments in the law are generally not considered advertising." Rule 7.1, Cmt. [7]; *see also*, *e.g.*, N.Y. State 918 (2012) (educational legal video that does not encourage viewers to retain the law firm is not an advertisement because the primary purpose is not retention of the law firm); N.Y. State 899 (2011) (providing general answers to questions in a legal chat room, without more, does not constitute advertising).

(24-13)

Ethics Opinion 968

Committee on Professional Ethics of the New York State Bar Association (6/10/13)

Topic: Conflicts of interest for government lawyer; government lawyer pursuing personal claims against employer; government lawyer representing agency against claim that could also be asserted by the lawyer

Digest: A federal government lawyer subject to a mandatory furlough may bring a challenge to the furlough in an administrative tribunal if consistent with the lawyer's other ethical obligations. If the inquiring lawyer does so, however, the lawyer may not represent the agency in opposition to challenges to the furlough by other employees, unless permitted by a rule of necessity applicable if no other lawyer can defend the agency. If the inquiring lawyer does not pursue such a challenge, the lawyer may represent the agency in opposition to such challenges by others if the agency gives informed consent and the other requisites for conflict waiver are met. Other lawyers in the office may also defend the agency against such challenges if there is appropriate waiver of the conflict and those other lawyers do not pursue their own challenges.

Rules: 1.0(h); 1.1(c); 1.7; 1.10(a), (d); 1.11(d); 8.5

QUESTIONS

1. May a lawyer who is employed by a Federal government agency and is subject to employment furloughs of up to 22 days resulting from "sequestration":

   a. exercise the lawyer's statutory right to challenge his or her own sequestration furlough before the Merit Systems Protection Board, an administrative tribunal established to hear appeals by Federal government employees from "adverse employment actions"; or

   b. represent the agency before the MSPB in actions brought by other agency employees, or otherwise advise the agency regarding implementation of the furlough?

OPINION

2. The Committee has received several inquiries from civilian lawyers who are admitted in New York and are employed by Federal government agencies concerning possible conflicts arising out of potential employment furloughs resulting from the ongoing Federal government "sequestration." As a result of the sequestration (a Congressionally mandated across-the-board budget cut), many Federal employees—including attorneys—may be subjected to employment furloughs of up to 22 days. Federal employees—again, including attorneys—have the statutory right to challenge such furloughs before the Merit Systems Protection Board ("MSPB").

3. The inquirers have raised questions concerning (i) whether the inquirers may pursue their own challenge before the MSPB against their employer, and (ii) whether the fact that the inquirers are themselves subject to sequestration furloughs would present a conflict of interest if the lawyers are asked to represent their agency in appeals of the furlough brought by other agency employees, or asked to advise the agency in implementation of the furlough. We understand that the challenges to the furlough will raise issues common to all or many persons affected by it, such as the adequacy of notice under governing statutes and rules, and whether the furlough otherwise meets statutory and constitutional requirements for such job actions.

Choice of Ethics Rules

4. We address first whether New York's Rules of Professional Conduct apply at all. Each of the inquirers is admitted in New York but practices in the District of Columbia or Virginia. Each assumes that New York's ethics rules apply.

5. Rule 8.5(b) of the New York Rules of Professional Conduct is a choice-of-law rule for legal ethics. It provides that "[f]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice…, the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1). For other conduct, the rules to be applied are New York's rules if the lawyer is admitted only in New York. Rule 8.5(b)(2)(i). If the lawyer is licensed to practice in New York and some other jurisdiction, the rules to be applied are those of the "admitting jurisdiction in which the lawyer principally practices," unless "the particular conduct clearly has its predominant effect in another" admitting jurisdiction, in which case the rules of that jurisdiction apply. Rule 8.5(b)(2)(ii).

6. As the inquirers are asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule.[1] (The proposal would have adopted the usage in the ABA Model Rules of Professional Conduct.) Thus, while there may be policy reasons for treating administrative tribunals as courts, *see* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* ("*Simon's*") 1626 (2013 ed.) (noting desirability of a uniform rule for practice before a particular administrative tribunal), we do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals such as the MSPB.[2]

7. The rules to be applied, therefore, are not necessarily those of the jurisdiction in which the MSPB sits. Rule 8.5(b)(2) provides that if the lawyer is admitted in multiple jurisdictions including New York, then the conduct will be subject to the rules of either New York or one of the other admitting jurisdictions (depending on where the lawyer principally practices and possibly on the predominant effect of the conduct). If the lawyer is admitted only in New York, then New York's rules will apply.[3] We are informed that at least one of the inquirers is admitted to practice only in New York.[4] We therefore will proceed to analyze the questions under New York's Rules of Professional Conduct.

MSPB Appeal Filed by Government Lawyer

8. One of the inquiries asks whether a government lawyer who is subject to a sequestration furlough as a government employee may file an MSPB appeal on his or her own behalf against the lawyer's employer. Rule 1.1(c)(2) provides that a lawyer "shall not intentionally…prejudice or damage the client during the course of the representation except as permitted or required by these Rules." We assume for purposes of this opinion that the inquirer's client is the agency that employs him or her.[5]

9. Professor Simon opines that the phrase "during the course of the representation" includes both a temporal aspect—making clear that the duty applies only to current clients—and also a substantive limitation—"that the duty not to prejudice or damage a client applies only in ways related to the 'representation'" and does not apply to lawyer conduct "*outside* the scope of the representation." Simon's, *supra*, at 73 (emphasis in original); *accord* Nassau County 05-1 (lawyer may give testimony against current client in matter unrelated to legal services being rendered). Even if this interpretation is accepted, it is unclear whether the action contemplated here—a claim by in-house counsel relating to the terms of his or her employment as counsel—is outside the scope of the representation of the agency, which presumably extends to all the work the lawyer does while employed by the agency.

10. While Rule 1.1(c)(2) is relatively unusual—it is not part of the ABA Model Rules of Professional Conduct—it captures part of the common law duty of loyalty. It is helpful to consider the courts' consideration of that common law right in delineating the scope of the Rule. Courts have generally allowed an in-house or government lawyer to assert his or her own statutory or contractual rights against the lawyer's employer where doing so would not violate a specific ethical duty.

11. In *Santa Clara County Counsel Attorneys Assn. v. Woodside*, 7 Cal. 4th 525, 869 P.2d 1142 (Cal. 1994), an association of attorneys in the office of the Santa Clara County Counsel's office sought a declaration from the Supreme Court of California that attorneys in the association would not violate their ethical obligations by bringing a lawsuit against the county counsel's office seeking to enforce statutory collective bargaining rights. Relying on ABA informal opinions concerning the right of in-house lawyers to participate in unions and union job actions, the court recognized a need for a "realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee." *Id.* at 551, 869 P.2d at 1157. Accordingly, the court found that:

> "[I]n determining whether an action taken by an attorney or employee association violates the attorney's ethical obligations, we look not to whether the action creates antagonism between the attorney/employee and the client/employer, since such antagonism in the labor relations context is unfortunately commonplace; rather, we seek to as-

> certain whether an attorney has permitted that antagonism to overstep the boundaries of the employer/employee bargaining relationship and has actually compromised client representation."

