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ONEONONE

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

Message from the Outgoing Chair

When you reach the end of your rope, tie a knot in it and hold on. **- Franklin Delano Roosevelt**

Emily Franchina

Summer brings warmer weather, barbecues, beach, and for small and solo firms, staff vacations and occasionally children or grandchildren who need entertainment! The NYSBA continues to be a rewarding resource for our members, whether it is the community for online questions, LawHUB to provide lawyers with new technology that facilitates interaction with clients and

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Message from the Incoming Chair

I am pleased to address you as the Chair of the General Practice Section, which gives general practice attorneys across the state—often solo or small firm practitioners, and attorneys in a broad range of practice areas—an avenue for collective strength and collegiality in the profession. I am a beneficiary of the Section's committees' philosophy of drawing from the best of all NYSBA Sections. My reason for joining the General Practice Section was to become a member of the Election Law

John Owens Jr.

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Inside

Message from the Outgoing Chair

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the Bar Association, or CL that we can listen to at the beach . . . .

Our spring program focused on the selection of the next American president. Speakers affiliated with either the Democrats or Republicans spoke about the nomination and electoral process and the many differences between each party in that process we call the convention. Because the venue was the former Franklin Delano Roosevelt home, now a library and museum, in Hyde Park, New York, we had a first-hand opportunity to immerse ourselves in World War II-era politics and the policy initiatives created by our then president. We were fortunate to have Jeffrey S. Urbin, Education Specialist, of the Franklin D. Roosevelt Presidential Library and Museum to address us regarding "Roosevelt and the Supreme Court." The New Deal aroused the greatest interest: a revolutionary government program that was to extricate Americans from an unprecedented and devastating financial depression. When women were excluded from the New Deal programs, Eleanor Roosevelt fought to include them. Franklin Roosevelt, with Eleanor's support, was among a handful of leaders who realized the U.S. economy would not escape the depths of recession without the full contributions of women. The so-called second New Deal of 1935, including the Works Progress Administration, Social Security and the Wagner Act recognizing union labor, represented an effort to meet the rising voices demanding an aggressive government approach to the collapse of our national prosperity. Coincidentally, I visited London shortly after our meeting and made certain that I visited the Churchill War Rooms and museum. Winston Churchill's day-to-day activities were chronicled as was his life. Apropos of our current election campaign, Churchill once said, "You have enemies? Good, that means you stood up for something, sometime in your life." My sincere thanks to Richard A. Klass and Seth Rosner for organizing the weekend. Our speakers for the Democratic process and for the Republican process were illuminating! Among them was Steven Richman, who deserves our thanks as well.

This message concludes my term as GP Section chair. I have many people to thank; our immediate past chair, Richard Klass continues to be an enthusiastic and involved Executive Committee member along with Martin Minkowitz and Matthew Bobrow as *One on One* co-editors. I must also extend my gratitude to NYSBA staff, especially our liaisons, Stephanie Bugos and Kathy Heider. Kathy retired on July 15, 2016; her vast institutional knowledge, creativity and sunny disposition will be missed. We wish her all our best! My best wishes are extended to our new Section leader, John Owens. Please continue to support him and our Executive Committee as we embark on a strategic planning process to strengthen and grow our Section.

Respectfully yours,

Emily F. Franchina

Message from the Incoming Chair

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and Government Affairs Committee. As a result of this decision, I have grown professionally and I have made a number of lasting friendships. I am certain that this is not an experience that is unique to me.

The General Practice Section has not been spared from the challenges facing Bar Associations throughout the country. The General Practice Section has consistently articulated a commitment to serving solo and small firm lawyers who make up a majority of our members. One of our primary goals is to enhance the competence and skills of lawyers engaged in the general practice of law and to improve their ability to deliver the most efficient and highest quality legal services to their clients. NYSBA and the Section continue to make major steps to improve the benefits available to its members. NYSBA has introduced LawHub (http://mylawhub.nysba.org/), which provides greater and easier access to key content for solo and small firm users. The Section's leadership has recently formed a long-term strategic planning committee. The goal of the committee is to review programs already undertaken by the Section to assist solos and small firms in their practices and to recommend ways by which those programs might be expanded or improved. We will be reaching out to members to ensure that we continue to provide a medium through which general practitioners may cooperate and assist each other in the resolution of the problems and issues of practicing law.

I personally want to extend my thanks to Emily Franchina, our outstanding Chair for the 2015-2016 year. Under Emily's leadership, the GP Section made great strides in helping all general practitioners in New York State. Fortunately, Emily has agreed to serve on the strategic planning committee and continue to offer her talents to the Section.

While I am excited by the prospects and challenges of the Section, I know that improving the Section is a long-term goal whose success requires the efforts of all its members. As Chair, I welcome the opportunity to hear from our Section members. Please contact me to join a committee, write an article for *One on One* or suggest a CLE topic of interest by reaching me at 646-232-6075 orjojesq@gmail.com.

John Owens, Jr.

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. As always, our journal provides the most recent NY ethics opinions. This issue, we are pleased to offer you the following articles, which we hope will be found very helpful and informative:

- ***Federal Rule of Evidence 502***: Gregory J. Skiff highlights the ethical obligations imposed by Rule 502 of the Federal Rules of Evidence ("Rule 502") that are often overlooked.
- ***In Praise of General Practitioners***: *One on One*'s Co-Editor Martin Minkowitz depicts the General Practitioner profession and all of the benefits that come with it.
- ***Vicarious Consent***: Steven Cohn explains a new exception to the bar against the use of evidence obtained in violation of New York's eavesdropping statute.
- ***Commercial Litigation in NY State Courts, Fourth Edition***: *One on One*'s Co-Editor Richard Klass provides a focused review of the latest update by Robert L. Haig.
- ***The Engagement Letter: Defining the Attorney-Client Relationship***: Amianna Stovall and Joel A. Chernov provide a summary of advice lawyers can provide to clients with regard to a variety of engagement letter issues.
- ***Horseplay: Employee's Fault, Employer's Burden***: *One on One*'s Co-Editor Martin Minkowitz provides an article from his student, James Shovlin, which gives an analysis of Workers' Compensation in horseplay cases.
- ***Fact-Finding in Litigation: Gain the Upper Hand and Boost the Bottom Line***: Anastasia Wincorn shares her insight into to how to create an aggressive fact-finding strategy that can help you efficiently and cost-effectively gather information without relying solely on the discovery process.
- ***To Merge or Not to Merge, That Is the Question—How Knowing Your Client Now Helps Plan for the Legal Situations Created by Divorce Judgments***: Joann Feld, a well-seasoned Family, Divorce, Estate, and Elder law attorney, advocates for increased due diligence and contract language that unremittingly contemplates a future legal challenge.
- ***Is a Trust for My Pet a Viable Option?***: Anthony J. Enea answers the question of what steps pet owners can undertake to ensure that their pet or other domestic animal is properly provided for in the event of their demise.

Martin Minkowitz

- ***The New York Bar Foundation Awards Over $580,000 in Charitable and Educational Grants—The General Practice Section Helps***: Deborah A. Auspelmyer, the Foundation Executive, highlights the ninety-nine programs across New York State that received grants totaling over $580,000 from The New York Bar Foundation this year, and presents a photo of the group.
- ***My Partner, My Enemy***: *One on One*'s Co-Editor Martin Minkowitz reviews the "[d]eadly vignettes or stories" of the Domestic Violence Court's newest book, written by its first Justice, John Michael Leventhal.
- ***The Young Lawyer's Section: Thank You***: The New York State Bar Association's Young Lawyers Section wrote to express its gratitude to the General Practice Section for sponsoring the 7th annual Trial Academy.
- ***From the April CLE Program***: *One on One*'s Co-Editors are happy to present photos and commentary from the General Practice Section's hit April CLE program.

Article Submission

The General Practice Section encourages its 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), Richard Klass at richklass@courtstreetlaw.com (718-643-6063), or Matthew Bobrow at matthew.bobrow@law.nyls.edu (908-610-5536) to discuss ideas for articles.

We have reinstated the "Letter to the Editor" as a way for our readership to express their personal views in our journal. Please address these submissions to matthew.bobrow@law.nyls.edu.

Sincerely,
Martin Minkowitz
Richard Klass
Matthew Bobrow
Co-Editors

Federal Rule of Evidence 502

By Gregory J. Skiff

Many practitioners continue to overlook the ethical obligations imposed by Rule 502 of the Federal Rules of Evidence ("Rule 502"), a rule designed to assist in preserving attorney-client privilege and attorney work-product protection when documents are produced during discovery. By disregarding Rule 502, attorneys put themselves at a disadvantage in litigation, and may be in breach of their ethical duties to protect client confidences.[1] Specifically, the Model Rules of Professional Conduct ("RPC") Rule 1.6(c) requires a lawyer to use "reasonable efforts" to protect against the disclosure or use of client confidences.[2] Rule 502 establishes procedures that a lawyer can use to discharge this duty, and the failure to utilize them might be an ethical violation that could lead to liability for malpractice.

1. Rule 502

According to the Advisory Committee Notes, Rule 502 has two major purposes: (1) to resolve disputes pertaining to the effects of disclosing communications or information protected by attorney-client privilege or as work-product, specifically addressing inadvertent disclosure and subject matter waiver, and (2) to respond to the rising costs of participating in discovery and protecting disclosure of privileged documents, where any disclosure could operate as a subject matter waiver, potentially waiving privilege for many other undisclosed documents.[3] Rule 502 provides a series of rules concerning the effect of inadvertent disclosure of privileged information during the course of litigation.[4]

Rule 502(a) addresses subject matter waiver and the circumstances that warrant a waiver of attorney-client privilege or work-product protection of undisclosed information.[5] Subject matter waiver of undisclosed information is meant to be reserved for situations where a party intentionally submits "protected information into the litigation in a selective, misleading and unfair manner."[6] When a party discloses such information in a federal proceeding, the party has also waived the privilege as to undisclosed communications and information (in federal or state proceedings) if: "(1) the waiver is intentional; (2) the disclosed and undisclosed communication or information concern the same subject-matter; and" (3) in the interest of fairness, the disclosed and undisclosed information should be considered together.[7]

Rule 502(b) addresses what constitutes "inadvertent disclosure," and what conduct could save a party from waiving attorney-client privilege or work-product protection.[8] Such a disclosure in a federal proceeding will not operate as a waiver (in federal or state proceedings) if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error[.]"[9] While Rule 502(b) does not require the producing party to conduct a post-disclosure review, the producing party must follow up on any obvious indication that protected information has been disclosed.[10]

Rule 502(c) addresses the effect of disclosures made in state court.[11] When such a disclosure is made in a state proceeding and is not subject to a state-court order concerning waiver, the disclosure will not operate as a waiver in a federal proceeding if (1) the disclosure would not have been a waiver under Rule 502 in a federal proceeding, or (2) the disclosure "is not a waiver under the law of the state where the disclosure occurred."[12]

Rule 502(d) provides that a federal court order may protect parties from waiving attorney-client privilege or work-product protection.[13] That protection will protect such disclosure from other federal or state proceedings and need not be based on an agreement between the parties.[14] An order under Rule 502(d) has the potential of saving significant discovery costs by explicitly addressing the protections being maintained, regardless of the disclosure.[15] If such an order is in effect, the disclosure will not act as a waiver in both federal and state proceedings.[16]

Rule 502(e) provides that an agreement between parties regarding the effect of disclosure will only be binding on those parties to the agreement (unless incorporated into a court order).[17] For optimal protection, a party should seek an order pursuant to Rule 502(d).

Rule 502(f) sets forth that Rule 502 applies to all state and federal court proceedings.[18]

Rule 502, when utilized, resolves much uncertainty concerning the effect of inadvertent disclosure of protected information. In addition, the rule explicitly provides different levels of protection for party stipulations and court orders that address inadvertent disclosure of attorney-client communications and attorney work-product. Attorneys should familiarize themselves with Rule 502 in order to maximize protection for their clients.

While attorneys continue to ignore Rule 502, the courts have not. *Swift Spindrift, Ltd. v. Alvada Ins., Inc.*[19] demonstrates the type of ignorance to Rule 502 that is commonplace today. That case involved an insurance coverage dispute arising out of a detained cargo ship.[20] During discovery, plaintiff disclosed various attorney-client privileged documents.[21] One such communication advised plaintiff that its insurance policy did not provide coverage for the underlying situation.[22] Defendant moved to compel the production of other attorney-client communications listed in plaintiff's privilege log, arguing that plaintiff had made a subject matter waiver by producing similar communications.[23] The parties argued over the scope of the potential waiver without ever referring to Rule 502.

In reiterating the importance of Rule 502, the Court pointed out the wide-sweeping unfamiliarity among practicing attorneys with respect to its existence and application:

> Despite its obvious application, neither party has mentioned [Rule 502], which governs the disclosure of privileged information to a litigation adversary in the course of a "Federal proceeding." Perhaps this omission should not be a surprise since remarkably few lawyers seem to be aware of the Rule's existence despite its enactment nearly five years ago. That is unfortunate because Rule 502 was specifically designed to avoid vexatious and time-consuming privilege disputes such as this one.[24]

Fortunately for the plaintiff, the Court went on to deny that part of defendant's motion, which sought to compel undisclosed documents based on subject matter waiver.[25]

Attorneys who utilize the benefits of Rule 502 obtain a clear level of protection memorialized by a court order. In those cases, the court need not go beyond the court order to determine whether a party has waived a privilege.[26]

While it appears that courts are willing to protect privileged information even where attorneys have failed to consider Rule 502, attorneys should not carelessly disregard its importance. Litigating over the issue of waiver is much easier and cheaper with a Rule 502(d) order in place. Attorneys are ethically obligated to protect their clients' privileged information. By not pursuing a Rule 502(d) order prior to disclosing documents, attorneys are failing to provide their clients with the upmost protection.

2. Potential Ethical Considerations

Absent a court order pursuant to Rule 502(d) that explicitly protects disclosure of documents that ought to be protected by attorney-client privilege or as attorney work-product, the unwitting litigant may find herself unnecessarily engulfed in motion practice over the issue of inadvertent disclosure under Rule 502(b). Since an order under Rule 502(d) effectively eliminates the possibility of a dispute, and since such a dispute can prove to be a lengthy and costly endeavor, one would be hard-pressed to justify *not* seeking an order under Rule 502(d) at the outset of discovery.

Although there is very little case law on whether Rule 502 considerations raise issues of malpractice, some federal judges have publicly stated that failure to, at a minimum, consider a Rule 502(d) order is in-and-of-itself malpractice. Speaking at a public conference in 2013, Judge Andrew Peck, United States Magistrate Judge for the United States District Court for the Southern District of New York, stated his view on "a fairly straight takeaway on 502(d)."[27] "In my opinion," he said, "it is malpractice to not seek a 502(d) order from the court before you seek documents. That doesn't mean you shouldn't carefully review your material for privileged documents before production, but why not have that insurance policy?"[28] Just last year, the American Bar Association published an article reporting that a panel of federal judges believed that an attorney's failure to consider Rule 502 constitutes malpractice and an ethical violation.[29]

The *Guidelines for Cases Involving Electronically Stored Information*, issued by the United States District Court, District of Kansas, specifically require that attorneys familiarize themselves with Rule 502.[30] Judge Paul W. Grimm, then-Chief United States Magistrate Judge for the United States District Court for the District of Maryland, wrote a lengthy article explaining the importance of Rule 502.[31]

One need not go far to find Model Rules of Professional Conduct that are implicated by Rule 502. Specifically, RPC Rule 1.6(c) provides, "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[32] New York's version of RPC Rule 1.6(c) is slightly narrower, but still imposes a duty of "reasonable care" to protect client confidences.[33] Implicating an attorney's duty of confidentiality, it would appear that requesting an order under Rule 502(d) is a reasonable effort that can and should be taken to avoid inadvertent disclosures.

RPC Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[34] Accordingly, a failure to at least familiarize oneself with Rule 502 and to use it, where appropriate, implicates an attorney's duty of competence.

Balancing the obligations under RPC 1.1 and 1.6(c) against an attorney's obligations under RPC 3.3, "Candor Toward the Tribunal," and RPC 3.4, "Fairness to Opposing Party and Counsel," obtaining an order under Rule 502 emerges as a straightforward effortless means for complying with one's ethical obligations. The inverse, however—that is, to fail to obtain an order under Rule 502—certainly raises questions as to whether an attorney has indeed complied with *all* of her ethical obligations.

