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ONEONONE

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Message from the Chair

Joel E. Abramson

May 2018 be a healthy and wonderful year for all *One on One* readers and their families. This edition of *One on One* provides articles that will be helpful to you, regardless of your area of practice or the size of your office.

You will get updates on attorney ethics, the attorney-client relationship/confidentiality privilege, and litigation pointers—knowledge that is impactful for all practitioners. This edition also contains highly informative articles on substantive developments in family law and the brave new world of the next generation of automobiles.

One important upcoming event to note—this year's NYSBA Annual Meeting! Hope to see many of you at the Section's Annual Meeting Program held on Tuesday morning, January 23, 2018, at the New York City Hilton.

This year, the agenda includes "Loose Lips and Emailing Lawyers: The Ethics or Protecting Client Confidences," "Hot Tips from the Experts," as well as updates on the CPLR and the NYS Lawyers' Fund for Client Protection.

It has in the past received great reviews from those in attendance and this year's program will be very informative and entertaining as well. There is a good opportunity to obtain credits for ethics CLE (2 Professional Practice; 2 Ethics).

Beyond keeping Section members well informed in diverse areas of substantive law, the Section hopes to advance an initiative to improve the conditions under which Section members and the overall legal community practice law.

Please feel free to submit to *One on One* articles pertaining to such subjects as professional liability (legal malpractice), professional discipline, the practitioner/court system relationship, and managing a law office.

These "nuts and bolts" issues connect all Section members, regardless of their substantive areas of practice. This commonality of interest forges a community of the General Practice Section members.

Your suggestions are always welcome whether for *One on One* or for General Practice Section programs, including the annual winter meeting. Please contact me or the editors with any suggestions. Now, it is time for you to enjoy this issue and to reap the benefits for your practice!

Joel E. Abramson

Message 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:

Insurance Policy Cancellations: *One on One*'s own Martin Minkowitz guides insured and insurance company counsel through the requirements of cancellation or non-renewal of a policy in New York.

Keeping Client Confidences and Loyalties after the Attorney-Client Relationship has Terminated: *One on One*'s own Richard Klass envelopes us in a timely story about one of the attorneys advising Harvey Weinstein, Lisa Bloom, daughter of famed women's legal advocate Gloria Allred.

The "Un-Orthodox" Divorce: Who Decides the Children's Religious Upbringing?: Natalie Diratsouian reviews the Weisberger divorce case, which shines a light upon the ever-evolving family dynamic within the context of current societal norms.

Broken Scales: Reflections on Injustice, by Joel Cohen with Dale J. Degenshein, with an Introduction by Honorable Nancy Gertner (retired): Carla Main provides a focused review that explores the nature of injustice, human frailty and its impact on judicial outcomes in *Broken Scales*.

Top Ten Things New Litigation Attorneys Should Know to Survive Their First Day in the Courtroom: Shannon Howley shows what attorneys should know before walking into court to maximize their potential for growth and avoid some common mistakes.

The Accelerating Evolution of Title VII's Treatment of Sexual Orientation Discrimination: Geoffrey A. Mort discusses developments during the past two years, and particularly in 2017, that have moved the country closer to banning sexual orientation discrimination.

Martin Minkowitz

Exes and the Attorney-Client Privilege: C. Evan Stewart explores the notion of whether—for purposes of the attorney-client privilege—there is (or should be) a similar demarcation between corporate clients and their ex-employees.

Inside the Courts: An Update from Skadden Securities Litigators: The attorneys of Skadden Arps provide a concise but exhaustive overview of significant corporate and securities litigation in the federal courts—in the current installment, from class actions to whistleblowing.

Autonomous Transportation: A Brave New World: Adam Dolan brings forward questions and unlikely answers related to the state law definitions that may impact the development of the next generation of automobiles.

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 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

Insurance Policy Cancellations

By Martin Minkowitz

A notice of cancellation of insurance coverage needs immediate attention. Having an insurance policy is a way of covering individuals or business with a sense of security. Increasing exposure to claims that can be made motivates obtaining insurance coverage, even more than once thought necessary. The policy needs attention every so often to make sure it is still adequate and that it is stays in effect. A good broker probably should do that although many policies are obtained directly from an insurance company, or its own agent, and many require the insured's attention.