Id. at 552, 869 P.2d at 1157. The court distinguished cases in which lawyers had been barred from pursuing claims where prosecution of the lawsuit would make use of confidential information, *Balla v. Gambro*, 145 Ill. 2d 492, 584 N.E.2d 104 (1991), or where the lawyer's claims impaired the lawyer's ability to defend the client in closely related claims that were assigned to the lawyer, *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1987). Under this analysis, the California court held, "The only realistic accommodation between the enforcement of statutory guaranties under [California labor law] and the enforcement of the Attorneys' professional obligations…is to permit [the Attorneys' lawsuit], as would be permitted to other public employees, while at the same time holding the Attorneys to a professional standard that ensures that their *actual* representation of their client/employer is not compromised." *Id.* at 553, 869 P.2d at 1157 (emphasis in original).

12. A similar result was reached in a Minnesota case brought by a lawyer alleging retaliatory discharge. *Nordling v. Northern State Power Co.*, 478 N.W.2d 498 (Minn. 1991). While by the time the suit was brought the lawyer was no longer employed by the client, the court's analysis addressed the effect of permitting the suit on the client's usual right to fire a lawyer at any time—an aspect of the current-client relationship. The Minnesota Supreme Court held, "It seems to us…that in-house counsel should not be precluded from maintaining an action for breach of a contractual provision in an employee handbook, provided, however, that the essentials of the attorney-client relationship are not compromised." *Id.* at 502. The court analyzed the particular claim at issue and concluded that it did not "appear to implicate company confidences or secrets" and, while there was a loss of trust between the lawyer and his direct superior, "this is not a loss of trust that necessarily impairs Nordling's attorney-client relationships with the constituencies of the corporate organization." *Id.* at 502-3; *see also Verney v. Pennsylvania Turnpike Comm'n*, 903 F. Supp. 826, 832 (M.D. Pa. 1995) (upholding attorney's right to bring retaliatory discharge claim for filing gender discrimination lawsuit where action did not "'so interfere[] with [Plaintiff's] performance of [her] job that it renders [her] ineffective in the position for which [she] was employed'") (citation omitted); *Parker v. M&T Chemicals, Inc.*, 566 A.2d 215, 236 N.J. Super. 451 (App. Div. 1989) (upholding in-house attorney's right to sue former employer for damages under the New Jersey Whistleblowers Act where lawyer complained that he was mistreated and constructively discharged for refusing to join illegal scheme).

13. Ethics committees in this State have considered analogous questions and reached similar conclusions. In N.Y. State 578 (1986), this Committee concluded that lawyers may join a union as long as they comply with all disciplinary rules. "If a conflict arises between union membership and a lawyer's ethical obligations under the Code, the lawyer must withdraw from the union or from the representation, or, if it is obvious that he or she can adequately represent the client… must obtain the informed consent of the client to continue the representation."[6] This Committee relied on the ABA ethics opinions upon which the California Supreme Court later relied in concluding that, by analogy, lawyers could sue their current employer as long as the "*actual* representation of their client/employer was not compromised." *Accord* N.Y. City 79-55 (1980) (if at any time membership of a lawyer in a union affects or reasonably may affect his or her professional judgment, the lawyer must choose between continuing the union membership and continuing to represent the client affected, unless the informed consent of the client is obtained): N.Y. City 82-75 (1983) (ethical obligations of attorneys employed by Legal Aid Society when their union calls a strike).

14. Similarly, in N.Y. City 1994-1, the ethics committee of the Association of the Bar of the City of New York concluded that a lawyer might sue his former employer for racially discriminatory discharge, as long as care was exercised to avoid disclosing confidential information of the former client. The Committee relied on, *inter alia*, the wrongful discharge cases discussed above.[7]

15. Based on the foregoing, we conclude that a lawyer who is subject to a sequestration furlough would not violate Rule 1.1(c)(2) merely by exercising his or her statutory right to file an appeal of that furlough on the lawyer's own behalf, but should consider whether doing so would affect his or her representation of the employer-client in violation of any other ethical rules. However, it does not appear likely that the challenges to the furlough would, for example, implicate confidential information, because those chal-

lenges would likely be based on considerations of notice and due process common to many employees.

Representation of Agency in MSPB Appeals

16. We turn next to the question of whether a lawyer who is subject to a sequestration furlough may represent the lawyer's employer-client either in connection with MSPB appeals filed by other government employees within the lawyer's agency or in implementation of the furlough generally. Rule 1.7(a)(2) prohibits a lawyer from representing a client 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." As Professor Simon wrote, a "significant" risk is "more than a possibility but less than a certainty." Simon's, *supra*, at 306.

17. Here, the risk is that a lawyer's personal interest as an employee subject to a sequestration furlough would alter the lawyer's professional judgment on behalf of the employer-client when asked to defend the same sequestration furlough or to implement the furlough. This is readily seen with respect to defending a challenge to the furlough: A good outcome for the employer client—that is, upholding the sequestration furlough, particularly as applied to employees at the lawyer's agency—would tend to harm the interests of the lawyer in the lawyer's capacity as an employee of the same agency. Conversely, a bad outcome for the employer-client—overturning the furlough—would tend to benefit the lawyer's personal and financial interests as an employee of the agency. We suspect that the same would be true for at least some of the advice that the lawyer may be asked to provide in connection with implementation of the furlough. The potential furlough could affect a substantial portion of the lawyer's annual income—up to 22 days, or approximately 8.5% of an employee's annual salary. Given this, we conclude that, in the usual case, there is a "significant risk" that a government lawyer's professional judgment on behalf of the lawyer's agency would be adversely affected by the lawyer's personal and financial interests in avoiding sequestration cuts as an employee of the same agency. *Cf.* N.Y. State 578 (1986) (State-employee lawyer who is covered by collective bargaining agreement has a conflict in representing the State in disciplinary proceedings against State employees under the agreement).[8]

18. This conflict is imputed to other lawyers in the same law office. Under Rule 1.10(a), "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

19. A "firm" is defined to include "a government law office." Rule 1.0(h). Despite that definition, there may possibly be circumstances in which a government law office is not subject to particular rules that apply to firms generally. Comment [3] to Rule 1.0 notes, "Whether lawyers in a government agency or department constitute a firm may depend upon the issue involved or be governed by other law." But in the context of this inquiry and the imputation rule, we are not aware of any governing law or other circumstances that would warrant reading "firm" any more narrowly than its definition. *Cf.* N.Y. State 900 ¶ 21 (2011) (a County Attorney's office is a "firm" under imputation rule). Our conclusion is reinforced by the Rule's history. Some jurisdictions have adopted versions or interpretations of imputation rules that do not apply to government law offices.[9] The New York State Bar Association endorsed that approach by proposing an amendment that would have made imputation under Rule 1.10(a) inapplicable to government law offices. NYSBA Proposed Rules of Professional Conduct 68 (Feb. 1, 2008) (proposing version of Rule 1.10(e) providing that "[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11"). That proposal, however, was not adopted by the courts.