Avail yourself to the protections of Rule 502(d), and be glad you did.

Endnotes

1. Model Rules of Prof'l Conduct, R. 1.6 (1983).
2. *Id.* at R. 1.6(c).
3. Fed. R. Evid. 502 Advisory Committee Notes (2008).
4. *See* Fed. R. Evid. 502.
5. *See* Fed. R. Evid. 502(a).
6. Fed. R. Evid. 502(a) Advisory Committee Notes (2008).
7. Fed. R. Evid. 502(a).
8. *See* Fed. R. Evid. 502(b).

9. Fed. R. Evid. 502(b).
10. Fed. R. Evid. 502(b) Advisory Committee Notes (2008).
11. *See* Fed. R. Evid. 502(c).
12. *Id.*
13. *See* Fed. R. Evid. 502(d).
14. Fed. R. Evid. 502(d) Advisory Committee Notes (2008).
15. *Id.*
16. Fed. R. Evid. 502(d).
17. *See* Fed. R. Evid. 502(e).
18. *See* Fed. R. Evid. 502(f).
19. No. 09 Civ. 9342 (AJN)(FM), 2013 U.S. Dist. LEXIS 104296 (S.D.N.Y. July 24, 2013).
20. *Id.* at *2.
21. *Id.* at *4-6.
22. *Id.* at *5.
23. *Id.* at *8.
24. *Id.* at *12 (internal citations omitted); *see also*, *e.g.*, *Seyler v. TSystems N. Am., Inc.*, 771 F. Supp. 2d 284, 287-88 (S.D.N.Y. 2011) (with no Rule 502 order in place, the parties were forced to litigate the issue of subject-matter waiver).
25. *See Swift Spindrift, Ltd*, 2013 U.S. Dist. LEXIS 104296, at *19.
26. *See*, *e.g.*, *Brookfield Assets Mgmt., Inc. v. AIG Fin. Prods. Corp.*, No. 09 Civ. 8285 (PGG)(FM), 2013 U.S. Dist. LEXIS 29543, at *2-3 (S.D.N.Y. Jan. 7, 2013) (court held a protective order to have a sufficient "claw back" provision protecting the defendant from waiving any privilege in any proceeding in any court); *U.S. v. Daugerdas*, No. S3 09 CR 581 (WHP), 2012 U.S. Dist. LEXIS 3134, at *6 (S.D.N.Y. Jan. 11, 2012) (court held certain communications to be protected by a court order, even in a related arbitration); *see also Zivali v. AT&T Mobility LLC*, No. 08 Civ. 10310 (JSR), 2010 U.S. Dist. LEXIS 130467, at *5-6 (S.D.N.Y. Dec. 6, 2010) (court held inapplicable Rule 502(b) because there was a protective order in place under Rule 502(d)).
27. Evan Koblentz, *View from the Bench: Judges on EDiscovery at LegalTech Day Two*, Law Tech. News, Jan. 31, 2013.
28. *Id.* Annexed hereto is a copy of a sample Rule 502(d) Order offered for use on Judge Peck's homepage, *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=928 (last visited July 1, 2015).
29. *See* Jeffrey G. Close, *FRE 502, "Inadvertence" in Privilege Waiver, and Avoiding Malpractice*, A.B.A. Sec. Pretrial Practice & Disc., May 22, 2013, *available at* http://apps.americanbar.org/litigation/committees/pretrial/email/spring2013/spring2013-0513-fre-502-inadvertence-privilege-waiver-avoiding-malpractice.html (last visited July 28, 2015).
30. *See* The United States District Court for the District of Kansas, Guidelines for Cases Involving Electronically Stored Information [ESI] (2013), at 8, *available at* http://www.ksd.uscourts.gov/guidelines-for-esi/ (last visited July 28, 2015).
31. *See* Hon. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 Rich. J.L. & Tech 8 (2011).
32. Model Rules of Prof'l Conduct, R. 1.6(c).
33. NY Rules of Prof'l Conduct, 22 NYCRR § 1200.0, Rule 1.6(c) (2009) ("A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.").
34. Model Rules of Prof'l Conduct, R. 1.1.

This article originally appeared in the Fall 2015 issue of NY Litigator, *published by the Commercial & Federal Litigation Section of the New York State Bar Association.*

The Engagement Letter: Defining the Attorney-Client Relationship

By Amianna Stovall and Joel A. Chernov

While in-house counsel often focus on the rates and fees set forth in an engagement or retainer letter, a well-crafted agreement with outside counsel addresses far more than costs. Although clarity with respect to cost is obviously an essential element of a client's relationship with counsel, other aspects of the relationship are equally important. This is especially true for in-house counsel tasked with juggling a myriad of legal needs for any number of entities and individuals. In such environments, it is important to have a carefully drafted engagement letter that identifies the client with specificity; describes in some detail the services that counsel will be performing; and identifies who will be represented should a conflict arise. An engagement letter that addresses each of these issues will help avoid confusion and ill-will between in-house counsel and their outside lawyers. More importantly, an adequate engagement letter may prevent claims for malpractice and/or motions for disqualification.

I. Identifying the Client

Specifically identifying the client is the first step in defining the scope of the representation. In the context of transactions involving corporations, for example, an engagement letter should plainly state if the attorney is representing the corporate entity, affiliates of that entity, or individual directors, officers, and employees of the entity. Carefully identifying the specific client may have significant ramifications. In *Kurre v. Greenbaum Rowe Smith Ravin Davis & Himmel, LLP*, individual shareholders brought a legal malpractice action concerning a failed corporate transaction.[1] The court dismissed the lawsuit because the engagement letter specified that the law firm represented only the corporate entity and further advised the individual shareholders to obtain separate counsel due to their differing "interests and concerns."[2]

II. Multiple Clients and Conflicts

When a lawyer represents multiple clients, in-house counsel should ensure that the engagement letter addresses what will occur should a conflict of interest arise: will the firm withdraw? Or will the firm seek to represent one or more of the clients? An engagement letter that memorializes the representation of, for example, a corporation and each of its individual directors and officers, or states that the representation does not create an attorney-client relationship between the law firm and the individual directors and officers, will help avoid misunderstandings and, hopefully, disqualification. In the event that multiple clients are being represented, however, the engagement letter should advise the clients that confidential, attorney-client communications will be shared.

III. Advance Waivers

In-house counsel should also be mindful of "advance waivers" which many law firms now include in their standard form engagement letters. By virtue of such a waiver, a client gives its informed consent to waive any potential conflicts among multiple defendants, as well as any conflicts that may arise with prospective clients. While the enforceability of advance waivers is typically determined based upon the facts specific to each case, courts consider, among other things, the sophistication of the client; whether the waiver is sought to be enforced in a litigation, as opposed to a transactional matter; whether the client was represented by independent counsel when it agreed to the advance waiver; whether the advance waiver is a wholesale or limited waiver; and, ultimately, whether the conflict is waivable at all, notwithstanding the advance waiver. However, courts are becoming increasingly tolerant of advance waivers. Indeed, relatively open-ended advance waivers have been enforced against sophisticated clients with in-house counsel, where the client "routinely retain[ed] different, large law firms to advise the corporation on various matters across the country."[3] The court in *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, explained: "[w]hen a client has their own lawyer who reviews the waivers, the client does not need the same type of explanation from the lawyer seeking the waiver because the client's own lawyer can review what the language of the waiver plainly says and advise the client accordingly."[4] As a result, it is important for in-house counsel to appreciate the potentially broad consequences of advance waivers and to discuss them with their lawyers before signing form engagement letters.[5]

IV. The Scope of the Engagement

In addition to identifying the client and potential conflicts, in-house counsel should make certain that the engagement letter will define with some specificity the services that the attorney agreed to perform. When the charging fee is expected to be in excess of $3,000, New York *requires* that there be a written engagement letter and that the letter specify "the scope of the legal services to be provided."[6] Toward that end, an engagement letter involving any new matter should spell out the tasks involved in the representation, as well as any restriction or limitation on the representation and the potential consequences of those limitations and restrictions.

For example, if an engagement letter provides that the representation is limited to proceedings before certain tribunals, a legal malpractice action for the attorney's failure to take an appeal is likely to be dismissed.[7] Similarly, where an engagement letter limited the claims and counterclaims to be litigated, the New York Court of Appeals found that the attorney had no duty to pursue other causes of action that might have been viable.[8] In *AmBase Corp. v. Davis Polk & Wardwell*, a client sued Davis Polk for failing to properly advise it about whether certain tax liability could be allocated to another entity.[9] Relying on the language of the engagement letter, the Court concluded that the scope of Davis Polk's representation was limited to the resolution of tax issues before the IRS—which it did, successfully absolving the client of over $20 million in tax liability.[10] The Court found that Davis Polk had no duty to advise its client with respect to whether, in the first instance, the client was primarily or secondarily liable for that tax liability.[11] It is, however, incumbent upon the lawyer to advise a client that seeks to limit a representation as to the potential consequences of such a limitation, and that advice should be reflected in the engagement letter.[12]

V. Conclusion

In the end, an engagement letter should not be viewed as a mere formality to comply with the ethics rules. Rather, articulating the scope of the engagement is a benefit to both client and counsel to the extent it provides both transparency and guidance. While in-house counsel are obviously alert to issues involving the costs associated with the legal services that they are retaining, they should also be alert to the other details in the proposed engagement letters. The actual breadth of the services being rendered by outside lawyers—or their limitation as the case may be—and to whom those services are being rendered should be set down in writing in order to provide basic parameters for the attorney-client relationship. Clarity and precision at the beginning of the relationship will go a long way toward preventing uncertainty in the event a dispute arises later.

Endnotes

1. *Kurre v. Greenbaum Rowe Smith Ravin Davis & Himmel, LLP*, No. A-5323-07T1 2010 N.J. Super. LEXIS 832 at *1 (N.J. Super. Ct. App. Div. Apr. 16, 2010).
2. *Id.*
3. *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 402 (N. D. Tex. 2013).
4. *See id*. at 405.
5. *See, e.g.*, *GEM Holdco, LLC v. Changing World Techs., L.P.*, 46 Misc. 3d 1207(A), 7 N.Y.S.3d 242 (Sup. Ct., New York Co. 2015), *aff'd*, 127 A.D.3d 598, 8 N.Y.S.3d 119 (1st Dep't 2015) (law firm was permitted to continue to represent one set of codefendants against the other after they became adverse where the codefendants entered into an engagement letter that included an advance waiver specifically contemplating a future conflict of interest between them and notwithstanding law firm's receipt of information from former client that could be used to the advantage of law firm's current client).
6. N.Y. Comp. Codes R. & Regs. tit. 22, § 1215.1(b)(1) and (2) (N.Y.C.R.R.); *see also* 22 N.Y.C.R.R. § 1215.2(1). There are exceptions to this provision "when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client." Rule 1.5(b), Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200.0; *see also* 22 N.Y.C.R.R. § 1215.2(2) (the 22 N.Y.C.R.R. § 1215.1 requirement for a written engagement letter does not apply to a "representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client").
7. *See, e.g.*, *Turner v. Irving Finklestein & Meirowtiz, LLP*, 61 A.D.3d 849, 879 N.Y.S.2d 145 (2d Dep't 2009).
8. *DeNatale v. Santangelo*, 65 A.D.3d 1006, 884 N.Y.S.2d 868 (2d Dep't 2009).
9. *AmBase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 834 N.Y.S.2d 705 (2007).
10. *Id.* at 709.
11. *Id*. *But see Superior Tech. Solutions, Inc. v. Rozenholc*, 2013 N.Y. Misc. LEXIS 1423, *15-17, 2013 N.Y. Slip Op. 30690(U) (Sup. Ct. New York Co. 2015) (engagement letter ambiguous as to whether scope of engagement was limited to litigation; thus, motion to dismiss legal malpractice action for negligence in connection with transactional work was denied).
12. *See* NYSBA Comm. on Professional Ethics, Formal Op. [No. 604 Nov. 14, 1989]; *see also Rupert v. Gates & Adams, P.C.*, 83 A.D.3d 1393, 919 N.Y.S.2d 706 (4th Dep't 2011) ("[a]n attorney has the responsibility to investigate and prepare every phase of his… client's case") (internal citations omitted); *Ellenoff, Grossman & Schole LLP v. APF Grp., Inc.*, 26 Misc.3d 1029(A), 907 N.Y.S.2d 100, at *2 (Sup. Ct. New York Co. 2009) (denying summary judgment where limitation on firm's engagement was unsupported by written evidence); *Unger v. Horowitz*, 8 A.D.3d 62, 777 N.Y.S.2d 648 (1st Dep't 2004) ("To the extent that the…defendants assert their role was limited to that of consultant or 'of counsel,' it was incumbent upon them to ensure that plaintiff understood the limits of their representation."); Restatement (Third) of the Law Governing Lawyers §19 (2000) (the client must be adequately informed and consent if the lawyer wants "to limit a duty that a lawyer would otherwise owe to the client").

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Fact-Finding in Litigation: Gain the Upper Hand and Boost the Bottom Line

By Anastasia Wincorn

An aggressive fact-finding strategy can help you efficiently and cost-effectively gather information without relying solely on the discovery process. Investigators and investigative attorneys have resources and techniques to help you uncover facts without waiting for your opponent to hand them over to you. In-house counsel and the litigation team will be able to approach litigation or settlement negotiations armed with crucial intelligence that gives your business the upper hand. This can lead to better outcomes, a faster resolution of your case, and, ultimately, a boost to the bottom line.

When Is Independent Fact-Finding Useful in the Litigation Process?

Independent fact-finding is useful in any case in which you will need to otherwise rely on the opposing party to provide you with information. Even if you know all of the salient legal facts prior to litigation, information on the opposing side's motivations, financial situation, or business relationships may inform and strengthen your position in negotiating a settlement.

Preparing for Litigation

In many cases, complaints can be fairly broad, include a variety of claims, and need not recite the facts of the case in detail, so why engage in pre-complaint fact-finding? First, you can save time and money by understanding your opponent. If you are the plaintiff, know which defendants to include in the lawsuit. Does the defendant company have any subsidiaries or parent companies that should be named in the suit? Who has the deepest pockets? You can search for and often find these facts long before discovery. Second, a thorough vetting and verification of the facts as you understand them can also help avoid unpleasant surprises down the road, such as inconsistencies in your or your fact witnesses' stories or embarrassing incidents in your expert witnesses' pasts.

If you are the defendant, do not wait for discovery to get to know your plaintiffs. Independent fact gathering can help you answer key questions like whether the plaintiffs have a pattern of filing frivolous lawsuits and how soon in the process they usually settle. You also may be able to begin gathering statements from non-parties (no violating the "no contact" rule, please) and to see what kind of fact witnesses might be out there and to what extent they will support or undermine your opponent's case. All of this can be done at the first whiff of conflict, can save you a significant amount of time and money, and can help you develop a smarter, more well-informed litigation strategy.

Making Discovery More Efficient: The Goldilocks Principle

Endless battles are fought over discovery, and these battles are expensive and frustrating. There is often a constant back-and-forth between attorneys who have the same two goals in mind: 1) get the other side to give you everything you want; and 2) give the other side as little as possible. The barrage of motions to quash and motions to compel in commercial cases can drag on forever. Some conflict is unavoidable, but there are ways to find key facts to support your case without duking it out in the courtroom.

First, the right information can tell you what to ask for in interrogatories and document requests. If your interrogatories are too broad, your opponent can refuse to answer, but you also do not want to make them too specific and risk missing something important. An independent investigation prior to or at the beginning of discovery can help you zero in on your Goldilocks questions: not too broad, not too narrow.

For example, in one case, our client, outside counsel for a large corporation, issued a series of document requests without first conducting its own fact investigation. It asked broadly for records of all transactions that fell into a certain category, let us call them "premium" transactions (this is fictionalized to protect our client's identity). The opponent agreed to hand over records for premium transactions, but there seemed to be an unusually small number of records. Rather than resort to a motion to compel, the client asked us to look into this issue. After speaking to a number of the opponent's former employees, we discovered that there was a wide variety of premium transactions, only a small minority of which were called simply "premium." The others were called "premium plus," "ultra-premium," "sub-premium," etc. There was an entire universe of documents available once we uncovered the proper terminology for our client to include in its document requests. Our client had found its Goldilocks questions, and the opponent could no longer evade the request as either too narrow or too broad. Motion practice averted.

Preparing for Settlement Negotiations

Collecting information that your opponent does not know you have can be a powerful tool in settlement negotiations. For example, in a recent case, the plaintiff, a large corporation, had us find and interview the defendant company's former employees prior to filing suit. Many of the employees told the same story, which strongly supported the plaintiff's position. In the

complaint, the corporation was able to state facts in meticulous detail that would normally not be available until months of discovery had gone by simply using information provided by the former employees they had interviewed. Once the defendant company saw the complaint replete with damning statements from its former employees, it agreed to a settlement that was highly favorable to the plaintiff before discovery even began. This technique can be extremely effective for both plaintiffs and defendants.

Does the defendant company claim to be judgment-proof? That may not actually be the case. A thorough investigation may reveal that the defendant actually has a shell company into which it funnels its money for the express purpose of appearing judgment-proof. An interview with the defendant's former bookkeeper or administrative assistant may tell you that the defendant's president has a bad habit of mixing his own money with that of the company. Armed with facts to support a potential veil-piercing claim, you will be in a much stronger position to convince the defendant to meaningfully participate in settlement talks.

"Armed with facts to support a potential veil-piercing claim, you will be in a much stronger position to convince the defendant to meaningfully participate in settlement talks."

In one case we encountered, the defendant claimed to be judgment-proof, and refused to cooperate with the plaintiff company in any way. Information uncovered as part of an independent fact investigation strongly suggested that the judgment-proof defendant company was benefiting from its parent company's breach of a crucial vendor agreement. Should the arrangement between the subsidiary and the parent company have been exposed at trial, the parent company's vendor would have ended its relationship, and the parent company's business would have ground to a halt. The defendant was entirely unaware that the plaintiff knew about this arrangement, as none of this information had been provided in discovery. Needless to say, the plaintiff was in a position to catch its adversary completely off guard, gaining a tremendous advantage and forcing the defendant to negotiate in good faith.

Regardless of the stage of litigation during which settlement negotiations are taking place or which side of the table you are on, a thorough knowledge of your opponent's circumstances and position can provide an advantage. For example, knowing that your opponent has been encountering financial difficulties might influence the amount of your opening settlement offer. Similarly, you may want to uncover the plaintiff's true motivation for initiating the lawsuit. Intimidation? Harassment? Money? All of the above? The answer will inform your strategy and help you determine on what points you think your opponent is willing to negotiate or how hard a line you should take on certain issues.

What Kind of Facts Can You Find and How Do You Find Them?

While some private information is protected by law, such as bank accounts and phone records, a surprisingly large amount is readily available, but only if you have the right resources. Most investigations begin with a thorough search of what we call the public record. This is a very broad category, and includes any information that we can glean without speaking to individuals. As part of a public record search in the context of litigation, we can identify and locate potential witnesses, look at a person's affiliation with private or public companies, real property holdings and other assets, publicly disclosed securities holdings, liens, bankruptcies, litigation history, criminal record, media profile, and social media profile.

"Public record" is a bit of a misnomer, since nearly all of the information is not readily available to the public. For example, even the most thorough Google search will not reveal that an individual has a hidden connection to a private company in Nevada or $4 million in tax liens. Most of this information is found through a collection of sophisticated databases. Since online litigation records are incomplete in most jurisdictions, investigators also use a nationwide network of trusted individuals to retrieve litigation records, which can be especially helpful in uncovering information about past business dealings and company affiliations. Occasionally, your outside counsel may be able to find some of this information; however, while a handful of law firms have in-house investigative teams, most do not have the resources or the expertise needed to conduct a thorough investigation. An experienced investigative attorney can help you and your outside counsel find the facts you need when you need them, and will allow you to develop far more efficient litigation and negotiation strategies.

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In Praise of General Practitioners

Martin Minkowitz

On January 25, 2010, the *New York Law Journal* published the following thoughts of mine while I was Chair of the General Practice Section. They are to me as valid today as they were then, and I bring them back to your consideration.

A general practitioner can be the one people expect their lawyer to be.

One common misconception is that general practitioners comprise only solo practitioners or members of small firms. A general practitioner is more than just a title; it is a higher elevation of being a lawyer; it describes someone willing to accept the challenge to learn and apply many areas of law in order to provide better counseling and lawyering to clients. This could just as easily describe a litigator working in a large law firm as a solo practitioner operating out of a storefront on Main Street.

No doubt even specialists need to have a basic understanding of other areas of law. In this context I have recently asked the question whether you can represent a matrimonial client without recognizing a potential real estate, insurance or tax issue.

Similar examples exist in all areas of the law. Hence, no matter how specialized their practice, most lawyers must be generalists when called upon. Therefore, I conclude that we are all general practitioners to some degree.

When the practice accepts clients who have legal problems of all kinds we call that a general practice. I have compared this to the physicians of yesteryear (before internists) who were general practitioners or family doctors. The general practice lawyer handles a large array of the client's problems.

As a result, clients of general practitioners develop strong relationships with their lawyers and trust them to handle all their "legal affairs." That is the general practitioner, and yes, he or she even still sometimes makes house calls. It is not unusual for the general practitioner to come to the home of an elderly client to execute a will, or complete the necessary papers to pursue a tort action for personal injuries.

That is how I see the general practitioner. While a lawyer should not accept a representation in a matter that she or he does not have the ability to handle, which cannot be readily or quickly learned, sometimes joining with another lawyer can solve the problem.

At the end of the day, the community benefits from the fact that there are attorneys willing to take on the challenge of being a general practitioner. The General Practice Section exists to help them become better in what they do, and hopefully to provide a network of other lawyers who can share.

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Horseplay: Employee's Fault, Employer's Burden

By James Shovlin

Workers' Compensation allows employees who are injured on the job to receive compensation for their injuries; but should they receive this compensation when the injury was caused by their own foolery? In a recent 2015 New York Workers' Compensation case, a maintenance worker injured his hand while allegedly jumping up to clean a spot stain on a high pillar.[1] The maintenance worker filed a Workers' Compensation claim in order to receive compensation for his injuries. The Workers' Compensation Law Judge found that the worker was entitled to Workers' Compensation benefits. The insurance carrier for the employer had doubts about the truthfulness of the maintenance worker's story. After all, the maintenance worker had previously claimed that he was jumping up to grab his keys from atop the pillar. The insurance carrier appealed the case by an application of review, asserting that the maintenance worker's injuries were actually the result of him "goofing off." The Board Panel who reviewed the case agreed with the insurance carrier that the maintenance worker was "goofing off" but affirmed the Judge's decision anyway.[2] The reason for this decision was fairly simple: under New York Workers' Compensation Law, the maintenance worker's actions are considered horseplay, which is fully compensable.[3]

Workers' Compensation is a legal remedy in which employees who are injured within the scope of their employment receive compensation for those injuries without regard to fault as a cause of the injury.[4] Horseplay is a concept within the legal framework of Workers' Compensation in which an employee is injured while he/she is, for lack of a better phrase, "goofing off." There is no specific mention of the term "horseplay" in New York Workers' Compensation statutes even though the term is found in several New York Workers' Compensation cases. The reason for this is that horseplay is not an exception to the rules of Worker's Compensation. Instead, the Board considers horseplay to be within the scope of employment. "Horseplay or frivolous activities, although involving intentional acts, are natural diversions between coemployees during lulls in work activities, and injuries sustained during them are compensable under workers' compensation law." *Shumway v. Kelley*.[5]

In many areas of law, especially torts, the concept of fault is used as a basis of liability for injury. It is logical that if a person causes his own injuries, he should not be permitted to impose the consequences of those injuries on someone who has not been negligent at all or whose negligence is trivial in comparison.[6] Consequently, the affirmative defense of "Contributory Negligence" is used considerably in tort law. Employees who are injured as a result of horseplay are able to avoid fault under contributory negligence because employers are unable to argue this defense under New York Workers' Compensation Law.[7] By the very nature of Workers' Compensation, negligence is not a factor. Therefore, an employee can injure himself/herself while engaging in an act of horseplay and not be held liable for the injury.

There are two main types of horseplay related cases: 1) cases in which the employee who engages in horseplay injures himself/herself, and 2) cases in which the employee who engages in horseplay injures a fellow employee. With the latter, the concept of receiving Workers' Compensation benefits might seem like an obvious result. After all, such a case would simply involve an employee getting injured while at work and receiving medical and compensatory benefits for those injuries. For example, in *Briger v. Toys R Us*, claimant was injured when a co-employee stuck out her foot in an attempt to trip plaintiff.[8] *Briger* found that the co-employee's action was a spontaneous prankish act, done in fun with no intention of causing injury. Therefore, the injury was fully compensable under New York Workers' Compensation Law.[9] It should be noted that if the co-employee's action had been done with the intention to injure the claimant, the claimant would still have a claim against his employer for compensation under Workers' Compensation Law.[10] The claimant could also sue that co-employee for an intentional tort and still collect compensation benefits, although any judgment or settlement is subject to offset by the employer or its insurance carrier.[11] For a case like *Briger,* it seems rather obvious why the injured employee would receive Workers' Compensation. The employee was working within the scope of his/her employment when he/she suffered an injury as a result of a co-employee's actions. Surely an employee should be compensated when he or she is injured while working. It is different, however, when the employee himself or herself engages in horseplay and suffers an injury. It is different because said employee is clearly not working when he or she is engaging in horseplay. Cases such as these are more complex and are the main focus of this article.

An early New York Workers' Compensation case involving horseplay is *Sarriera v. Axel Electronics, Inc*.[12] In this case, the claimant and a co-worker were discussing the co-worker's weight during a lull in their work. Claimant then decided to pick up said co-worker, which resulted in the claimant falling and injuring his leg. The Court found that this was not a deviation from the claimant's employment but instead "an episode to which the employment lent some stimulus."[13] Because the Court found that the accident was within the scope of the claim-

ant's employment, the accident was compensable.[14] Furthermore, the Court found that the claimant's act of horseplay could be reasonably anticipated as a work-related incident.[15] Many horseplay cases are decided using similar reasoning and therefore result in compensation for the claimant.

Another example of a horseplay case is *Lubrano v. Malinet*.[16] In this case, claimant was working as a "gas jockey" at a service station. During work hours one day, a fellow employee showed claimant that it was possible to toss a lighted match into a bucket containing a residue of oil, gasoline and grease without causing an explosion. Several other employees had demonstrated the trick as well. Then on a separate day, while there was a lull in work, claimant attempted the trick for himself. The trick did not go as planned and resulted in the residue exploding, which caused excessive burns to the claimant.[17] The Court stated that, "injuries or deaths arising from employee horseplay are compensable under the Workers' Compensation Law if they result from conduct which 'may reasonably be regarded as an incident of the employment.'"[18] Because there was testimony that other workers had also performed this trick in the past, it was established that this was not an isolated incident. As a result, the Court concluded that the claimant's action was cumulative horseplay, which is compensable under New York Workers' Compensation Law.[19]

Finally there is *Aucompaugh v. General Electric*, a well-known New York horseplay case.[20] In *Aucompaugh*, claimant fell and injured himself while attempting to do a handstand on the arms of a swivel chair. The Board found that claimant and his co-workers regularly did physical exercises while at work. The Board even went as far to say that "young men, whose jobs call for expenditures of physical energy, cannot be expected, during slack periods, to sit in idleness and gossip; that the employer must expect that they will engage in some form of activity and that the risk was a risk of employment".[21] Once again, the Board found that the claimant's action was within the scope of his employment because the horseplay in question was sufficiently related to the employment. As a result, the Board found the injury compensable.[22]

Not all horseplay cases, however, result in compensation for the claimant. In *Gladwell v. C&S Communications Inc*., claimant was riding in a van driven by his employer.[23] While driving, a co-worker who was also in the van decided to do a stunt in which he leaned back out of the open van door while the van was moving. After completing the stunt, the co-worker went back to his seat and the claimant then attempted the stunt as well. While claimant was attempting the stunt, he lost his balance and fell, which resulted in injury. The Court stated that while injuries resulting from horseplay can be compensable, that is only the case in instances where the horseplay arises out of a regular and foreseeable aspect of the employment.[24] *Gladwell* found that this was not the case for the claimant. The Court determined that this was an isolated act of horseplay because there was no evidence that the employer was aware of or allowed the claimant's activity. Because claimant's action was a singular event that was not a regular or foreseeable incident of his employment, the Court found that the injury was not compensable under New York Workers' Compensation Law.[25]

Continuing the precedent set forth in *Gladwell* is the more recent case, *Healtheon Medical Services*.[26] In *Healtheon*, claimant claimed that while cleaning up at work, she found a roll of toilet paper that inspired her to play a prank on an individual who worked near her office.[27] The individual was not a co-employee and had no affiliation with the employer. The prank was to wrap the individual's car in the toilet paper, which claimant did. Upon return to the office, claimant told a co-worker about the prank. The co-worker advised claimant to further the prank by putting post-it notes on top of the toilet-papered car. Claimant did just that and once again returned to her office. Claimant then left the office again to photograph her prank. Upon re-entry into her office for the third time, claimant tripped and injured herself. *Healtheon* quoted *Gladwell* in stating, "although momentary deviations for a customary and accepted purpose have been found compensable, accidents resulting from obviously unauthorized and isolated incidents of foolery are not compensable."[28] The Board also said that injuries resulting from a purely personal act that was performed solely for the claimant's benefit and is not related to any service for the employer are not within the scope of employment. The claimant's actions were clearly more than just a brief deviation from work.[29] The Board also found that the claimant's actions were in no way related to her employment.[30] As a result, claimant's injuries were also not compensable under New York Workers' Compensation Law.

Overall, horseplay cases in New York Workers' Compensation Law have generally not changed. While cases may have further defined certain terms in Workers' Compensation Law, the general rules have stayed the same. Workers' Compensation itself is a concept in which fault for an injury is supposed to be irrelevant. Thus, it makes sense then that when an employee engages in horseplay, he or she should be compensated for injuries regardless of fault. As previously mentioned, though, there are cases in which the claimants were not compensated for their injuries.[31] As these cases are decided, the precedents they create do slightly alter the trend in a manner more favorable to the employer. *Gladwell*, for example, stresses the idea that the employee will only be compensated for a horseplay injury when such horseplay is regular and foreseeable.[32] They further clarify that the action cannot be an isolated act of horseplay.[33] In that case, however, the claimant engaged in his act of horseplay right after

watching his co-worker do the same action. Surely it is not unreasonable to believe that the employer could have foreseen the employee doing something that a co-employee just did. For that reason, the *Gladwell* court could have found that this was a habitual act that the employer had a duty to stop. Instead, the Court found in favor of the employer, a precedential decision that potentially could have had a much bigger impact on the New York Workers' Compensation Law than it did.

So what are the factors used to determine whether horseplay is compensable? The courts in the aforementioned cases, as well as in other cases, all reference certain elements that are to be considered when answering this question. These elements may differ in relevance depending on the case but all have significant weight in general horseplay law. An essential element in horseplay, as well as in all Workers' Compensation cases, is that the claimant's action was not done by willful intention to bring about the injury or death of himself/herself or another.[34] This standard is shown in an early case, *Stillwagon v. Callan Bros*.[35] In *Stillwagon,* claimant and a co-employee got into a verbal altercation over a work-related issue. Claimant then struck co-employee with his fist, which resulted in retaliation by the co-employee. The co-employee struck claimant, which resulted in claimant's death. The Court applied the willful intentions standard and determined that claimant's injury (death) was not compensable.[36] Because claimant willfully intended to injure the co-employee, claimant's resulting injury was thereby not compensable under Workers' Compensation Law. If the claimant has willful intent to cause himself/herself or another injury, the Board will never find it to be horseplay. By its nature, horseplay involves playful pranks and stunts intended to cause amusement, not willful intentions to cause injury.

"An essential element in horseplay, as well as in all Workers' Compensation cases, is that the claimant's action was not done by willful intention to bring about the injury or death of himself/herself or another."

Another factor to consider is whether the horseplay action is related to the claimant's employment. *Aucompaugh* states that an injury resulting from horseplay is compensable when the horseplay was sufficiently related to the employment.[37] Likewise, the *Healtheon* decision says that it is well established that injuries resulting from a personal act, that is not related to any services for the employer are not compensable.[38] This precedent can be traced back to *Richardson v. Fiedler Roofing*, which states that whether a specific activity is within the scope of employment rather than purely personal depends on whether the activity is both reasonable and sufficiently work-related under the circumstances.[39] *Aucompaugh* found that doing a handstand on a swivel chair was sufficiently related to claimant's employment. *Healtheon*, on the other hand, found that the claimant's actions in that case (putting toilet paper and post-it notes on a neighbor's car and photographing it) were in no way related to her employment. The standard for relativity does not seem to be a difficult one to meet based on these cases. The claimant's actions in *Healtheon* were not related to her employment because she was pranking a non-employee outside of her office. *Aucompaugh* found that claimant's action did relate to his employment because it took place in his office chair where the claimant generally worked. A New York Worker's Compensation Board will typically find an action relative to a claimant's employment as long as the action can be traced to any of claimant's typical work duties.