20. As applied to this inquiry, Rule 1.10 imputes a personal-interest conflict of a lawyer in the government law office to any other lawyer in that office who knows of the conflict. More particularly, it means that if any lawyer in the relevant government law office is subject to the furlough, all lawyers in that law office who know that fact would have a conflict in defending the agency against a challenge to the furlough by any employee of the agency.

21. The existence of a conflict under Rule 1.7(a), however, does not end the inquiry. Under Rule 1.7(b), a lawyer who has a conflict under Rule 1.7(a) may nevertheless represent a client in the matter when certain criteria are met, namely that:

> "(1) the lawyer reasonably believes that the lawyer will be able to pro-

vide competent and diligent representation to each affected client;

"(2) the representation is not prohibited by law;

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

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

22. We have held that a public agency can give informed consent, N.Y. State 629 (1992), and we will assume that there are no laws prohibiting the representation. The remaining questions are whether a lawyer subject to the furlough can reasonably conclude that he or she will be able to provide "competent and diligent representation" to the employer's agency, and whether the representation would "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Rule 1.7(b)(1), (3).

23. On the first question, we believe that a lawyer who has not challenged the furlough could well reach a reasonable conclusion that he or she could set aside the effect on himself or herself, and competently and diligently represent the agency in defending a challenge or advising on implementation of the furlough. This is particularly the case because of the nature of the issues likely to arise in the challenge cases, which go to statutory and constitutional issues and not questions of deeply personal choice or belief.

24. Where a lawyer does file his or her own appeal against the sequestration furlough, however, we doubt that the lawyer could reasonably reach the conclusion that he or she could competently and diligently defend the agency against a similar appeal by another employee, at least where, as is likely to be the case, the issues in the lawyer's own case and those of the defense are the same. It is not just that the lawyer could profit personally from losing the argument. As a matter of common experience, a litigant frequently has or acquires a deeply held belief in the justness of his or her cause, and the merits of the arguments advanced in support, so as to make it difficult to pursue the contrary position wholeheartedly. A recent opinion by the ethics committee of the District of Columbia Bar reaches the same conclusion under the identical language of D.C. Bar Rule 1.7(c)(2):

> "In our view, the reasonable belief requirement of Rule 1.7(c)(2) is a difficult obstacle to surmount if the lawyer is asked to defend the agency against a furlough complaint with allegations that are substantially similar to the allegations she has raised in her own furlough complaint against the agency. The level of difficulty increases with the similarity of the allegations in the complaints."

District of Columbia Opinion 365 (2013).[10]

25. We do not believe that this condition of nonconsentability extends to all lawyers in the agency, however. Rule 1.10(d) contains a specific provision for consent to imputed disqualification: "A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." Thus, if the lawyer pursuing the appeal is Lawyer A and the lawyer to whom the conflict would be imputed is Lawyer B, the conflict imputed to Lawyer B can be waived under the conditions in Rule 1.7. Under our analysis above, Lawyer B (if not pursuing his or her own appeal) may reasonably conclude that he or she "will be able to provide competent and diligent representation to each affected client" within the meaning of Rule 1.7(b)(1), so that the conflict imputed to Lawyer B can be waived by the client agency. In other words, in deciding whether an imputed conflict (in the language of Rule 1.10(d), the "disqualification prescribed by this Rule") can be waived, it is necessary to apply the standards set forth in Rule 1.7(b) to the lawyer to whom the conflict is imputed.

26. In many kinds of cases, a conclusion that Lawyer A has a nonconsentable conflict will likewise apply to Lawyer B. For example, in a private law firm setting, if Lawyer A's nonconsentable conflict arises from the fact that Lawyer A cannot give enough information to one of Lawyer A's clients in order to obtain informed consent to take on representation of another client (*e.g.*, because the matter to be handled for the new client involves a still-secret hostile action to be taken against the other client), that condition would affect all lawyers in Lawyer A's firm. But where the nonconsentable nature of Lawyer A's conflict is personal to Lawyer A, the circumstances may well allow the client to consent to representation by Lawyer B.

27. To be clear, this is not to suggest that the conflict is not imputed in the first place. Nothing about Rule 1.10(d), which deals only with consent to waive an imputed conflict, alters the basic rule that all conflicts under Rules 1.7, 1.8 and 1.9—whether derived from representation of another client or from personal circumstances of one lawyer in the law firm—are imputed to all lawyers in the firm under the standards set forth in Rule 1.10(a).

28. There is one form of nonconsentable conflict that presents a different problem, and that is the situation presented by Rule 1.7(b)(3), which bars a lawyer from representing clients on both sides of the same litigation or other proceeding before a tribunal. Lawyer A cannot appear on both sides of a litigation, but can Lawyer A appear adverse to Lawyer B from the same law firm in that litigation? We think that such a situation would be governed by different considerations because litigation involves the interests not just of the affected client or clients but also of the public and the judiciary. For example, where a matter is in litigation, the appearance of lawyers from the same firm may deprive the judiciary and the public of the confidence that the adversary system, on which the development of the law depends, will function as it should. But we do not address that question with finality here, as the issue is not presented.[11]

29. Finally, we note that other provisions of the New York Rules of Professional Conduct, and our previous opinions, provide for a "rule of necessity," which allows lawyers—in particular, government lawyers—to engage in an otherwise impermissible representation in cases where there is no one else who can act. *See, e.g.*, Rule 1.11(d)(1) (permitting a government attorney to participate in a matter in which the lawyer "participated personally and substantially while in private practice or nongovernmental employment" in cases where "under applicable law no one is, or by lawful designation may be, authorized to act in the lawyer's stead in the matter"); N.Y. State 638 (1992) ("The rule of necessity thus recognizes that, as a matter of ethics, Lawyer should not be disciplined for undertaking a prosecution that the law requires and a court directs Lawyer to undertake, even if Lawyer personally and substantially participated in the matter while in private practice."); *cf*. N.Y. State 675 (1995) ("[I]n recognizing that a prosecuting attorney seeking reelection is not bound by the same limitations on his conduct as otherwise attach when he is not a candidate for reelection, we do so not for ethical reasons but under a notion of necessity in deference to the realities of the political elective process."). Ordinarily, if outside counsel, or counsel from another agency, could lawfully represent the agency, that would obviate the need to invoke any rule of necessity. N.Y. State 638 ("The disqualification created by DR 9-101(B)(3)(a) [now Rule 1.11(d)(1)] depends on the availability as a matter of law of a special prosecutor."). We have insufficient facts to determine whether a rule of necessity would apply to the inquiries before us.