Foreseeability is yet another element weighed by the Board/Court to determine compensability. Some courts have linked foreseeability to whether the action has happened before.[40] In other words, if a specific act of horseplay has been done before, it is more likely that the employer could have foreseen it happening again. This factor may seem strange considering foreseeability is typically irrelevant in New York Workers' Compensation Law.[41] After all, the basic policy for Workers' Compensation is that if the injury was accidental and arose within the course of employment, recovery should be allowed regardless of foreseeability of injury.[42] Nevertheless, foreseeability has been used as a factor to determine whether horseplay cases are compensable.

In *Kotlarich v. Inc. Vill. of Greenwood Lake*, the Court stressed the importance of foreseeability and whether the horseplay action had been done before.[43] *Kotlarich* stated that when horseplay causes an injury that was precipitated by the claimant and was an isolated act of foolery that was not foreseeable by the employer, claimant would not be entitled to compensation because the injuries did not arise out of his employment. A year later, *Gladwell* reiterated this standard saying, "although recoveries for injuries resulting from horseplay have been permitted, they have been limited to instances where the horseplay arises 'out of a regular and foreseeable feature of the employment.'"[44] In both *Kotlarich* and *Gladwell,* the respective Courts found that the horseplay actions were not foreseeable and thus not compensatory. *Kotlarich* involved a part-time police officer (claimant) who jokingly unfastened his gun-holster. Claimant's actions caused a fellow officer to draw his gun, which accidentally fired

and resulted in an injury for the claimant. The Court reasoned that this was an isolated and unforeseeable incident because the Police Department prohibited the unnecessary display of weapons. Thus, because it was unauthorized, it was also isolated. In *Gladwell*, which as previously mentioned involves a claimant who hung out of a moving van after seeing his co-worker do so, the Court also found that the act was unforeseeable. The court reasoned that the employer, who was driving the van, could not have foreseen this isolated incident. The results of both cases appear to show a low threshold for the foreseeability standard. *Kotlarich* claimed that because there was a policy against unnecessarily displaying weapons, doing so would be unforeseeable. But doesn't establishing such rule admit that the employer was aware that such an action was possible? As for *Gladwell*, it seems likely that the employer could have foreseen claimant's actions after having witnessed his other employee doing that very action. Ultimately, the foreseeability standard is based on precedent, which in some cases may allow for the employer to plead ignorance if a rule prohibiting the action is put into place or if the action had been done by another employee only moments before. Therefore, the foreseeability factor may be an employer and/or employer's insurance carrier's best opportunity to argue that the injury arouse outside the scope of employment.

A final factor to consider, which may actually be a sub-factor of foreseeability, is common occurrence. Common occurrence refers to whether such acts of horseplay are done regularly within the employment. As previously mentioned, an injury caused by an isolated act of horseplay will generally not be compensated. When such an act is standard, however, the Board will find in favor of the claimant. *Lubrano* referred to what they called "cumulative horseplay."[45] "Cumulative horseplay" occurs when several employees engage in the same act of horseplay. Because horseplay is cumulative, the Board expects the employer to be aware of such horseplay. Another case that stresses the importance of a common occurrence is *Home Depot USA, Inc.*[46] In *Home Depot,* claimant and a co-worker were wrestling each other, which resulted in an injury to the claimant. The Court determined that because the claimant and co-worker had previously engaged in wrestling activity before, it was proper for the claimant to be compensated for his injuries.[47] The common occurrence factor may be the easiest for a claimant to prove and basically guarantees that the Board will find the injury compensable. As long as a claimant can show that the horseplay was a common occurrence in the work-place, the Board should almost always find that the act of horseplay was within the scope of employment.

Based on the aforementioned observations, several conclusions can be made with regard to horseplay under New York Workers' Compensation Law. A horseplay Workers' Compensation case arises when an employee engages in horseplay and either injures himself/herself or someone else. Horseplay cases, like all Workers' Compensation cases, are not based on negligence. Instead, they are founded on the idea that an employee can engage in acts of play and/or foolishness at work and still be within the scope of his/her employment. Consequently, many horseplay cases result in the Board finding that the claimant's injury is fully compensable under New York Workers' Compensation. There are, however, exceptions to horseplay and so the Board must weigh several factors to determine whether the act by the claimant was, in fact, an act of horseplay. While the horseplay action can be careless, negligent, or just foolish, it cannot be an action in which there is intent to cause injury. In order to be considered horseplay, an action must also be related to the employment. In other words, it cannot be a purely personal act with no connection to the claimant's work. The action must also be reasonably foreseeable by the employer. If the employer could have reasonably predicted that an employee might engage in a specific horseplay action, any injuries resulting from said action would be compensable under Workers' Compensation. Likewise, if the Board finds that the horseplay is a common occurrence, and not an isolated incident, the resulting injury will be within the scope of employment and thus compensable.

So why exactly do we allow employees who injure themselves while engaging in horseplay to receive compensation for those injuries? The simple answer is that the concept fits so well within the construct of Workers' Compensation. After all, the very idea behind Workers' Compensation is that employees should be compensated for their injuries without being faulted for their own negligence. Horseplay is no exception to this rule. Therefore, no matter how foolish the horseplay by the employee, New York Workers' Compensation Law ensures that any resulting injuries will be fully compensable.

Endnotes

1. *See* Employer: Stop & Shop New York Metro., No. G090 3734, WL 5711066 (N.Y. Work. Comp. Bd.) (Sept. 23, 2015).
2. *Id*.
3. *Id*.
4. N.Y. Workers' Comp. Law § 10 (McKinney 2011).
5. Shumway v. Kelley, 60 A.D.3d 1457 (N.Y. App. Div. 4th Dept. 2009).
6. Martin Minkowitz, New York Workers' Compensation § 1:5 (2d ed. 2011)
7. N.Y. Workers' Comp. Law § 11 (McKinney 2009).
8. Briger v. Toys R Us, 236 A.D.2d 683 (N.Y. App. Div. 3d Dep't 1997).
9. *Id.* at 684.
10. N.Y. Workers' Comp. Law § 11 (McKinney 2009).
11. N.Y. Workers' Comp. Law § 29 (McKinney 2011).
12. Sarriera v. Axel Elec., Inc., 25 A.D.2d 592 (N.Y. App. Div. 3d Dept. 1966).
13. *Id.*
14. *Id.*

15. *Id.*
16. Lubrano v. Malinet, 480 N.E.2d 737 (N.Y. 1985).
17. *Id.*
18. *Id.*
19. *Id.*
20. Aucompaugh v. Gen. Elec., 111 A.D.2d 1073 (N.Y. App. Div. 3d Dept. 1985).
21. *Id.* at 1074.
22. *Id.*
23. Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775 (N.Y. App. Div. 3d Dept. 1996).
24. *Id.* at 776.
25. *Id.*
26. Healtheon Med. Servs., No. G101 0821, 2015 WL 746256 (N.Y. Work. Comp. Bd.) (Feb. 18, 2015).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775 (N.Y. App. Div. 3d Dept. 1985); Healtheon Med. Servs., G101 0821, 2015 WL 746256 (N.Y. Work. Comp. Bd.) (Feb. 18, 2015).
32. Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775, 776 (N.Y. App. Div. 3d Dept. 1985).
33. *Id.*
34. N.Y. Workers' Comp. Law § 10 (McKinney 2011).
35. Stillwagon v. Callan Bros., 183 A.D. 141 (N.Y. 1918).
36. *Id.* at 145.
37. Aucompaugh v Gen. Elec., 111 A.D.2d 1073 (N.Y. App. Div. 3d Dept. 1985).
38. Healtheon Med. Servs., G101 0821, 2015 WL 746256 (N.Y. Work. Comp. Bd.) (Feb. 18, 2015).
39. Matter of Richardson v. Fiedler Roofing, 493 N.E.2d 228 (N.Y. 1988).
40. *See* Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775 (N.Y. App. Div. 3d Dept. 1985); Kotlarich v. Inc. Vill. of Greenwood Lake, 101 A.D.2d 673 (N.Y. App. Div. 3d Dept. 1984).
41. Matter of Wolfe v. Sibley, Lindsay & Curr Co., 330 N.E.2d 603 (N.Y. 1975).
42. *Id.*
43. Kotlarich v. Inc. Vill. of Greenwood Lake, 101 A.D.2d 673 (N.Y. App. Div. 3d Dept. 1984).
44. Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775, 776 (N.Y. App. Div. 3d Dept. 1985).
45. Lubrano v. Malinet, 480 N.E.2d 737 (N.Y. 1985).
46. Home Depot USA, Inc, No. 0075 1337, 2008 WL 4404323 (N.Y. Work. Comp. Bd.) (Sept. 17, 2008).
47. *Id.*

James Shovlin was a student of Prof. Minkowitz at Brooklyn Law School.

To Merge or Not to Merge, That Is the Question —*How Knowing Your Client Now Helps Plan for the Legal Situations Created by Divorce Judgments*

By Joann Feld, Esq.

Acceding that a lawyer's tools are his or her words, our selection of words when drafting a Separation Agreement or a Marital Settlement Agreement, must unremittingly contemplate a future legal challenge.

As an attorney preparing the agreement, you must endeavor to anticipate and to provide for future events that could ensue and adversely affect the client's rights or responsibilities. Working with your client and understanding his/her sense of what may come to pass in his/her future or the future of his/her spouse and/or children will help in recognizing those occasions that need to be contemplated and dispensed with in a divorce agreement.

Should the Divorce Agreement, therefore, be incorporated into the Judgment of Divorce but not merged, thereby surviving the Judgment of Divorce, or should it be merged into the Judgment of Divorce? Perhaps even more significantly, does such wording really make a difference to the clients? It is the legal effect of each such situation that is meaningful. By knowing the client now, you can be mindful of this.

Most Stipulated Agreements resolve all the issues stemming from the divorce of the parties and will include words to promptly place the matter on the Uncontested Matrimonial Calendar. Further the agreement will recite … "it is the intention of the divorcing parties to have the terms and conditions of the agreement be INCORPORATED BUT NOT MERGED into any judgment for divorce dissolving the marriage between the parties."

By so petitioning the court, when the Judgment of Divorce is signed by the Judge, the ex-spouses will have the right to enforce the terms and conditions of the agreement both as a private contract between the two parties, while still having available the option to resolve the issues through the court's enforcement powers. New York law is clear that an agreement incorporated but not merged into a judgment of divorce survives the judgment and thus remains enforceable as a contract claim.

Accordingly, an agreement incorporated but not merged into a Judgment of Divorce survives the judgment and remains enforceable as a separate and independent contractual claim between the parties. The Court of Appeals has treated separation agreements and stipulations of settlement as contracts, stating in the seminal case of *Boden v. Boden*, "the terms [contained in a separation agreement or stipulation of settlement], like other contract clauses, are binding on the parties to the agreement."

Generally, the merged agreement into the Judgment of Divorce yields separate methods of modification and enforcement.

Merger of the Separation Agreement or Marital Settlement Agreement into the Judgment of Divorce renders it impossible for the parties to seek redress for a breach of the Agreement under any contract law theory and the Agreement is no longer a separately enforceable contract. Once merged, the agreement cannot be enforced as a stand-alone contract. Since merger into the Judgment of Divorce makes the Agreement a court order, the agreement will live on only as a Judgment of Divorce. Remedies for violation of Judgment of Divorce are usually reduced to specific performance and/or contempt. Consequently, in order to be challenged, the client would need to open up the Judgment of Divorce and litigate the post divorce issues.

Alternatively, if the agreement is incorporated but is not merged, the result is two singular instruments, each subject to enforcement—a contract entered into by the parties and a Judgment of Divorce.

When incorporated but not merged, the contractual aspects of the agreement are preserved and binding upon each of the parties. A court may not alter the party's agreement, even where there might be a statutory reason to do so. Therefore, the legal effect of incorporation but not merged operates to deprive a party of statutory remedies. Any portion of an agreement that survives a Judgment of Divorce is not open to modifications. The Agreement will live on as a separate contract, enforceable as such, free of the Judgment of Divorce.

If a separation agreement or marital settlement agreement plainly evidenced the parties' intent that the agreement was to survive the resulting Judgment of Divorce, then that agreement remains a separate and enforceable contract upon which the party seeking redress of court could seek contractual relief and provide the court with a valid basis for exercising subject matter jurisdiction over the dispute. *Boden v. Boden*, 42 N.Y.2d 210 (Ct. App. 1977).

Joann Feld, Esq. is the sole proprietor of Joann Feld Attorney at Law and Divorce Mediation in Dix Hills, NY. She practices Estate and Elder Law as well as being a Divorce and Family Mediator. She has worked extensively with mediated matrimonial matters involving transgender disputes, custody issues, maintenance, equitable distribution disputes and pre-nuptial agreements.

Is a Trust for My Pet a Viable Option?

By Anthony J. Enea, Esq.

One only needs to observe life's daily interactions to conclude that pets have become an integral part of the lives of many. It is virtually impossible to go to a mall or airport without encountering someone who has a pet or two in tow. In Westchester County, the importance of pets has been readily apparent for over a century. For almost 120 years, Hartsdale has been the home of what is now recognized as the oldest pet cemetery in the nation. Thus, the question most pet owners face is what steps they can undertake to ensure that their pet or other domestic animal is properly provided for in the event of their demise.

Historically, one could always provide for his or her pet(s) in a Last Will and Testament. One's pet could be left as a bequest to another with the hope that said person would properly provide for the pet, or one's Last Will and Testament could specifically allocate a portion of his or her estate for the care and maintenance of the pet(s). However, the problem with providing for one's pet(s) in one's Last Will is that the Last Will can be contested for a reason unrelated to the pet, and there can also be a significant lapse of time between one's death and the appointment of the executor of said Last Will. These roadblocks can essentially leave the pet in a state of limbo. Because of these impediments, the wishes of pet owners have in many instances been thwarted by the use of a Last Will to provide for their pets.

In 1996, New York was one of the first states to enact a Pet Trust Statute. N.Y. Estates, Powers and Trusts Law (EPTL) § 7-8.1 (McKinney 2010) permits the creation of a trust for the care and maintenance of a pet(s). The pet trust can be created and funded during the life of the grantor/creator as an "inter vivos trust" or it can be a testamentary trust, created in one's Last Will. As with any other trust document, a trustee(s) is appointed to oversee the implementation of the trust terms. Originally, N.Y. EPTL § 7-8.1 provided that the income and principal of the trust was to be used for the benefit of the designated pet(s) until the death of the pet or at the end of a twenty-one (21) year period, whichever occurs earlier. This was done to comply with the well-established "Rule against Perpetuities," where all interests in property must vest, if at all, no later than twenty-one (21) years after the measuring life passes. However, in 2010, the statute was amended to recognize the fact that some animals may have a longer life expectancy than twenty-one (21) years. Thus, the statute now permits the trust to continue for the entire life span of the pet or animal.

At the end of the life of the pet or animal, the trust will terminate and the balance of the income and principal of the trust will be distributed per the wishes of the grantor/creator of the trust. It is important to note that N.Y. EPTL § 7-8.1 (b) specifically provides: "(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals."

N.Y. EPTL § 7-8.1 (d) provides a court with the authority to reduce the amount of property transferred to the pet trust if it determines that it substantially exceeds the amount required for the intended use. The amount of the reduction, if any, will pass to beneficiaries named to receive upon the death of the pet or animal**.** The most well-known pet trust is the one created by Leona Helmsley for her beloved white Maltese, "Trouble." Trouble's Trust was originally funded with twelve million dollars. The Manhattan Surrogate's Court reduced the size of the trust to two million dollars, determining that the trust was overfunded for the implementation of the decedent's wishes. Stephanie Strom, *Helmsley Left Dogs Billions in Her Will,* N.Y. Times (July 2, 2008), *available a*t http://www.nytimes.com/2008/07/02/us/02gift. html; discussed in *In re Copland*, 988 N.Y.S.2d 458 (2014).