CONCLUSION

30. For the reasons stated, and subject to the qualifications set forth above, a lawyer who is employed by a government agency and is subject to employment furloughs resulting from "sequestration" may exercise his or her statutory right to appeal the sequestration furlough before the MSPB, so long as the dispute does not impermissibly affect his or her representation of the employing agency. A government lawyer who is subject to a sequestration furlough, or knows that another lawyer in the same government law office is subject to such a furlough, may only represent the employee's agency before the MSPB in actions brought by other agency employees if (i) the agency gives informed consent, confirmed in writing, prior to the lawyer engaging in such representation and (ii) the lawyer does not file his or her own appeal with the MSPB.

Endnotes

1. NYSBA Proposed Rules of Professional Conduct 240 (Feb. 1, 2008), *available at* http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports.

2. We do not need to address in this opinion the question of what would happen if the rules of an administrative tribunal presented ethical requirements that conflicted with New York's rules, because the MSPB rules do not appear to impose such conflicting obligations. The MSPB permits parties to be represented by anyone of their choosing subject to relatively general rules permitting another party to challenge an adverse representative on grounds of "conflict of interest" and permitting a judge to limit a representative's participation for conduct prejudicial to the administration of justice. 5 C.F.R. §§ 1201.31(b), 1201.43(d) (2012); *see also* Standards of Ethical Conduct for Employees of the Executive Branch, *id*. Part 2635 (2013) (general conflict of interest and other standards).

3. This conclusion would also apply to representing the agency in connection with implementation of the furlough, which would not be conduct in connection with a proceeding in a court. We note that decisions by the MSPB are appealable to the U.S. Court of Appeals for the Federal Circuit, which is of course a "court" within the meaning of Rule 8.5(b)(1). So, if an MSPB decision were appealed to the Court of Appeals, conduct in connection with that appeal would be subject to "the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1).

4. We express no view on whether the inquirers' practice is permitted under the rules governing unauthorized practice in

Virginia and the District of Columbia. *Cf. Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 401 (1963) (allowing petitioner to practice federal patent law in a state in which he was not admitted to practice law because the Patent and Trademark Office had issued rules on practice before it and "[t]he rights conferred by the issuance of letters patent are federal rights").

5. We recognize that identification of a government lawyer's client is not always straightforward. *See* Rule 1.13, Cmt. [9] ("Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context."); Restatement (Third) of the Law Governing Lawyers §97, Cmt. c (2000) ("No universal definition of the client of a governmental lawyer is possible."); Roger Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 Geo. J. Legal Ethics 291, 296 (1991) (noting possibilities that government lawyer's client could be the public, the government as a whole, the branch of government in which the lawyer is employed, the particular agency or department in which the lawyer works, and the responsible officers who make decisions for the agency). We do not strive to address or resolve such issues in this opinion. *See* Rule 1.13, Cmt. [9] ("Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules."); N.Y. City 2004-03 ("Ultimately, the question of who is the government lawyer's client is a question of law and not of ethics, and one to which the government lawyer must give careful consideration in each case."). A prevailing approach, however, and the one we follow here, is that (apart from cases like Attorneys Generals' Offices or prosecution agencies), the employing agency is treated as the presumptive client. *See*, *e.g.*, N.Y. City 2004-03 (assuming generally "that the government agency is for practical purposes the 'client agency'"); Restatement §97, Cmt. c ("For many purposes, the preferable approach on the question presented is to regard the respective agencies as the clients…"); Cramton, *supra*, at 298 ("For day-to-day operating purposes, the government lawyer may properly view as his or her client the particular agency by which the lawyer is employed.").

6. The provisions of the former Code of Professional Responsibility referred to in the Committee's opinion were identical or similar to provisions of the current Rules of Professional Conduct. The text of Rule 1.1(c)(2) closely followed that of DR 7-101(A)(3). *See* Simon's, *supra*, at 73.

7. N.Y. City 1994-1 (citing *Parker* and *Nordling*). The committee raised a question whether a claim based on the common law, as opposed to statute or an employee handbook, would be permitted, citing the cases, among others, that the California Supreme Court had characterized as ones in which the attorney's suit would violate a separate ethics prohibition. We do not consider such issues here, because we understand that the furlough challenge would be based on statutory and constitutional claims.

8. This conclusion may vary with the facts of individual cases, however. Some employees may not view the furlough as a negative development, where, for example, they can replace the lost income from other sources or would welcome the opportunity to devote time to other activities. One inquirer, for example, states that he is indifferent to whether he is furloughed, because he would devote the time to paid service in the military reserve.

9. *E.g.*, ABA Model Rule 1.10(d); ABA Model Rule 1.11, Cmt. [2]; *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987); *State v. Fitzpatrick*, 464 So. 2d 1185 (Fla. 1985); *Anderson v. Commissioner of Correction*, 15 A.3d 658 (Conn. App. Ct. 2011); ABA Formal 342 (1975) (construing broad imputation rule of DR 5-105 as not applicable to government law offices and citing policy reasons in support).

10. Whether the lawyer could represent the agency in advising on implementation of the furlough would depend, as the D.C. Bar opinion concluded, on how close the questions on which advice is sought are to the lawyer's claims in the challenge to the furlough. The Philadelphia Bar Association ethics committee concluded that the conflict presented by the furlough is waivable, even if the lawyer might later file an appeal of his or her own, but did not expressly discuss the question of a lawyer defending the agency while at the same time pursuing an appeal. Phila. 2013-3.

11. None of the inquirers proposes to represent the agency adverse to a lawyer from the same government agency. Rule 1.7(b)(3) by its terms only applies when lawyers are *representing clients* on both sides of the case. Here, the appealing lawyer would be the client, or would be proceeding *pro se*, and would not be representing a client (other than him- or herself). Even so, however, other lawyers in the office could have a personal conflict of interest that would prevent them from competently and diligently representing the agency (even with consent) against a colleague working in the same office.

(16-13)

Ethics Opinion 969

Committee on Professional Ethics of the New York State Bar Association (6/12/13)

Topic: Limiting an attorney's liability

Digest: A lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee of an opinion letter to the client.

Rules: 1.8(h)

FACTS

1. A client has requested that an opinion letter to be written by the inquirer be addressed not only to the client but also to the client's lessee.