In conclusion, if one wishes to ensure that one's pets or animals are adequately protected upon one's demise, a pet trust, even though it too may be contested, especially if it is overfunded, may be the best and most viable option of ensuring that one's wishes are implemented.

Anthony J. Enea, Esq. is the managing member of Enea, Scanlan & Sirignano, LLP with offices in White Plains and Somers, NY. Mr. Enea is a past chair of the New York State Bar Association's Elder Law Section. He was named Best Lawyers' 2016 Elder Law "Lawyer of the Year" in White Plains and Westchester County's Leading Elder Care Attorney at the Above the Bar Awards. Mr. Enea can be reached at 914-948-1500 or A.Enea@esslawfirm.com.

This article originally appeared in the Summer 2016 issue of the Elder and Special Needs Law Journal*, published by the Elder Law and Special Needs Section of the New York State Bar Association.*

Vicarious Consent

By Steven Cohn, Esq. and Daniel Sullivan

In the past, CPLR 4506 (McKinney 1969) has barred the use of evidence obtained in violation of New York's eavesdropping statute, N.Y. Penal Law § 250.05 (McKinney 1988).[1] One such violation of N.Y. Penal Law § 250.05 is defined as "the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment."[2] Recently, New York state law has carved out an exception to this statute, regarding parents who are acting in their children's best interest.

The federal wiretap statute has a similar requirement to New York's eavesdropping statute, in which one party to the conversation must consent to the recording.[3] Many jurisdictions around the country created "vicarious consent" exemptions to wiretap statutes. In 1998, the Sixth Circuit Court of Appeals "recognized a 'vicarious consent' exemption to the federal wiretap statute (18 USC § 2511 (2008)), and held that if a parent or guardian can demonstrate a 'good faith, objectively reasonable basis' to believe that it 'was necessary for the welfare of the child' to record a conversation, a parent may consent to the recording on the child's behalf and be exempt from liability under the federal wiretap statute."[4]

The Appellate Term, Second Department previously recognized a vicarious consent exception to New York's eavesdropping statute based on "the common-law rule that infants are often deemed incompetent to act on their own behalf, and that a parent or guardian must act for them."[5]

It was not until January 14, 2015, in the case *People v. Badalamenti,* that the Appellate Division, Second Department applied the vicarious consent exception to New York's eavesdropping statute.[6] In *Badalamenti*, the defendant was convicted in Supreme Court, Nassau County of crimes including endangering the welfare of a child.[7] The Defendant, on appeal, attempted to suppress a conversation between a child and the Defendant which was recorded by the father. The recording captured the Defendant berating and threatening the child.

The Defendant argued this recording was a violation of N.Y. Penal Law § 250.05 as neither he or the child consented to the recording of this conversation.[8] The Second Department noted that the statute serves a "strong public policy goal of protecting citizens from eavesdropping," but is not persuaded that the legislature "intended to subject parents to criminal penalties when, 'out of concern for the best interests of their minor child, they record that child's conversations.'"[9] The Second Department held that because the parent had a "'good faith, objectively reasonable basis to believe' that it was necessary for the welfare of the infant to record the conversation," the parent could vicariously consent to the recordings and the admission of the recordings as evidence was not barred by CPLR 4506.[10] While *Badalamenti* was a criminal case, the vicarious consent exception to N.Y. Penal Law § 250.05 may apply in many other types of cases, including matrimonial cases. It will be interesting to see how this ruling is applied to Family Court and matrimonial cases in the future.

Endnotes

1. *People v. Badalamenti,* 124 A.D.3d 672, 673 (N.Y. App. Div. 2d Dep't 2015).
2. *Id.*
3. *Id.*
4. *Id.* quoting *Pollock v. Pollock,* 154 F.3d 601, 610 (6th Cir. 1998).
5. *Id.* at 674, citing *People v. Clark,* 855 N.Y.S.2d 809, 812 (N.Y. App. Term, 2d & 11th Jud. Dists. 2008).
6. *Id.* at 674.
7. *Id.* at 672.
8. *Id.* at 673.
9. *Id.* at 674.
10. *Id.*

Steven Cohn, Esq. is a partner at Goldberg & Cohn, LLP and a Fellow of the NYSBA.

Daniel Sullivan is a third year law student at Brooklyn Law School.

Book Review

My Partner, My Enemy

Reviewed by Martin Minkowitz

"Deadly vignettes or stories," based upon true cases and events is how an author describes a most engaging tale of a part of the Supreme Court of the State of New York. Little known to most of its population, it is called the Domestic Violence Court. The author John Leventhal, now an Appellate Division Justice in the 2nd Department of that court, was the first Justice to preside over the felony domestic violence part. He has justly been credited with developing the model for how such a court could be administered with an understanding of the law, a conviction to provide justice to the victims of domestic abuse, while at the same time protecting the procedural and constitutional rights of the defendants, but also with a grasp of the social behavioral problems which brought the defendants to his court.

What he states as "an unflinching view of domestic violence and new ways to protect victims," is understated. Justice Leventhal has brought the reader into his courtroom and exposed us to the true life tales of people at a most difficult time of their life. It is story after story of domestic brutality whose existence we should all be aware of, and who better to tell it than the judge who first witnessed it all and had to make the tough decision for almost 12 years?

Case after case is recounted in sufficient detail to understand how difficult it must be to administer justice in such a court.

There is a separate chapter which takes us through cases of domestic violent murders perpetuated by people considered to have once been a member of the family, a friend, a lover, a parent or a spouse. Perpetrators labeled "Caustic Killers" who used caustic substances to disfigure or blind their former lovers or spouses, or attempted to burn them with accelerants.

Here is an effort to try and make us understand what delays or prevents victims of domestic violence from getting the needed help before they are continuously abused, beaten, mutilated or even murdered. How does one deal with being told "you cannot escape from me, I will find you, and when I do, I will kill you, your baby, and your mother. You will never know where I am or where I will come at you from." These stories will hold your attention and arouse your sympathy, especially when there may not always be a happy ending.

Justice Leventhal concludes with chapters offering advice on what can done to protect abused women and how they can be helped to help themselves. What should be done with the perpetrators?

This book is a quick but disquieting read and is recommended to lawyers even if this is not their field of practice.

Martin Minkowitz is of counsel with Stroock & Stroock & Lavan LLP.

Book Review

Commercial Litigation in New York State Courts, Fourth Edition

Review by Richard A. Klass, Esq.

Without a doubt, New York's role as a major venue of commercial litigation has increased over the past 20 years since the creation of the first commercial court of its kind in the country. As stated in the Report and Recommendations to the Chief Judge of the State of New York of the Task Force on Commercial Litigation in the 21st Century, "the number and complexity of cases in the Commercial Division have grown dramatically." Against the backdrop of an ever-growing number of commercial cases with their various permutations and combinations, the commercial law practitioner can take comfort that there is a great resource to which one can turn for guidance – *Commercial Litigation in New York State Courts*.

The treatise *Commercial Litigation in New York State Courts*, edited by Robert L. Haig, Editor-in-Chief, was first introduced in 1995, and has now published its Fourth Edition. The First Edition was published around the same time that the New York State court system established the Commercial Division in several counties throughout the State. The treatise (comprised of eight volumes with 127 chapters) covers a panoply of matters affecting commercial law. Numerous chapters address issues that arise in every commercial case, such as forms of pleading, parties, discovery demands and responses, motion practice and trial. Many of the chapters are catered to particular areas of law which may confront the commercial law practitioner, and widely range from contract disputes to white collar crime cases to commercial real estate litigation. Aside from discussing the topics in each chapter, the treatise provides the reader with easy-to-use forms, sample language, checklists and handy tips. This reviewer has referred to these volumes for many years and considers the treatise an excellent resource.

The Fourth Edition has added 22 chapters to address new subjects arising today, including: Internal Investigations; Preliminary and Compliance Conferences and Orders; Negotiations; Mediation and Other Nonbinding ADR; Arbitration; International Arbitration; Pro Bono; Reinsurance; Workers' Compensation; Trade Associations; Securitization and Structured Finance; Derivatives; Medical Malpractice; Licensing; Social Media; Tax; Land Use Regulation; Commercial Leasing; Project Finance and Infrastructure; Entertainment; Sports; and Energy. The 182 principal authors of the 127 chapters in the Fourth Edition bring with them many years of experience in their respective areas of practice.

To get a better sense of the value of this treatise, one chapter entitled "Social Media" deals with the rapidly growing area of the "social media" Internet phenomenon. The outline of the chapter includes social media's Impact on Legal Ethics; Use in Case Preparation; Contractual, Property and Regulatory Issues; and Social Media and the Courts. The chapter provides a tremendously helpful glossary of terms, list of relevant websites, and broad list of issues surrounding social media. The practice aids at the end of the chapter include checklists, data authorization forms and discovery demands. Given the increase of litigation in this particular area, the chapter is of great benefit to the practitioner.

The Fourth Edition of *Commercial Litigation in New York State Courts* is a must-have in the library of the commercial law practitioner. Together with the companion disk, this eight-volume treatise is one of the most useful tools when confronted with the commercial case.

Commercial Litigation in New York State Courts, Fourth Edition, is a joint venture between Thomson Reuters and the New York County Lawyers' Association. The publisher may be contacted at (800) 344-5009.

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court Street, 28th Floor, Brooklyn, New York. He may be reached at (718) COURT•ST or RichKlass@courtstreetlaw.com.

Foundation Board Member Carla Palumbo (center) presents a $5,000 grant check to Legal Assistance of Western New York, Inc. to assist with their Veteran's Pro Bono Project. Shown left to right are: Staff paralegal Tami Sprague, Staff Attorney Deirdresha Wint, Staff Attorney Gavin Reynolds, AmeriCorps Paralegal Kristen Scherb, Supervising Attorney Kate Woods, Staff Paralegal Bruce Stahl, NYBF Board Member Carla Palumbo, Executive Director C. Kenneth Perri, Managing Attorney Keith McCafferty, Administrator Ellen Pfeif, and Equal Justice Works Fellow Melissa Molfetas.

The New York Bar Foundation Awards Over $580,000 in Charitable and Educational Grants—The General Practice Section Helps

By Deborah A. Auspelmyer
Foundation Executive

Ninety-nine programs across New York State received grants totaling over $580,000 from The New York Bar Foundation this year. "Contributions enabled us to provide at least one grant to each judicial district across New York State," notes Grant Committee Chair Lucia Whisenand. "Unfortunately, however, there is still significant need for resources to provide legal representation to the underserved."

Funding for the grants comes from the generous contributions to The Foundation by lawyers, law firms, corporations and others. "The collective impact of The Foundation's donors complements local organizational efforts," explains Whisenand. "The grants help make their dollars have a larger impact."

Grant applications support a variety of programs that touch on quality of life issues. "For example, applications that impact children and teenagers include programs for assistance for children with disabilities, teen dating violence, child sexual abuse and exploitation, supervised visits, transitioning from foster care, broken adoptions, and youth courts," Whisenand continues.

NYSBA Section and individual gifts make a positive impact on these programs. Through the generosity of the NYSBA General Practice Section, $25,000 was allocated toward pro bono initiatives via the grant program. "The Section is in a very healthy position financially and we believe that this is a productive use of funds in promoting pro bono legal efforts by general practice attorneys across the State," states Chair of the General Practice Section Emily F. Franchina. "Partnering with The Foundation to assist in fulfilling this need is a good way to help make a difference. The Foundation is familiar with where the areas of need are and what programs non-profit organizations that apply are focusing on. We are happy to help in increasing their efforts."

One recipient, the Legal Assistance of Western New York, Inc. will use their grant for their Veteran's Pro Bono Project; a new and innovative project to help veterans file fully developed claims for VA disability benefits, and

to assist with other VA benefits issues, such as military discharge upgrades. The project is innovative in that it is based at the VA Medical Center in Canandaigua where veterans can consult with their pro bono attorneys at the same location where they receive other veterans' services. "The project uses Rochester based volunteer attorneys to serve a rural veteran population who live in counties with a significantly smaller bar and, consequently, fewer pro bono attorneys available," states Managing Attorney Keith McCafferty. "The money we received from The New York Bar Foundation will allow us to continue to develop this much needed project."

Additional organizations assisted through the grant program via the General Practice Section support include:

- **Advocates for Children of New York** for their Assistance for Children with Disabilities Program, New York
- **Jacob A. Riis Neighborhood Settlement House** for Providing Free Legal Benefit Services to Low-Income Immigrants, Long Island City
- **Lawyers Alliance for New York** for Pro Bono Legal Services for Economic Development Nonprofit Organizations, New York
- **Legal Assistance of Western New York, Inc.** for their Veteran's Pro Bono Project, Geneva
- **The Children's Law Center** for their Broken Adoptions Subsidy Mediation Project, Brooklyn
- **Human Rights First** for their Refugee Representation Project of New York, New York

"So many of the organizations that reach out to The Foundation provide essential legal programs across New York State," explains President of The Foundation John H. Gross. "They impact quality of life issues for senior homelessness prevention, human trafficking, immigration, veteran's programs, wage justice, re-entry, and domestic violence. The legal assistance provided is often life-changing for the recipients and also for their families. Having a voice that is heard makes an impact on their present and their future. As attorneys we need to be proactive in supporting The Foundation and its grant program."

The New York Bar Foundation is the philanthropic arm of the New York State Bar Association. To learn more about The Foundation or to see a listing of all of the grant recipients visit www.tnybf.org To make a donation to The Foundation, visit www.tnybf.org/donation/ or call 518-487-5651 or email nybarfoundation@tnybf.org.

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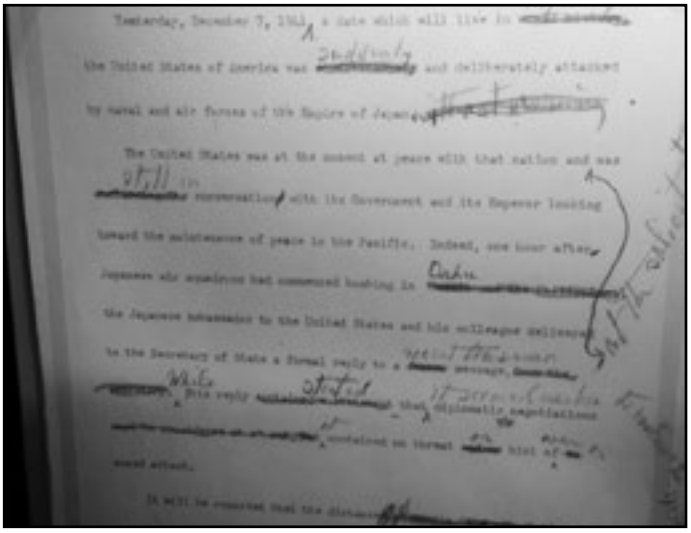
NYSBA

Spring Weekend Event

The General Practice Section held its Spring weekend event on May 6th-7th in Dutchess County. On Friday evening, everyone gathered for a wonderful dinner meeting at the Brasserie 292, a stylish French restaurant in Poughkeepsie. Afterwards, some went to the Second Annual Short Play Festival at the Center for Performing Arts in Rhinebeck. Saturday morning, there was a CLE presentation at the Henry A. Wallace Visitor and Education Center at the Franklin Delano Roosevelt Presidential Library. First, there was an informative lecture by Jeffrey S. Urbin, Education Specialist at the FDR Library, about FDR and the Supreme Court "packing plan." Then there was the presentation of the CLE topic "Electing the President—2016," by Steven Richman and Jeffrey Buley, in which they discussed the method in which the Democratic and Republican parties select their delegates and nominees for the convention. This was followed by a tour of the FDR Library and a sumptuous lunch.


Franklin D. Roosevelt
Presidential Library — Museum


Franklin D. Roosevelt
Presidential Library — Museum


Yesterday, December 7, 1941, a date which will live in
the United States of America was
and deliberately attacked
by naval and air forces of the Empire of Japan
The United States was at the moment at peace with that nation and was
conversation with the Government and its Emperor looking
toward the maintenance of peace in the Pacific. Indeed, one hour after
Japanese air squadrons had commenced bombing in Oahu
the Japanese Ambassador to the United States and his colleague delivered
to the Secretary of State a formal reply to a
this reply
that diplomatic negotiations
contained no threat
attack.
It will be recorded that the


POUGHKEEPSIE


Franklin D. Roosevelt
Presidential Library — Museum

A Thank You Note from the Young Lawyers Section

April 27, 2016
Emily F. Franchina, Esq.
Franchina & Giordano PC
1050 Franklin Avenue, Suite 302
Garden City, NY 11530

Dear Ms. Franchina:

On behalf of the New York State Bar Association Young Lawyers Section, I write to express our gratitude to the General Practice Section for sponsoring the 7th annual Trial Academy.