QUESTION

2. May the attorney ethically request prospectively that the client indemnify the attorney against a lawsuit brought by the third-party lessee?

OPINION

3. Rule 1.8(h)(1) of the New York Rules of Professional Conduct provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice." Comment [14] to this Rule notes: "Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation." Thus, it is clear that the attorney could not prospectively enter into an agreement with the client that would require the client to indemnify the lawyer against a judgment in favor of the client, or otherwise hold the lawyer harmless for any liability to the client, arising from legal malpractice.

4. In the instant case, however, the lawyer seeks indemnity against any malpractice or other claims that might be brought by a non-client, that is, the client's lessee who is the third-party addressee on the opinion letter. The Rules contemplate that a lawyer at the request of a client may provide an opinion that will be provided to a third party: "A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." Rule 2.3(a). As Comment [3] notes, a legal duty to the third party "may or may not arise," and that is a question of law. *See*, *e.g.*, *Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 N.Y. 2d 377, 605 N.E.2d 318, 590 N.Y.S.2d 831 (1992). Whether or not a legal duty to the third party arises, however, the third party, absent other facts, is not a client of the attorney.

5. Given that the prohibition of Rule 1.8(h) applies only to prospective agreements limiting liability to the lawyer's *client*, we conclude that a lawyer may prospectively request indemnity against potential malpractice or other claims that could be asserted by a third party. *See* Report of the ABA Business Law Section Task Force on Delivery of Document Review Reports to Third Parties, 67 Bus. Law. 99 (2011) ("While professional ethics rules normally prohibit lawyers from prospectively limiting their liability to clients, these prohibitions do not apply to non-clients."); Michigan Opinion RI-258 (1996) (lawyer serving as guardian ad litem may negotiate for release of liability from families and other interested persons because the lawyer's duty is to the child only).

6. We note that the potential harm expressed in Comment [14] to Rule 1.8 does not arise where the client agrees to indemnify the lawyer against a malpractice judgment or other claims arising from harm to the third party. Such indemnification seems unlikely to undermine competent and diligent representation of the client, because the lawyer may not prospectively enter into an agreement limiting malpractice liability to such client.

CONCLUSION

7. A lawyer may ethically ask a client to indemnify the lawyer against potential malpractice or other claims by a third-party addressee of an opinion letter to the client.

(66-12)

Ethics Opinion 970

Committee on Professional Ethics of the New York State Bar Association (6/21/13)

Topic: Disclosure of deceased client's file

Digest: If an executrix of a decedent's estate who seeks files possessed by the decedent's former attorney is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all those files. If, on the other hand, her status as executrix does not confer on her the same legal right as the decedent possessed, then the contents of a deceased client's file will generally not be disclosable to the executrix unless (1) the information disclosed is not "confidential information" or (2) the lawyer has grounds to conclude that release of the information is impliedly authorized.

Rules: 1.6(a), 1.9(c), 1.15(c), 1.16(e)

FACTS

1. The inquirer represented a client who is now deceased. The executrix of the former client's estate has requested the client's file. The inquirer wants to know his obligations regarding this request.

QUESTION

2. What are a lawyer's obligations regarding a request for a former client's file from the executrix or executor of that former client's estate?

OPINION

3. This inquiry turns on a threshold legal question: does an executrix of an estate stand in the shoes of a decedent to such a degree that the executrix is entitled to access the decedent's confidential information?[1] Matters of law, however, are beyond the purview of this Committee. Accordingly, we do not opine on this threshold question. Instead we consider the implications of the alternative answers under the Rules of Professional Conduct (the Rules).

4. In any circumstances in which the answer to the legal question is yes, this inquiry is straightforwardly controlled by N.Y. State 766 (2003), which concluded that a former client is presumptively entitled to access to all his files possessed by his former attorney. The opinion was influenced by *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelson*, 91 N.Y.2d 30, 34 (1997), which adopted the majority rule that upon termination of an attorney-client relationship, a client is "presumptively accord[ed]…full access to the entire attorney's file on a represented matter with narrow exceptions."[2]

5. N.Y. State 766 was based on two provisions in the Code of Professional Responsibility, DRs 9-102(c) and 2-110(A)(2), which are now comparably set forth in Rules 1.15(c)(4) and 1.16(e). Rule 1.15(c)(4) provides that "a lawyer shall… promptly pay or deliver to the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive." Rule 1.16(e), which addresses termination of representation, provides, in relevant part:

> "A lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including…delivering to the client all papers and property to which the client is entitled...."

These provisions of the current Rules support our conclusion in N.Y. State 766 just as did the corresponding provisions of the prior Code.

6. Thus if, as a matter of law, an executrix stands in the shoes of a decedent for these purposes, then the executrix is presumptively entitled to access to the decedent's files possessed by the inquirer, subject only to the inquirer's ability, as to particular materials, to make a substantial showing of good cause to refuse client access.

7. If, on the other hand, an executrix's legal status does not confer on her a general right of access to the decedent's confidential information (and the rest of this opinion is based on that assumption), then the inquirer's professional responsibilities are more complicated. Rule 1.9(c)(2) addresses a lawyer's obligation to refrain from revealing confidential information of a former client.

8. Rule 1.9(c)(2) provides that "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter…reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client." The protections of Rule 1.6, as applied through Rule 1.9(c)(2), are not limited to

former clients who are still alive; those protections continue to apply as to a deceased former client.[3]

9. Rule 1.6 defines "confidential information" as consisting of

> "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's knowledge of legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

A lawyer is, of course, permitted to provide those contents of a deceased client's file that do not fall within Rule 1.6's definition of confidential information. *See* D.C. Opinion 324 (2004) (attorney whose client is deceased may turn over information that is not a confidence or secret to client's spouse who is executor of client's estate).

10. As to confidential information, Rule 1.6(a)(2) allows for disclosure that is "impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." Comment [5] to Rule 1.6 notes, for example, that in some situations, "a disclosure that facilitates a satisfactory conclusion to a matter" may be impliedly authorized. Indeed, we believe that implied authorization will comfortably cover many disclosures that an attorney would contemplate making to a former client's executor. *See* D.C. Opinion 324 (2004) ("In the ordinary case, release of information an executor requests would be authorized under" D.C.'s comparable Rule 1.6); Disciplinary Board of the Hawaii Opinion 38 (1999) (attorney disclosure to executor of former client's estate "is impliedly authorized in order to carry out the representation"); North Carolina Opinion 206 (1995) (a lawyer may reveal a client's confidential information to the personal representative of the client's estate, unless the disclosure would be contrary to the goals of the original representation or would be contrary to the client's instructions to the lawyer).