Without your continued support, the program would not be the success that it is, and for that we thank you. Our more than 60 attendees gained experience and developed skills that will continue to resonate well beyond the days spent at Cornell Law School. Specifically, your support provided scholarships to deserving participants who otherwise would not have been able to attend.

We hope that the General Practice Section will consider sponsoring the 8th annual Trial Academy, which will take place from Wednesday, April 5th through Sunday, April 9th.

Very truly yours
Erin K. Flynn, Esq.
Co-Chair 2016 Trial Academy
Chair-Elect, Young Lawyers Section

Sarah Gold, Esq.
Co-Chair 2016 Trial Academy
Immediate Past Chair, Young Lawyers Section

New York State Bar Association Committee on Professional Ethics Ethics Opinions 1098-1103

OPINION 1098 (6/10/2016)

Topic: Criminal law; prosecutor conditioning plea bargain on defendant's waiver of ineffective assistance of counsel claims

Digest: A prosecutor may not ethically require, as a routine condition of a plea bargain, that a defendant waive ineffective assistance of counsel claims.

Rules: Rule 8.4(d)

FACTS

1. In N.Y. State 1048 (2015) we considered whether a defense lawyer may ethically advise a defendant whether to accept a plea bargain that includes a waiver of future claims of ineffective assistance of counsel ("IAC"). We concluded that a per se personal-interest conflict under Rule 1.7(a) does not arise. Instead, we concluded that determining whether advising as to an IAC waiver creates a personal-interest conflict for the defense lawyer—and whether any such conflict is waivable—requires a case-by-case inquiry. We expressly left open the question, however, whether a prosecutor is ethically prohibited from routinely requiring IAC waivers as a condition of a plea bargain. We now consider that open question.

QUESTION

2. May a prosecutor ethically require, as a routine condition of a plea bargain, that a defendant waive IAC claims against a defense lawyer?

OPINION

3. At the outset, we note that prosecutors often insert into a plea bargain agreement a general waiver of any right to appeal or otherwise make a collateral attack on the conviction. Although such a waiver does not specify an appeal based on ineffective assistance of counsel, the courts have read such general waivers as including at least some IAC claims. *See People v. Abdullah*, 122 A.D.3d 958 (3d Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea). Consequently, when this opinion refers to IAC waivers, it includes a general waiver of the right to appeal, unless it specifically excludes an appeal based on a claim of ineffective assistance of counsel.

4. Rule 8.4(d) provides that a lawyer or law firm shall not "engage in conduct that is prejudicial to the administration of justice." Comment [3] to Rule 8.4 states that this prohibition generally is applicable when the conduct at issue "results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation." While the examples provided by the comment all involve willful malfeasance, we have not interpreted Rule 8.4(d) to apply only to instances involving bad faith. Instead, if the conduct in question is likely to cause substantial individual or systemic harm to the administration of justice, regardless of the motivation of the party, we have interpreted Rule 8.4(d) to apply. Rule 8.4(d), of course, applies to all lawyers, including prosecutors. Examples of the rule's particular application to prosecutors are useful. Thus, for example, we have repeatedly interpreted Rule 8.4(d)—and its predecessor under the former N.Y. Code of Professional Responsibility, Disciplinary Rule 1-102(A)(5)—to prohibit prosecutors from engaging in partisan political activity. See N.Y. State 1071 (2015) (municipal attorney employed by Civilian Complaint Review Board); N.Y. State 696 (1997) (examining attorney for Department of Investigations); N.Y. State 675 (1995) (Assistant District Attorney or Assistant County Attorney); and N.Y. State 568 (1985) (District Attorneys and their assistants). The result reached in those opinions was supported by the recognition that "prosecutors have a duty to seek justice," see N.Y. State 683, and by the conclusion that partisan political activity by prosecutors has the potential to cause systemic harm to the administration of justice because such activity risks creating the appearance that prosecutors are not exercising their discretion in an independent, disinterested fashion.

5. Other jurisdictions have applied their 8.4(d) analog, in the context of plea proceedings, to the conduct of prosecutors that, while not motivated by bad faith, risked harming the administration of justice. For example, in *In the Matter of Nancy J. Flatt-Moore*, 959 N.E.2d 241 (Ind. 2012), the Indiana Supreme Court concluded that a prosecutor

violated 8.4(d) by allowing the victim of a crime to have unfettered veto power in plea negotiations, including insisting on terms the court would not be authorized to impose. The Flatt-Moore Court concluded that, at the very least, this practice gave the appearance that the resolution of the case would not turn on the equities of the case. *Id*. at 245. The Court reached this result notwithstanding its conclusion that the prosecutor "did not act out of any selfish or dishonest motive . . . ." *Id*. at 246.

6. Similarly, in *In re Complaint as to the Conduct of Roger Rook*, 556 P. 2d 1351 (Ore. 1976), the Oregon Supreme Court concluded that it was prejudicial to the administration of justice for a prosecutor to refuse to offer a plea bargain to a group of criminal defendants as long as they remained represented by either of two particular criminal defense attorneys. The Court concluded that, while the prosecutor did not act out of any motive for personal gain or profit, the prosecutor's conduct risked unduly burdening the plea bargaining process, and was therefore prejudicial to the administration of justice. *Id*. at 1356. *Cf. United States ex rel. United States Attorneys v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014) (finding that routine use of IAC waivers by prosecutors violates Rule 3.8 because a prosecutor is charged with seeing that the defendant is accorded procedural justice, "and we simply do not believe the use of IAC waivers lives up to that lofty expectation").

7. Various ethics opinions from state bars around the country have concluded that a per se personal conflict of interest arises when defense attorneys are asked to advise their clients as to an IAC waiver. A number of those opinions have also concluded that a prosecutor derivatively violates Rule 8.4(d) by requiring an IAC waiver because the demand for an IAC waiver creates a conflict of interest for the defense lawyer. See, e.g., Ariz. Op. 15-01 (2015); Fla. Op. 12-1 (2012); Mo. Op. 126 (2009). Although N.Y. State 1048 rejected the per se rule adopted by those other state bars, we nonetheless now conclude that the harms attributable to a prosecutor's routine conditioning of plea bargains on the waiver of IAC claims are sufficiently substantial as to prejudice the administration of justice in violation of Rule 8.4(d). Those harms are chiefly associated with the undue burdens on defense lawyers, defendants, and the court system that arise from a prosecutor's routine use of IAC waivers in an already overburdened criminal justice system.

8. We concluded in N.Y. State 1048 that a personal-interest conflict does not automatically arise every time a defense lawyer counsels a defendant as to the waiver of an IAC claim, but we also recognized that ascertaining whether or a not a conflict of interest exists in a particular case (and whether any such conflict is waivable) is often a difficult, complex task. First, a defense lawyer must review the representation and assess the likelihood that a successful IAC claim exists. Critically, when a lawyer actually did provide ineffective assistance of counsel, the lawyer will typically be unaware of the deficient performance. After making this initial, performance-based assessment, the defense lawyer will need to assess the likelihood that continued representation will be adversely affected by the defense lawyer's self-interest in securing an IAC waiver. While many lawyers may be relatively unconcerned about the risk of an IAC claim, other lawyers will be concerned about the time and anxiety that would be involved in defending against any IAC claim.

9. The routine insistence on IAC waivers by prosecutors similarly burdens the courts. When a defense lawyer concludes that a personal conflict exists but is waivable (and has been waived), the court will have to conduct its own independent inquiry to ascertain whether the defendant's waiver of the conflict is knowing, intelligent, and voluntary. *See, e.g., People v. Gomberg*, 38 N.Y.2d 307 (1975) (holding that a defendant's waiver of any conflict must be "knowing and intelligent"). When a defense lawyer concludes that the conflict created by a prosecutor's demand for an IAC waiver is not a waivable conflict, the defense lawyer will have to move to withdraw. In that situation as well, the court will have to expend resources to ascertain whether a conflict exists, and the court typically will need to balance the defendant's right to counsel of choice against defense counsel's duty to avoid potential conflicts of interest. *See People v. Watson*, 26 N.Y.3d 620 (2016) (noting that when potential conflicts of interest arise in criminal cases, courts often must engage in sensitive inquiries and weigh competing interests). If the court concludes that the danger of the conflict outweighs the defendant's right to choice of counsel, the court will need to allow time for the defendant to locate substitute counsel. Substitution of counsel usually will delay the proceedings and cause additional financial costs. But if the court denies the defense lawyer's motion to withdraw, then the defense lawyer will be forced to proceed despite a belief that there is an unwaivable (or unwaived) conflict of interest. That result may undermine public confidence in the fairness of the proceedings and often will trigger further litigation.

10. Given the large volume of cases in the criminal justice system, and the high caseloads carried by many defense lawyers (*see, e.g., Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2015)), a prosecutor's routine insistence on IAC waivers carries a

substantial cost in time and money. Even more worrisome, these costs create enormous pressure for courts and defense lawyers to ignore the potential conflicts created by IAC waiver demands. Defense lawyers will reasonably fear that raising the conflict-of-interest issue at the point where a plea deal is about to be consummated will aggravate the court (or the prosecutor). Moreover, courts undoubtedly will be confused as to why the IAC waiver does not present a conflict as to some of the cases before it but does present a conflict as to other cases. To avoid aggravating and confusing the courts, defense lawyers will be sorely tempted to ignore conflicts they believe exist. (Indeed, we are concerned that, given the current, widespread use of these waivers, that is exactly what is going on now.) And, if a defense lawyer believes that raising the conflict-of-interest issue will jeopardize a beneficial plea bargain for the client, the defense lawyer will be placed in the untenable position of deciding between ignoring ethical obligations and undermining the client's interests.

11. IAC waivers also cause substantial, unacceptable harms to criminal defendants. The Sixth Amendment entitles criminal defendants to the effective assistance of counsel. But when defense lawyers unwittingly have provided ineffective assistance of counsel (i.e., when defense lawyers have been ineffective but do not know it), IAC waivers effectively leave these defendants without counsel as to the impact of the as-yet-undiscovered ineffectiveness.

12. Another problem is that the scope and impact of IAC waivers are uncertain. *See, e.g., People v. Abdullah*, 122 A.D.3d 958 (3d Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea). Accordingly, defendants are unlikely to comprehend the effect of these waivers. And, defendants who are informed that the waiver will foreclose all future claims of ineffectiveness may mistakenly believe that they will be unable to bring any IAC claim even when cases like Abdullah might allow them to do so. Finally, in contrast to parties suing for malpractice in civil litigation, criminal defendants who waive IAC claims but who were harmed by their lawyers have little recourse to malpractice litigation, both because the very conviction that resulted from the ineffectiveness will usually bar any relief at all—and because even in the rare instances when criminal defendants succeed in proving malpractice, nonpecuniary damages are not available. *See Dombrowski v. Bulson*, 19 N.Y.3d 347 (2012) (when a convicted criminal defendant sues the former criminal defense attorney for legal malpractice, nonpecuniary damages are not available).

13. One final harm caused by IAC waivers is that they create an incentive for prosecutors to employ them to conceal IAC claims that are known to prosecutors but unknown to defendants and their lawyers. An experienced prosecutor may well witness an inexperienced defense lawyer's unwitting ineffectiveness. A prosecutor's use of an IAC waiver to cover up an IAC claim would result in a substantial injustice.

14. These substantial harms that the routine use of IAC waivers cause to the administration of justice are not outweighed by any identifiable benefits. While appeal waivers that apply to other issues may promote finality, IAC waivers do not achieve finality because the scope of an IAC waiver is so uncertain. As suggested earlier, IAC waivers that "impact the voluntariness" of the plea are not waivable (*see People v. Abdullah*, 122 A.D.3d 958). But almost all IAC claims arising from plea cases arguably impact the voluntariness of the plea. Consequently, most IAC claims will be subject to future litigation, notwithstanding the presence of a waiver. That the cost of foregoing IAC waivers is not substantial is demonstrated by the United States Department of Justice's 2014 decision to prohibit federal prosecutors from using IAC waivers. See Deputy Attorney General James Cole, Memorandum for All Federal Prosecutors (Oct. 14, 2014). No negative effects have been reported as a result of the nationwide implementation of this policy.

15. Notably, the Massachusetts Supreme Court, apparently drawing the same conclusion about the impact of IAC waivers that the United States Department of Justice drew, amended the Massachusetts Rules of Professional Conduct effective April 1, 2016 explicitly to prohibit prosecutors from seeking IAC waivers. See Mass. R. Prof. C. 3.8(h) ("The prosecutor in a criminal case shall: . . .(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct."). While the New York Rules of Professional Conduct do not contain an explicit bar against IAC waivers, we believe that, under the totality of the circumstances, these waivers are prohibited under Rule 8.4(d) because of the substantial harms they cause to the administration of justice.[1]

16. In this opinion, we have considered whether the "routine" requirement of IAC waivers is prejudicial to the administration of justice. Because many of the harms that we have identified are connected with the broad use of IAC waivers in an already overburdened criminal justice system, we believe that there may well be case-specific scenarios in which a bargained-for waiver of IAC claims does

not raise the same concerns. The ABA House of Delegates Resolution and Report 113E (2013), which also condemned the general use of IAC waivers in criminal cases, noted one such example: a defendant who has been advised by an independent lawyer may waive an identified instance of ineffectiveness. Similarly, when a particularly sophisticated client has retained a lawyer of the client's choosing, a negotiated disposition that includes an IAC waiver would not necessarily implicate the same concerns as those addressed in this opinion.

CONCLUSION

17. A prosecutor may not ethically require, as a routine condition of a plea bargain, that a defendant waive ineffective assistance of counsel claims.

Endnote

1 Because, prior to this opinion, prosecutors were not on notice that Rule 8.4(d) prohibits prosecutors from routinely conditioning a plea bargain on the waiver of ineffective assistance of counsel claims, we do not believe that a prosecutor's prior use of this practice should be subject to discipline.

* * *

OPINION 1099 (7/12/2016)

Topic: Obligation to Report Judicial Misconduct

Digest: A New York lawyer is not required to report a violation by a judge of the Rules of Judicial Conduct, but is free to do so if it is consistent with the lawyer's duty of confidentiality to the lawyer's client.

Rules: 1.6, 8.3(a), (b) & (c), 8.4(f)

FACTS

The inquirer believes that he has knowledge that a judge who sits in, and is a member of the bar of, New York has engaged in unethical conduct in a judicial capacity. The inquirer seeks advice on whether this knowledge obligates the inquirer to report the judge to the New York State Commission on Judicial Conduct (or "CJC").

QUESTION

1. Must a lawyer report to the Commission on Judicial Conduct knowledge of a judge's violation of the Rules of Judicial Conduct?

OPINION

2. We assume, for purposes of this opinion, that the judge's unethical conduct constitutes a violation of the Rules of the Chief Administrative Judge Regarding Judicial Conduct, 22 N.Y.C.R.R. Part 100 (the "Rules of Judicial Conduct" or "RJC") and does not also violate the New York Rules of Professional Conduct (the "RPC"), which are applicable to all New York lawyers.

3. The question is an issue of first impression for this Committee. Rule 8.3 of the RPC, entitled "Reporting Professional Misconduct," provides in part:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
>
> (b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

4. Rule 8.3(a) imposes a duty to report; Rule 8.3(b) imposes a duty to cooperate. Rule 8.3's duty to report arises when a lawyer knows of conduct by another lawyer which violates the Rules and raises a substantial question about that other lawyer's honesty, trustworthiness or fitness. Rule 8.3(b)'s duty to cooperate arises when a lawyer has knowledge or evidence that a tribunal or other authority lawfully demands concerning another lawyer or a judge. Had the drafters intended the duty to report to include conduct by a judge that violates the Rules of Judicial Conduct, they easily could have said so. That 8.3(a) does not refer to judges, while Rule 8.3(b) does, suggests an intention not to impose an obligation to report alleged judicial misconduct. Rule 8.3(a) contrasts with the analogous provision of the RJC. See RJC Part 100.3(D)(1) ("A judge who receives information indicating a substantial likelihood that another judge has committed a substantial violation of this Part shall take appropriate action.")

5. To characterize the omission from the RPC as an oversight is difficult. Rule 8.3 is substantially the same as Disciplinary Rule ("DR") 1-103 of the former Code of Professional Responsibility ("the Code"). When the New York State Bar Association's Committee on Standards of Attorney Conduct, known as COSAC, proposed a revision of the Code to conform to the format, and in many instances the substance, of the American Bar Association's Model Rules of Professional Conduct ("Model Rules"), COSAC recommended that DR

1-103, which was to become Rule 8.3, be amended to extend the duty to report to a lawyer who "knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office." See L. Emanuel, "Major Differences Between COSAC Proposals & Current N.Y. Lawyer's Code of Professional Responsibility," New York Legal Ethics Reporter (April 1, 2006) (quoting the COSAC report). In adopting the RPC, the courts did not accept this recommendation.

6. Of the 51 jurisdictions in the United States that regulate lawyer conduct, 48 explicitly address a lawyer's duty to report alleged judicial misconduct, in most instances with language either tracking Model Rule 8.3(b), e.g., N.J. Rule 8.3(b); Ill. Rule 8.3(b), or tailored to the judicial oversight committee authority of a particular jurisdiction, e.g., Ark. Rule 8.3(b). At least two states—Washington and Georgia—provide that a lawyer "should" do so; Georgia is express in saying that a violation of this suggestion is not a disciplinary violation, see Ga. Rule 8.3. In addition to New York, two other states do not address the matter: California has no parallel to Rule 8.3, even in regard to reporting lawyer misconduct. See D. Karpman, "New Professional Rules Generate Plenty of Disagreement," Cal. L.J. (September 2010) (California rules impose no duty to report misconduct by other lawyers). Alabama requires lawyers to report any violation of its Rule 8.4, which, like New York's, refers only to lawyers, not judges, and yet contains a provision identical to New York's 8.3(b). These comparisons indicate that, when regulators want to impose a whistleblower provision, they know how to phrase it.

7. In this State, at least above the municipal court level, judges are invariably lawyers, which invites the possibility of interpreting Rule 8.3(a)'s reference to the conduct of "another lawyer" to include judges. Certainly the temptation exists to impose a duty to report serious ethical violations by members of the judiciary who are central to the fair administration of justice. Yet for this Committee to do so would require us to ignore (1) Rule 8.3's predecessor (DR 1-103), (2) the evolution of Rule 8.3 from COSAC (which believed an amendment was desirable if not necessary) to the courts that adopted the Rules (which did not agree), and (3) the rules in most other jurisdictions that adopted variations of Model Rule 8.3 specifically imposing an obligation, on pain of disciplinary sanction, for failing to report judicial misconduct. We believe that ignoring these considerations would be overreaching. In any event, we have assumed for purposes of this opinion that the judge's conduct does not violate the RPC.

8. To say that a lawyer is not subject to discipline for failure to report judicial misconduct is not to say that a lawyer should not make such a report. Subject only to the following caveat, nothing in the Rules may be read to discourage a lawyer from reporting to an appropriate authority (including the CJC) knowledge that a judge has engaged in conduct raising substantial questions about the judge's fitness to occupy a judicial post. The most important restraint on a lawyer's right to report is Rule 1.6, which obligates a lawyer to preserve confidential information acquired in the course of an attorney-client relationship, which includes not only privileged communications but any information the disclosure of which would be embarrassing or detrimental to the client or is inconsistent with the client's wishes. Rule 8.3(c) makes clear that a lawyer's duty to report does not require disclosure of information that Rule 1.6 protects (or is obtained by a lawyer or judge while participating in a bona fide lawyer assistance program). These constraints exist regardless whether the lawyer has a duty to report. Thus, when a lawyer's knowledge of judicial misconduct consists of confidential information within the meaning of Rule 1.6, a lawyer wishing to report the misconduct may require the consent of the client to do so.

9. It bears noting that the Constitution of New York authorizes the CJC to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system." N.Y. Const., Art. VI, § 22, subd. a. To this end, the Legislature has provided the CJC with broad investigatory and enforcement powers. See Judiciary Law §§ 41, 42, 44. Although our State Constitution vests the CJC with this power, a lawyer has the right, subject to any restrictions that Rule 1.6 imposes, to report the alleged judicial misconduct to the CJC or to other authorities, such as a district attorney (for violations of law) or to a grievance committee (for violations of applicable Rules of Professional Conduct).

10. This opinion does not address a lawyer's obligation to report criminal conduct by a judge. Such conduct involves questions of law, such as misprision of a felony, which are beyond our jurisdiction to confront. See Rule 8.4(f) (a lawyer may not knowingly assist a judge "in conduct that is a violation of the rules of judicial conduct or other law").

CONCLUSION

11. A New York lawyer has no duty, at risk of disciplinary sanction, to report a violation by a judge of the Rules of Judicial Conduct, but the lawyer is

free to do so consistent with the lawyer's duty of confidentiality to the lawyer's client.

(10-16)

* * *

OPINION 1100 (7/12/2016)

Topic: Specialization; Use of the designation "Accredited Estate Planner®" on an attorney's website and business cards

Digest: An attorney who obtains the designation "Accredited Estate Planner®" from the National Association of Estate Planners & Councils may not use that designation on the attorney's website or business cards because, even though the American Bar Association has approved a different specialization program of the sponsoring organization, the ABA has not approved its "Accredited Estate Planner®" program.

Rules: 7.4(a) & (c)

FACTS

1. The inquirer is pursuing the designation "Accredited Estate Planner®" ("AEP") through the National Association of Estate Planners & Councils ("NAEPC"). Both attorneys and non-attorney professionals (such as Chartered Life Underwriters® and Certified Public Accountants) may earn this designation. According to the inquirer, the designation reflects a commitment to a "team approach" to estate planning and does not connote being a "specialist" in estate law. The inquirer says he would not hold himself out as a specialist, but wishes to use the designation on his website and business cards.

QUESTION

2. May a lawyer's website and business cards use the designation "Accredited Estate Planner®" if the lawyer obtains that designation through the National Association of Estate Planners & Councils?

OPINION

3. The question involves the permissible ways for an attorney to claim to be certified as a specialist in a particular practice area of law. Rule 7.4 of the New York Rules of Professional Conduct (the "Rules"), which addresses identification of practice areas and specialization, states:

> (a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or 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 is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).
>
> * * *
>
> (c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:
>
> (1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "This certification is not granted by any governmental authority."
>
> (2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "This certification is not granted by any governmental authority within the State of New York."
>
> (3) A statement is prominently made if:
>
> (i) when written, it is clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification; and
>
> (ii) when spoken aloud, it is intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification.

4. The inquirer states that the designation "Accredited Estate Planner®" does not connote being a "specialist," but we do not agree. The terms "accredited" and "certified" imply expertise. We have previously held that a lawyer may not claim to be

an "expert" in any area of the law, other than as permitted by Rule 7.4(c). See N.Y. State 1021 (the word "expert" is an obvious synonym for the word "specialist"); N.Y. State 757 (no support in rules for use of "expert"); N.Y. State 722 (if membership in a professional organization implies certification in a legal field, the reference must comply with [the former Code's equivalent to Rule 7.4(c)]). When used in conjunction with "a particular area of law or law practice," the term "accredited" is a synonym for specialist.

5. This conclusion is supported by the NAEPC website, which asserts that one of its goals is to "encourage specialization programs to increase recognition and acceptance of estate planning as a specialty. … NAEPC administers two separate and distinct specialization programs." (Emphasis added.) One of the programs NAEPC administers is the AEP program, and the other program is the "Estate Planning Law Specialist (EPLS)" program. The EPLS program has been approved by the ABA, but the AEP program has not received such approval.

6. We do not opine here on whether enforcement of Rule 7.4 would pass constitutional muster, since that question is one of law that is beyond the jurisdiction of this Committee. The U.S. Supreme Court held in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 (1990), that States may not categorically restrict attorneys from making claims of certification and specialization, but the Court also said that "[t]o the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organizations or standards of specialty."

7. In Rule 7.4, New York has created criteria for screening certifying agencies. Specifically, Rule 7.4(c) prohibits a lawyer from claiming specialty certification unless the certification is issued by either (i) a private organization approved for the purpose of certifying attorneys in particular practice areas by the American Bar Association ("ABA"), or (ii) an authority having jurisdiction to do so in another state or territory. The inquirer has not met either of these standards. According to the ABA's website, the ABA has approved the NAEPC's Estate Planning Law Specialist program, but the ABA has not approved the NAEPC's Accredited Estate Planner program. Moreover, to our knowledge, the AEP program has not been certified by any authority with jurisdiction to certify estate planners in another state or jurisdiction.

CONCLUSION

8. An attorney may not use the term "Accredited Estate Planner®" on the attorney's website or business cards. The issuer of the designation is a private organization and its AEP program has not been approved by the ABA for the purpose of accrediting specialization as required by Rule 7.4(c)(1).

(16-16)

* * *

OPINION 1101 (7/12/2016)

Topic: Advertising; dual practice; link from law firm's website to real estate brokerage information

Digest: A lawyer may place a link on the lawyer's website to a page describing the lawyer's separate status as a real estate broker, as long as the content of the lawyer's website and of the page reached by the link comply with the advertising rules. The lawyer also should be mindful of Rule 5.7, which addresses lawyer involvement in ancillary nonlegal businesses.

Rules: 1.0(a) & (c), 5.7(a), 7.1(a) & (f)

FACTS

1. The inquirer is both a lawyer and real estate broker, pursuing the latter as a part-time associate broker through a separate real estate brokerage firm. The inquirer wishes to create a link on the inquirer's law firm website to a real estate profile page that would display (i) the inquirer's real estate background, (ii) real estate listings, and (iii) contact information for the real estate agency.

QUESTION

2. May a lawyer who is also a real estate broker create a link on the lawyer's website to a real estate profile page that would display (i) the inquirer's real estate background, (ii) real estate listings, and (iii) contact information for the real estate office?

OPINION

3. Our opinions since the late 1970s have permitted a lawyer to advertise a law practice and a business as a real estate broker together. See, e.g., N.Y. State 933 (2012) (lawyer may conduct law practice and real estate brokerage in same office and advertise them together if the ads are not false or misleading); N.Y. State 493 (1978) (lawyer may conduct law practice and real estate brokerage from same

office, but may not solicit employment as a lawyer in violation of any statute or court rule and may not act as lawyer and broker in the same transaction). This contrasts with our opinions before the Supreme Court's lawyer advertising opinion in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See, e.g., N.Y. State 206 (1971) (lawyer may not publicize a law practice together with a non-legal occupation, since such publicity might involve improper solicitation or the use of the non-legal business as a "feeder" to the law practice).

4. N.Y. State 933 concerned only mailing advertising material (such as greeting cards, business cards, refrigerator magnets and the like) to both law firm and brokerage clients, but nothing in the New York Rules of Professional Conduct (the "Rules") prohibits the link proposed here, as long as it complies with the advertising rules. See N.Y. State 915 (2012) (if relevant advertising rules are adhered to, a law firm's website may link to the website of a related nonlegal entity); N.Y. State 888 (2011) (lawyer website may include links to other businesses if neither the link nor the linked material involves misrepresentation or causes confusion).

5. In N.Y. State 915, we noted that the definitions of "advertisement" and "computer-accessed communication" in Rule 1.0(a) and (c) were broad enough that, if the primary purpose of a particular link were to facilitate the retention of the services of the lawyer or law firm, the link and the related text would be "advertisements" under the Rules and therefore must comply with Rule 7.1, governing advertisements. Thus, for example, the linked website must not contain "false, deceptive, or misleading" statements, see Rule 7.1(a)(1), and the notation "Attorney Advertising" must appear on the home page of the website, see Rule 7.1(f).

6. In addition, our prior opinions have pointed out a number of restrictions that apply when a lawyer provides both legal and nonlegal services to a client. While it seems unlikely that the inquirer could provide both legal and nonlegal services to the same client, it is useful to repeat some of those restrictions here.

7. First, the lawyer's personal interest in receiving a brokerage commission has led us to point out that a lawyer-broker may not in most instances act as both a lawyer and a real estate broker in the same transaction. See N.Y. State 1043 (2015) (lawyer who represented client in selling real estate may not accept a referral fee from the real estate broker even if the lawyer does not charge a legal fee); N.Y. State 1015 (2014) (lawyer may serve as both a lawyer and real estate broker only if the brokerage services are compensated by a flat fee paid in advance rather than in a commission-based payment contingent upon closing); N.Y. State 933 (lawyer may not act as a lawyer and broker in the same transaction); N.Y. State 919 (lawyer may not act as attorney for any party to a real estate transaction in which the lawyer is acting as a broker); N.Y. State 493 (1978) (lawyer may not act as a lawyer and a real estate broker in the same transaction). The personal interest conflict of a lawyer acting in receiving the brokerage commission is ordinarily not a consentable conflict. See N.Y. State 933 at ¶ 7.

8. Second, Rule 5.7 applies to lawyers or law firms providing nonlegal services to clients or other persons, such as the inquirer here. In particular, Rule 5.7(a) provides that the nonlegal services are subject to the Rules of Professional Conduct where (1) the nonlegal services provided to a person are not distinct from legal services being provided to that person by the lawyer or law firm, (2) the nonlegal services are distinct from the legal services being provided by the lawyer but the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, or (3) the lawyer is an owner or agent of, or otherwise affiliated with, the provider of nonlegal services, and the persons receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

9. Under Rule 5.7(a)(4), for purposes of paragraphs (a)(2) and (a)(3) of Rule 5.7:

> [I]t will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

10. The inquirer is unlikely to provide both legal and nonlegal services to the same client (because, as noted, a lawyer may not serve as lawyer and real estate broker in the same transaction). However, if the inquirer plans to link the legal and brokerage web pages, the inquirer may wish to avoid confusion about whether the brokerage services are subject to a client-attorney relationship by providing, on the linked pages describing the nonlegal services, the warning quoted above from Rule 5.7(a)(4). Opinion 933 ¶ 8, which draws upon Rule 5.7, explains the problem:

> If the brokerage services provided to a ... brokerage client are not distinct from legal services provided to that same client, albeit in different matters, or could be perceived by that client to be the subject of a client-lawyer relationship, those [brokerage] services will be subject to the Rules of Professional Conduct. Moreover, "it will be presumed that the person receiving [the brokerage] services believes" them to be the subject of a client-lawyer relationship "unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the non-legal services…."

CONCLUSION

11. If the content of the lawyer's website and of the page reached by a link therein comply with the advertising rules, a lawyer may place a link on a law firm website to a page describing the lawyer's separate status as a real estate broker. The lawyer, however, should also be mindful of the restrictions of Rule 5.7(a) on ancillary businesses.

(18-16)

* * *

OPINION 1102 (7/15/2016)

Topic: Insurance counsel; sharing office space with nonlawyers

Digest: The lawyers in an insurance company's in-house department who provide legal services to the insurance company's policy holders must take reasonable steps to protect client confidential information of the insureds and to avoid conflicts of interest, and must comply with other applicable Rules.

Rules: Rule 1.0(h), 1.1, 1.6(a) & (c), 1.8(f), 5.3

FACTS

1. The inquirer is a salaried employee of an insurance company. The inquirer's practice is limited to the defense of the insurance company's policy holders. The lawyers in the inquirer's department are setting up an office within the building that houses the insurance company and have asked if there are any ethical requirements regarding the layout and function of the office.

QUESTION

2. What ethical rules govern the office of an insurance company's in-house department that provides legal services to the insurance company's policy holders?

OPINION

3. This Committee has long held that a lawyer may be retained or employed as "house counsel" to an insurance company to defend the insurance company's assureds. See N.Y. State 519 (1980); N.Y. State 109 (1969) (citing ABA Opinion 282). N.Y. State 109 notes that the contract of insurance gives the insurance company control over the defense of any action brought against the assured. Opinion 109 also notes that, since the interests of the insurance company and the assured are usually the same (i.e., to defeat claims that the insurance company might be required to pay), an insurance company's in-house lawyer's representation of an insured normally does not present a conflict of interest.[1] But see N.Y. State 519 (1980) (insurance company's staff counsel may not represent assured when company disclaims coverage). When the insurance company designates counsel for the assured, whether the designated counsel is inside or outside counsel, the lawyer's client is the insured and not the insurance company. See N.Y. State 716 (1999) (the lawyer's primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client); *American Employers Insurance Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S.2d 393 (1954) (although the insurance company has retained the lawyer under its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company). Cf. Rule 1.8(f) (lawyer shall not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship).