11. A lawyer in the inquirer's situation needs to consider whether the circumstances meet the standards for implied authorization, taking into account factors including what is known about the deceased client's wishes. For example, disclosure of information pertinent to the settlement of an estate may often be appropriate where the lawyer provided trusts and estates representation to the deceased client and such disclosure would facilitate the client's testamentary disposition in a way that the client would have favored. *See* D.C. Opinion 324 (disclosure to executor permitted where release of information would further the interests of former client in settling estate).[4]

12. Even where the lawyer prepared the client's will, however, there may be confidential information in the client's file that would not facilitate the settling of the client's estate or for other reasons may not advance the best interests of the client. In that case the material must remain undisclosed. *See* Nassau County 03-4 (2003) (attorney who represented client who died before divorce action was commenced could not provide itemized billing to spouse-executor where information sought would reveal information that client wanted to keep secret); D.C. Opinion 324 (2004) (citing ethics opinions and concluding that an attorney "who reasonably believes that she knows what her client would have wanted, on the basis of either what the client told her or the best available evidence of what the client's instructions would have been, should carry out her client's wishes").

CONCLUSION

13. When the executrix of an estate seeks files possessed by the decedent's former attorney, the ethical obligations of that attorney turn on the legal rights of the executrix. If the executrix is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all the files, except when there is good cause to refuse access to particular materials.

14. If, on the other hand, her status as executrix does not confer on her the same legal right of access as the decedent possessed, then the contents of a deceased client's file will generally not be disclosable to the executrix unless (1) the information disclosed is not "confidential information" or (2) the lawyer has grounds to conclude that release of the information is impliedly authorized under the Rules.

Endnotes

1. The answer to this legal question may be yes, no, or "it depends on the circumstances." In the context of litigation brought on behalf of an estate against an estate planning attorney, the Court of Appeals, recognizing the special legal relationship between a personal representative and a decedent, concluded that "privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." *Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 309 (2010). Moreover, there is considerable support for the proposition that, at least in certain circumstances, an executrix is authorized to waive the attorney-client privilege of the decedent. *See Mayorga v. Tate*, 302 A.D.2d 11, 11-12 (2d Dep't 2002) (concluding that an executor may waive the privilege "in the interest of the deceased client's estate"); *accord In re Colby*, 723 N.Y.S.2d 631 (N.Y. Co. Sur. Ct. 2001). There is, however, at least in older cases, some support for the view that an executor cannot waive a decedent's attorney-client privilege. *See, e.g., Westover v. Aetna Life Ins. Co.*, 99 N.Y. 56 (1885) (presenting question of doctor-patient privilege, though opinion also addresses attorney-client privilege) ("An executor or administrator does not represent the deceased for the purpose of making such a waiver."); *Matter of Beiny*, 129 A.D.2d 126, 517 N.Y.S.2d 474, 479 (1st Dep't 1987) ("While it is questionable whether even a duly appointed executor would have had the power to waive the decedent's attorney-client privilege ..., it is quite certain that one merely named as executor in an unprobated will would have had no authority whatsoever to do so."); *Matter of Alexander*, 130 N.Y.S.2d 648 (Sur. Ct. Suff. Co. 1954) ("it should be borne in mind that the power to waive the privilege arising out of the relationship of attorney and client ended with the death of the client so that no one can now waive it"); *cf*. CPLR §4504(c) (allowing personal representative to waive doctor-patient privilege of deceased client except as to "information which would tend to disgrace the memory of the decedent"). It is worth noting, additionally, that the duty of confidentiality is broader than the attorney-client privilege. *See* Comment [3] to Rule 1.6 ("The confidentiality duty applies not only to matters communicated in confidence to the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to representation, whatever its source.").
2. Exceptions arise when the attorney can make "a substantial showing…of good cause to refuse client access." For example, the attorney "should not be required to disclose documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law," or "firm documents intended for internal law office review and use." 91 N.Y.2d at 37.
3. *See, e.g.,* D.C. Opinion 324 (2004); Philadelphia Opinion 2007-6 (following American College of Trust and Estate Counsel commentary on Rule 1.6 that in general, "the lawyer's duty of confidentiality continues after the death of a client"); South Carolina Opinion 05-09 (effect of Rule 1.6 "continues after the representation has ended…, and many, if not most, jurisdictions that have issued ethics opinions believe the rule extends after the death of the client"); *cf. Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (recognizing prevailing common-law rule that despite death of a client, material that had been protected by attorney-client privilege remains so unless subject to an exception) (citing cases including *People v. Modzelewski*, 203 A.D.2d 594 (2d Dep't 1994)); *Mayorga v. Tate*, 302 A.D.2d at 11-12 (asserting that "the attorney-client privilege…survives the death of the client for whose benefit the privilege exists" and citing cases); *People v. Vespucci*, 745 N.Y.S.2d 391 (Nassau Co. Ct. 2002) (surveying five approaches to issue of whether privilege survives, and finding support in New York law for two of the five approaches, both involving survival of the privilege, when privilege belonged to an deceased individual rather than an "expired corporation").
4. If an executor can waive a decedent's attorney-client privilege when it is "in the best interest of the deceased's estate," *Mayorga v. Tate,* 302 A.D.2d 11-12, the applicable waiver analysis in that situation will often be comparable to the analysis employed under the implied authorization doctrine.

(8-13)

Ethics Opinion 971

Committee on Professional Ethics of the New York State Bar Association (6/26/13)

Topic: Solicitation; auction of legal services by charity

Digest: Subject to disclosure requirements and limitations, a lawyer may donate legal services to a charitable organization for auction as a fundraising device.

Rules: 1.1(b), 1.2(c), 1.7, 1.9, 7.1, 7.2(a)

FACTS

1. In N.Y. State 524 (1980), this Committee concluded that it is improper for a lawyer to donate legal services to a charitable organization for auction as a fund-raising device. The inquirer asks whether this remains the Committee's opinion under the New York Rules of Professional Conduct.

QUESTION

2. May a lawyer donate legal services to a charitable organization for auction as a fund-raising device?

OPINION

3. N.Y. State 524 concluded that a lawyer may not donate legal services to a charitable organization for a fund-raising auction. The principal reasoning was as follows:

> "[A] lawyer who has committed his services to be auctioned is unable to exercise the professional judgment and discretion that must be brought to bear in deciding to accept a client. The Code specifies a number of factors relating to the client and the legal matter that a lawyer must consider prior to undertaking representation.… For example, and most obviously, a lawyer 'should accept employment only in matters which he is or intends to become competent to handle.' EC 6-1. In the context of a charitable auction, the lawyer has agreed to represent the successful bidder without knowing whether the employment will involve him in a matter beyond his competence."

Additionally, the Committee expressed concern that "[t]he practice of donating legal services to a charitable organization to be auctioned as a fundraising device may also be deemed improper under DR 2-103(B), which prohibits the lawyer from giving anything of value to a third party for recommending or obtaining the lawyer's employment." Finally, the Committee expressed a concern that "the offering of legal services as a fundraising device does not appear to be an appropriate means of publicizing the lawyer whose services are being offered," because the Committee believed that such devices "tend to confuse the process of intelligent selection of counsel with the objectives of the fundraising organization."

4. Most other ethics committees that considered the question at around the same time reached a similar conclusion. *See, e.g.*, ABA Inf. 1250 (1972) (advertising the auction of the lawyer's services by a charitable organization would contravene the spirit of the advertising and solicitation rules and be undignified); Kentucky Opinion E-239 (1981) (the auction does not facilitate an informed decision whether to retain the lawyer "but merely forces a particular person(s) to go to a particular lawyer"); New Jersey Opinion 319 (1975) ("this arrangement puts the charity in the position of recommending [the] attorney and then being remunerated by him for the introduction"); San Diego County Opinion 1974-19 (1974) ("An attorney may not offer free legal services to a charitable organization because such would be a solicitation of business."). *But see* California Opinion 1982-65 (auctioning legal services in a charitable fund raiser is not forbidden, and "the benefits that flow from an attorney's donation of legal services" outweigh "the remote likelihood of abuse of fundamental public policies," but the lawyer must comport with limitations established by the advertising, competence and conflict rules).

5. The language of the rules applicable to this inquiry has not meaningfully changed since 1980, when this Committee issued Opinion 524. The restriction on undertaking work for which the lawyer is unqualified is codified in Rule 1.1(b), which generally provides: "A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle…." The earlier solicitation rule against compensating others for recommending the lawyer's services has been carried over into Rule 7.2(a), which provides, subject to exceptions inapplicable here, that: "A lawyer shall not compen-

sate or give anything of value to recommend or obtain employment by a client…."

6. Nonetheless, the courts' approach and, accordingly, this Committee's approach to interpreting rules on lawyers' advertising and solicitation has become less restrictive since 1980, particularly in light of evolving constitutional case law under the First Amendment recognizing the right of lawyers and other professionals to engage in commercial speech.[1] Where once this Committee interpreted advertising and solicitation rules sweepingly to prevent deceit and the other harms against which the rules protect, the Committee now interprets the rules more cautiously. Our objective is to effectuate the rules' language and purpose consistently with the public interest in access to information about lawyers' services, and lawyers' legitimate interest in marketing their services. *See, e.g.*, N.Y. State 897 (2011) (concluding that "[l]awyer may market legal services on a 'deal of the day' or 'group coupon' website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and competence to provide the services").

7. Since the mid-1980s, perhaps influenced by the courts' evolving approach to lawyers' advertising and solicitation, many more ethics committees have concluded, contrary to Opinion 524, that subject to certain restrictions, lawyers may donate legal services to a charitable organization to be auctioned at a fund-raising promotion. *See, e.g.*, Florida Opinion 86-9 (1987); Hawaii Opinion 31 (1992); Indiana Opinion 4 of 2008 (identifying caveats, including that the lawyer must be competent, avoid conflicts, and ensure that the client is satisfied with the choice of counsel, and that the description of the attorney must not include laudatory remarks or claims of special expertise); Nebraska Opinion 06-11 (2007) (rescinding earlier opinion, and reasoning that "the possibility of misleading information being communicated to the bidders could be adequately protected against by the attorney in the wording of the auction item that the services would only be in the lawyer's area of competence, that the attorney retains the right to decline the service for conflicts or other ethical problems in which case the price would be refunded by the attorney, and that communications regarding the auction not be false and misleading"); South Carolina Opinion 91-35 (1991) ("to avoid misleading the recipient of donated services, the donating lawyer must offer the services with certain express qualifications, clarifications, and reservations"). *But see* Nassau County Opinion 97-11 (1998); New Hampshire Opinion 1990-91/2 (1991) (finding that because of ethical concerns, lawyers should not donate their services to a charitable fund raiser even though the rules do not explicitly prohibit doing so); Ohio Opinion 2002-5 (concluding that donating legal services "is a giving of a thing of value which secures employment of the lawyer").

8. For example, Hawaii's ethics committee concluded:

> "A lawyer may donate his or her legal services to a charitable cause or nonprofit corporation, to be auctioned to the highest bidder in fund-raising promotions, provided that:
>
> (a) only services for which the lawyer has the requisite competence are donated;
>
> (b) the legal services donated *and* the identity of the lawyer who will perform the services must be clearly designated at the auction (for example, 'preparation of a will by John Doe, Esq.');
>
> (c) the lawyer retains the right to decline his or her provision of the donated services in the event of a conflict of interest or for similar cause, in which event the lawyer must take steps to ensure that any auction bid paid by the prospective client is promptly refunded by the charitable organization, nonprofit corporation, or by the lawyer; and
>
> (d) the lawyer takes steps to ensure that communications or advertisements regarding the auction (i) accurately describe the donated legal services *and* the identity of the lawyer who will perform the services, and (ii) are not false, fraudulent, misleading or deceptive."

   Hawaii Opinion 31 (1992) (original emphasis).

9. Likewise, Florida's ethics committee concluded, among other things, that the lawyer (1) must comply with applicable advertising rules, including by "ensur[ing] that the charitable organization, in publicizing and conducting the auction, does not describe the offered legal service in a false or misleading manner," which the lawyer can accomplish by providing the description and requiring pre-approval, and (2) "should have a guarantee from the charitable organization that the successful bidder's money will be refunded

on request if the lawyer is prevented by any of the conflict rules from performing the auctioned service for that person." Florida Opinion 86-9 (1987).

10. On reexamining N.Y. State 524, we conclude for the following reasons that, consistent with the language and purposes of the Rules, a lawyer may properly donate legal services to a charitable organization to be auctioned in exchange for a contribution to the organization. However, limitations and conditions apply, including those identified in the Hawaii and Florida bar opinions noted above.

11. First, as N.Y. State 524 correctly recognized, a lawyer will not necessarily be able to provide the requested legal services to the winner of the auction. A lawyer may not accept a representation that the lawyer cannot perform competently. Rule 1.1(b). Nor may a lawyer accept a representation if it would involve an impermissible conflict of interest. *See, e.g.*, Rules 1.7 and 1.9. In allowing his or her services to be auctioned, the lawyer must ensure that bidders are apprised of these limitations and any other applicable limitations in advance, so that prospective clients are not misled. The lawyer must also ensure that the charitable organization sponsoring the auction will offer to refund the bidder's contribution if for any reason the lawyer ultimately cannot provide the relevant legal services. But the fact that there are limitations does not mean that the lawyer cannot participate at all. *See, e.g.*, N.Y. State 897 (2011), cited above.