4. In N.Y. State 726 (2000), we held that a group of lawyers who are salaried employees of an insurance company and whose practice is exclusively to defend the company's policyholders may hold themselves out as a law firm, as long as (i) they undertake to act consistently with the professional responsibilities of a law firm and (ii) they disclose to insureds and others they are employees of the insurance company. We noted there that these responsibilities include compliance with the rules on confidentiality and conflicts of interest. However, all of the New York Rules of Professional Conduct (the "Rules") would apply to the lawyers in the legal department, since the department constitutes

a "law firm" under the Rules, whether or not the lawyers in the department hold themselves out as such. See Rule 1.0(h) (the term "firm" or "law firm" includes the legal department of a corporation or other organization).

5. Regarding the design of the office space of the in-house department (the "Department"), the requirement to safeguard the confidentiality of client information informs that issue. Rule 1.6(a) provides: "A lawyer shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person" unless the client gives informed consent. Rule 1.6(c) provides: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client . . . ." (Emphasis added.) Here, the "others" include employees of the insurance company outside the Department, including the management of the insurance company and the insurance company's claims investigators. See N.Y. State 987 (2013) (absent consent from the insured, staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company); N.Y. State 716 (1999) (lawyer representing insured may not submit legal bills to an independent audit company employed by the insurance carrier without the consent of the insured after full disclosure because legal bills may contain confidential information of the client).

6. We have previously opined on the requirement of confidentiality where a lawyer shares office space with non-lawyers or lawyers not in the lawyer's own firm. See N.Y. State 643 (1993) (where a bar association provides volunteer lawyers to a legal service organization, client files may be kept at the offices of the bar association as long as client confidential information is protected from unauthorized disclosure and the files are stored in a secure location available only to (i) the client, (ii) the client's present or former lawyer, or (iii) another person for whom the client has given informed consent); N.Y. State 939 (2012) (independent lawyers who share office space must take reasonable measures to ensure the confidentiality of client confidential information).

7. We believe the requirement of confidentiality mandates that the work space of the lawyers who represent assureds must be separated from the work space of other insurance company managers and employees, so that conversations about clients of the Department may not be overheard by persons outside the Department. In addition, client papers should be secured so that persons outside the Department cannot access them absent the client's informed consent.

8. The inquirer must determine whether use of the insurance company's computer system would adequately safeguard confidential information of the assureds. For example, in N.Y. State 939 (2012), we discussed lawyers who shared office space as well as a single computer. Each of the lawyers had a separate administrative password to the computer that was not known to the other. We said:

> The fact that the lawyers have separate computer passwords is certainly an appropriate precaution. Whether it is sufficient would depend on further factors. Some password systems may be more resistant to unauthorized access than others. Protection of the password is also important; for example, a password kept on a piece of paper stuck to the computer and readily visible to any user does not provide much protection. On the other hand, if a robust password system provides a degree of protection similar to that of locked file cabinets, then its proper and consistent use may well constitute reasonable care.

See also Rule 1.1, Cmt. [8] (a lawyer should "keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients").

9. Here, if the insurance company's technical administrators have access to the Department's client files and are not prohibited from sharing them with persons outside the Department, the lawyers in the Department will be violating their duty to preserve the confidentiality of client information.

10. Finally, the lawyers in the Department have an obligation under Rule 1.6(c) and Rule 5.3 to supervise the work of nonlawyers in the Department to ensure that it is consistent with the lawyers' responsibilities under Rule 1.6. See Rule 5.3, Cmt. [2] (law firm must ensure that assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client).

CONCLUSION

11. The lawyers in an insurance company's in-house department who provide legal services to the insurance company's policy holders must take reasonable steps to protect client confidential information

of the insureds and to avoid conflicts of interest, and must comply with other applicable Rules.

(19-16)

Endnote

1 In N.Y. State 109, the inquirer also asked whether such an arrangement would constitute the unauthorized practice of law by the insurance company. We declined to answer that question, on the grounds that identifying the unauthorized practice of law is a question of law, and thus is outside the jurisdiction of this Committee. See generally Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581 (1999), available at: http://ir.lawnet.fordham.edu/flr/vol67/iss5/32.

* * *

OPINION 1103 (7/15/2016)

Topic: Conflicting interests; representation of competing enterprises; substantial relationship

Digest: An attorney who previously represented Corporation A may undertake the representation of Corporation B in litigation with Corporation X that is unrelated to the attorney's prior representation of Corporation A, notwithstanding that Corporations A and B are competitors in the same industry and that it is in Corporation A's economic interest for Corporation B to lose the litigation with Corporation X. Corporation A's threat to sue Corporation B in a matter unrelated to the attorney's prior representation of Corporation A similarly does not bar the attorney from representing Corporation B in the threatened litigation.

Rules: 1.0(l), 1.7(a) and 1.9(a) & (c)

FACTS

1. Corporation A and Corporation B are competitors. They are engaged in the same industry, in the same geographic area, providing similar services to the same customer base. The inquirer previously represented Corporation A in a matter that has been concluded ("Matter 1"). The inquirer now proposes to represent Corporation B in litigation with Corporation X ("Matter 2"). The inquirer states, and we assume for purposes of this opinion, that Matter 1 and Matter 2 are not factually related. However, if Corporation B is unsuccessful in this suit, it might be forced to cease operations, which would benefit Corporation A.

2. Also, Corporation A has recently threatened to sue Corporation B on a matter ("Matter 3") that is not factually related to Matter 1.

QUESTIONS

3. May a lawyer undertake to represent a client, Corporation B, in litigation with Corporation X, where it is in the economic interest of a former client, Corporation A, for Corporation B to lose the litigation?

4. May a lawyer undertake to represent a client, Corporation B, in litigation threatened against it by the lawyer's former client, Corporation A, when the threatened litigation is not related to the lawyer's former representation of Corporation A?

OPINION

Applicable Rules

5. The inquirer states that Matter 1 has concluded. Consequently, we assume that Corporation A is a former client of the inquirer. But see N.Y. State 1008 (2014) for an example where the client argues it is a current client despite the fact that the matter has concluded. Whether the client is a current or former client is a mixed question of fact and law that is outside our jurisdiction to determine.

6. We have held that a lawyer's duty of loyalty to a client ends with the termination of the representation. See N.Y. State 638 (1992), N.Y. State 628 (1992) (although the duty to preserve confidences remains, the duty of loyalty ends with the termination of the lawyer-client relationship).

7. The limitations on a lawyer's right to oppose a former client are defined mainly by Rule 1.9(a), which provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client unless the former client gives informed consent, confirmed in writing. [Emphasis added]

Thus, even assuming that the former client has not consented, Rule 1.9(a) does not prohibit a lawyer from representing a new client unless both prongs of Rule 1.9(a) are satisfied—(i) the new matter must be the "same" matter or "substantially related" to the prior matter, *and* (ii) the new client's interests must be "materially adverse" to the interests of the former client.

8. The term "matter" is defined in Rule 1.0(l):

> "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusa-

> tion, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

9. Comment [2] to Rule 1.9 helps to understand the meaning of the terms "matter" and "materially adverse":

> [2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with *materially adverse interests in that transaction* clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type, even though the subsequent representation involves a position adverse to the prior client. . . . [Emphasis added]

10. Comment [3] to Rule 1.9 explains what is meant by "substantially related":

> [3] Matters are "substantially related" for purposes of this Rule if they involve *the same transaction or legal dispute* or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise *a substantial risk that confidential factual information that would normally have been obtained in the prior representation* would materially advance the client's position in the subsequent matter. . . . [Emphasis added]

11. Even if the legal issues involved in two matters are the same, it would not make the matters substantially related. As we noted in N.Y. State 1029 (2014):

> The mere circumstance that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such "issue" (or "positional") conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily "take inconsistent legal positions in different tribunals at different tribunals at different times on behalf of different client," although there can be circumstances in which an issue conflict arises because "there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case."

See also Rule 1.9, Cmt. [2] (quoted in ¶ 8 above).

12. The fact that the current client and the former client have competing economic interests does not create a conflict of interest under Rule 1.9(a). Even if Corporations A and B were both current clients of the inquirer, their economic competition would not prohibit the inquirer from representing both of them. As Comment [6] to Rule 1.7 explains, with respect to simultaneous representation of two clients:

> [S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, *such as representation of competing economic enterprises in unrelated litigation*, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. [Emphasis added.]

See also, Charles W. Wolfram, *Competitor and Other "Finite Pie" Conflicts*, 36 Hofstra L. Rev. 539, 550-55 (2007) (discussing cases in which lawyers represent economic competitors). Since a lawyer may simultaneously represent current clients who are economic competitors, then *a fortiori* a lawyer may represent a client whose interests are contrary to the interests of a *former* client who competes economically with the current client.

May the inquirer represent Corporation B in Matter 2?

13. The inquirer has told us, and we are assuming, that Matter 1 (the completed matter in which the inquirer previously represented Corporation A) is not "substantially related" to Matter 2 (Corporation B's contemplated suit against Corporation X). We thus assume that Matter 1 and Matter 2 do not involve the same transaction or legal dispute. Because the contemplated and former matters are not the same or substantially related, Rule 1.9 would not bar the inquirer from undertaking the proposed representation. We therefore do not need to determine whether Corporation B's interests in Matter 2 are materially adverse to the interests of Corporation A. Rule 1.9(a) requires that both prongs of the test

be met—same or substantially related, and materially adverse—and here the first prong is not met.

14. Nevertheless, it is worth noting that Corporation B's interests in Matter 2 would not be materially adverse to the interests of Corporation A under Rule 1.9. Just as competing economic interests do not create "differing interests" within the meaning of Rule 1.7(a)(1), so they do not create a "materially adverse" interest within the meaning of Rule 1.9(a). Here, the fact that Corporation A will benefit if Corporation B is unsuccessful in Matter 2 (because Corporation B is likely to be forced to go out of business if it loses, thus eliminating a competitor), does not create a materially adverse interest under Rule 1.9(a). That would stretch the meaning of "materially adverse" too far.

15. However, the inquirer remains bound by Rule 1.9(c) even if Rule 1.9(a) does not apply. Rule 1.9(c) prohibits a lawyer from using or revealing a former client's confidential information that is protected by Rule 1.6 except as the Rules would permit or require with respect to a current client.

    May the inquirer represent Corporation B in Matter 3?

16. Corporation A's threat to sue Corporation B, even if the threat matures into a lawsuit, does not disqualify the inquirer from representing Corporation B in Matter 3, as long as Corporation A remains a former client and Matter 1 and Matter 3 are not the same or substantially related. *See, e.g.*, N.Y. State 1008 (2014) (discussing whether a client is a current or former client as well as the conflicts rules applicable in each situation). Since the inquirer has stated and we are assuming that Corporation A is a former client and that Matter 3 is not substantially related to Matter 1, Rule 1.9(a) does not bar the inquirer's representation of Corporation B in Matter 3 because the first prong of the test in Rule 1.9(a) is not met. In addition the second prong of the Rule 1.9(a) test is not met. The fact that Corporations A and B have generally competing economic interests does not create a "materially adverse" interest within the meaning of Rule 1.9(a).

17. If the inquirer's representation of Corporation B in Matter 3 were substantially related to the former representation of Corporation A in Matter 1, then Rule 1.9(a) would prohibit the inquirer from defending Corporation B in the litigation brought by Corporation A unless the inquirer obtained Corporation A's informed consent, because the "materially adverse" prong of Rule 1.9(a) is always met when a former client is on the opposite side of a lawsuit involving the same or a substantially related matter, whether as plaintiff or defendant.

CONCLUSION

18. Where an attorney had previously represented Corporation A, the attorney may undertake the representation of Corporation B in litigation unrelated to the attorney's representation of Corporation A, notwithstanding that the two corporations are competitors in the same industry and that Corporation B's failure in the litigation would indirectly benefit Corporation A by eliminating a competitor. Corporation A's bringing suit against Corporation B in a matter unrelated to the attorney's prior representation of Corporation A is similarly not barred by Rule 1.9(a).

(20-16)

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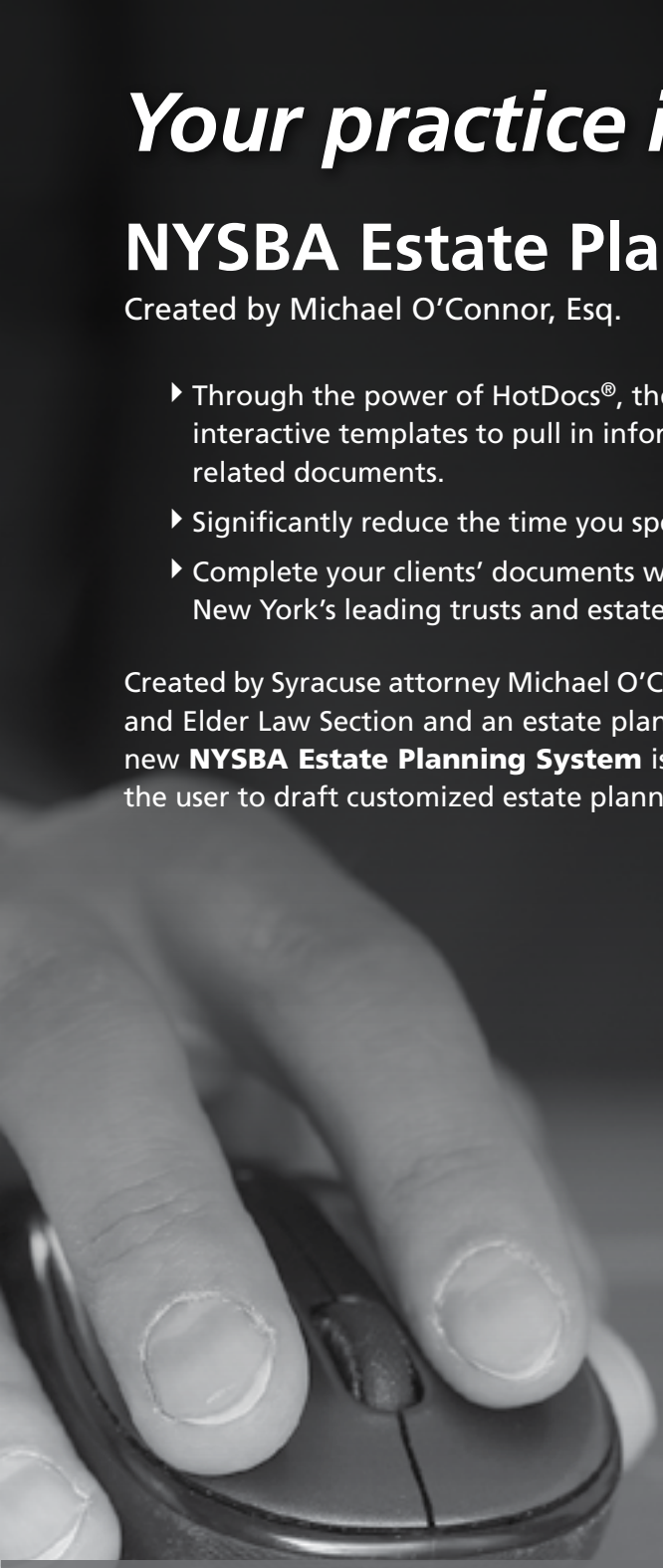

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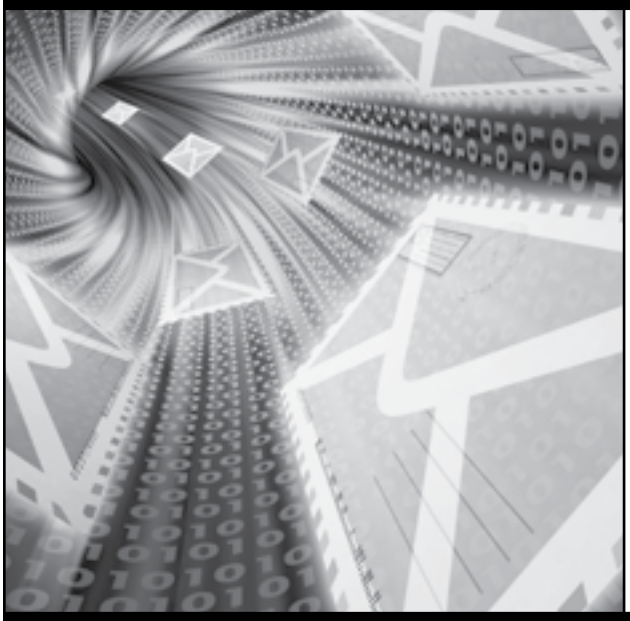

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