12. Second, we conclude on reflection that participating in a charitable fundraising auction does not violate Rule 7.2(a) by giving something of value to the charitable organization for the purpose of having it recommend the lawyer's services. The lawyer's purpose is to assist the organization's charitable fund-raising efforts, not to secure a referral. Indeed, it is fair to assume that lawyers will conclude that they have achieved their primary purpose if the winning bidder simply makes a donation without seeking to take advantage of the lawyer's uncompensated services.

13. Third, we do not believe that a charitable fundraising auction of the lawyer's services will necessarily undermine the prospective client's ability to make an intelligent selection of counsel. However, the lawyer must ensure that sufficient information is provided, including about the areas of law in which the lawyer practices, to enable prospective bidders intelligently to decide whether to bid on the lawyer's services.

14. Fourth, the lawyer must comply with the advertising rules, as applicable,[2] including Rule 7.1(a)(1), which forbids any "false, deceptive or misleading" statements or claims in advertising the lawyer's services. Therefore, only accurate information about the lawyer should be provided to potential bidders. The scope of the services to be provided should be clearly described, *cf.* Rule 7.1(j), as should the limitations on the lawyer's ability to provide services.

15. Often the auctioned service may be a discrete one, such as the preparation of a simple will. However, if the lawyer were to offer a service of limited scope—e.g., a set number of hours of advice concerning estate planning—the representation would have to comport with Rule 1.2(c). That is, any limitation must be "reasonable under the circumstances," which means that the services may not be too limited to be useful to the client. If the lawyer proposes to donate a limited number of hours of advice to be auctioned by the charitable organization, but to offer the client foreseeably needed additional services for a fee, the auction materials should indicate that as well.

CONCLUSION

16. Subject to disclosure requirements and limitations as described in this opinion, a lawyer may donate legal services to a charitable organization for auction as a fund-raising device.

Endnotes

1. *See, e.g.*, N.Y. State 933 (2012) (citing, among other sources, *Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136 (1994), which struck down advertising restriction on lawyer-accountant); N.Y. State 757 (2002) (discussing implications of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), which recognized a lawyer's First Amendment right to state on letterhead "certified civil trial specialist by the National Board of Trial Advocacy"); N.Y. State 637 (1992) (citing, among other cases, *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 481 N.Y.S.2d 40 (1984), holding that the blanket prohibition of mail solicitation of accident victims is unconstitutional).

2. Rule 1.0(a) defines an "advertisement" as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Promotional material concerning the lawyer's services, and distributed by the organization sponsoring the charitable auction, may constitute an "advertisement" under that definition. Although the lawyer's primary purpose in donating his or her services is not to secure a referral but to make a charitable contribution, the primary purpose of the promotional material describing the lawyer's services may be "for the retention of the lawyer," since that is the incentive that the organization offers to attract bids. And even if such materials are not deemed advertising, provisions in Rule 8.4 indicate that the lawyer should not assist the charitable organization in disseminating false or misleading information.

(4-13)

Ethics Opinion 972

Committee on Professional Ethics of the New York State Bar Association (6/26/13)

Topic: Listing in social media

Digest: Law firm may not list its services under heading of "Specialties" on a social media site, and lawyer may not do so unless certified as a specialist by an appropriate organization or governmental authority.

Rule: 7.4

FACTS

1. The inquiring lawyer's firm has created a page on LinkedIn, a professional network social media site. A firm that lists itself on the site can, in the "About" segment of the listing, include a section labeled "Specialties." The firm can put items under that label but cannot change the label itself. However, the firm can, in the "About" segment, include other sections entitled "Skills and Expertise," "Overview," "Industry," and "Products & Services."

QUESTION

2. When a lawyer or law firm provides certain kinds of legal services, and is listed on a social media site that includes a section labeled "Specialties," may the lawyer or law firm use that section to describe the kinds of services provided?

OPINION

3. The New York Rules of Professional Conduct allow lawyers and law firms to make statements about their areas of practice, but the Rules also limit the wording of such statements:

> "A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm *shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).*"
>
> Rule 7.4(a) (emphasis added). The exception in Rule 7.4(c) allows a lawyer to state the fact of certification as a specialist, along with a mandated disclaimer, if the lawyer is certified as a specialist in a particular area by a private organization approved for that purpose by the American Bar Association, or by the authority having jurisdiction over specialization under the laws of another state or territory.[1]

4. A lawyer or law firm listed on a social media site may, under Rule 7.4(a), identify one or more areas of law practice. But to list those areas under a heading of "Specialties" would constitute a claim that the lawyer or law firm "is a specialist or specializes in a particular field of law" and thus, absent certification as provided in Rule 7.4(c), would violate Rule 7.4(a). *See* N.Y. State 559 (1984) (under the Rule's similar predecessor in Code of Professional Responsibility, it would be improper for a lawyer to be listed in law school alumni directory cross-referenced by "legal specialty"). We do not in this opinion address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings such as "Products & Services" or "Skills and Expertise."

5. If a lawyer has been certified as a specialist in a particular area of law or law practice by an organization or authority as provided in Rule 7.4(c), then the lawyer may so state if the lawyer complies with that Rule's disclaimer provisions, which have undergone recent change.[2] However, Rule 7.4(c) does not provide that a law firm (as opposed to an individual lawyer) may claim recognition or certification as a specialist, and Rule 7.4(a) would therefore prohibit such a claim by a firm.

CONCLUSION

6. A law firm may not list its services under the heading "Specialties" on a social media site. A lawyer may not list services under that heading unless the lawyer is certified in conformity with the provisions of Rule 7.4(c).

Endnotes

1. Also, Rule 7.4(b) allows a lawyer admitted to patent practice before the United States Patent and Trademark Office to use a designation such as "Patent Attorney." This opinion does not address the particular circumstances of such patent attorneys.
2. In *Hayes v. Grievance Comm. of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012), the Court struck down two parts of the Rule's required disclaimers. One part was the language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law." Subsequently, by order dated June 25, 2012, the Appellate Divisions deleted that language from the required disclaimers. (The other part of the originally required disclaimers—that a certifying organization is not affiliated with a governmental authority, or alternatively that certification granted by another government is not recognized by any New York governmental authority—remains in place.) The Hayes court also held that Rule 7.4's requirement that disclaimers be "prominently made" was unconstitutionally void for vagueness as applied to the plaintiff. In a memorandum dated May 31, 2013, the Unified Court System requested comments from interested persons with respect to defining the term "prominently made." A lawyer asserting a specialty risks violation of Rule 7.4(c) if the social media site does not satisfy the requirement of "prominently" making the required disclaimer. See Rule 8.4(a) (violation of Rules "through the acts of another").

(22-13)

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