Whether a policy has been or is being cancelled, or non-renewed, obviously is one of those events which needs attention. Cancellation or a non-renewal of a policy in New York regardless of whether it is a personal or commercial one, requires statutory compliance by the insurance company. Failing to strictly comply with the statutory mandate can render the attempt to cancel or non-renew void and of no effect. The New York State Insurance Law has separate cancellation provisions for personal lines and for commercial lines.[1]

Workers compensation policies, which of course are a commercial line of coverage, are mandatory for employers[2] and have their own statutory provisions for cancellation and non-renewal, in the Workers' Compensation Law, separate from the Insurance Law.[3] Those policies can be cancelled for nonpayment after 10 days from a notice by the insurance carrier which has been served on the employer and filed with the chair of the Workers' Compensation Board.[4] They can be cancelled or non-renewed within 30 days for all other reasons other than non-payment.

The cancellation notice is not sent to the insured by ordinary mail, it is sent certified or registered mail, return receipt requested. The notice can be sent to the last known place of business of the employer/policyholder.[5]

No one who wants and needs insurance coverage wants to have the policy cancelled or non-renewed. The 30 days advance notice is intended to enable the policyholder to have sufficient time to obtain new coverage. The coverage will continue if the cancellation and non-renewal provisions are not strictly adhered to. The effect of not having coverage because it was cancelled or non-renewed can be devastating, especially in the event of a claim which would have been covered. That is why the statutory provisions must be strictly observed by the insurance carrier and which is why, as noted above, failure to follow every detail of the statute could render the cancellation void. The insurance carrier has the burden of proof to establish that it has complied with the provisions of the law in cancelling the policy.[6] Whether proper notice of a workers' compensation policy was given by the insurance carrier is a question of fact for the Workers' Compensation Board. An Appellate Court will not substitute its own judgment if the Board's decision is based upon substantial evidence, such that a reasonable mind might accept as adequate.[7]

Therefore an attorney who has accepted a client whose liability for a workers' compensation claim has resulted from a cancellation of coverage should meticulously review the cancellation process used by the insurance carrier and the notice given. Proving that the policy is still in effect even though a notice was sent is the most effective way to protect the client. It will transfer the payment for the legal representation and compensation benefit payments from the client back to the insurance carrier.

Although it is rare that an Appellate Court will find that a decision of the Board is not supported by substantial evidence, particularly on an issue of a policy cancellation, it does occur. In a recent case it did just that.

In the *Osorio* case,[8] the Worker's Compensation Board had found that the insurance carrier had "produced insufficient proof to establish a nexus between its cancellation notice and its proof of mailing." It therefore concluded that the policy was still in effect. The insurance carrier appealed to the Appellate Division, Third Department. The court reviewed the evidence presented by the insurance carrier at the Board hearing and reversed the Board's finding that the insurance carrier was responsible for paying the workers' compensation claim. It held that the record as a whole had uncontroverted proof by the insurance carrier, that the notice was correctly addressed and sent by certified mail return receipt requested to the employer, which acknowledged receipt. The policy was found to have been properly cancelled. This case is an exception to what is generally a standard affirmance of the Board's decision and finding of fact. However the case is important, it demonstrates that an appeal to the Appellate Division (Third Department) can be fruitful, and should not be overlooked by either side.

Endnotes

1 *See* § 3425 and 3426 IL.

2 § 10 and 50 WCL.

3 § 54 WCL.

4 § 54 (5) WCL.

5 § 54 (5) WCL.

6 *Rue v. Northeast Timber Erections*, 289 A.D.2d 787.

7 *Cirrincione v. Scissors Wizard*, 145 A.D.3d 1325 (2016).

8 *Osorio v. M & L Express, Inc.*, 63 N.Y.S.3d 145 (2017).

Martin Minkowitz is Of Counsel at Stroock & Stroock & Lavan LLP in New York. He focuses his practice on insurance.

"I Got Bloomed": Keeping Client Confidences and Loyalties After the Attorney-Client Relationship Has Terminated

By Richard A. Klass

There is nothing more sacrosanct in the relationship between a client and his or her attorney than that of the joint duties owed by the attorney to the client to keep his confidences and remain loyal. By virtue of these duties owed by the attorney, the client is able to completely and candidly communicate with the attorney without the threat of having confidential information revealed to anyone else (with few exceptions). When the attorney has completed the legal matter at hand for the client, it is also important to recognize that these duties to keep client confidences and be loyal continue through the termination of representation. Thus, the duty to protect confidential information of an attorney's client is owed from the initial consultation with the client to the conclusion of the legal matter and, further, to the rest of the attorney's life.

They Got "Bloomed"

The year 2017 will be remembered as the year that Hollywood was forced to deal with its reputation for being sleazy; hopefully, the days of the typical Hollywood casting couch abuses will end. The allegations of sexual assault by many women against film producer Harvey Weinstein have brought about the "Weinstein effect," where many people now feel empowered to reveal abuse and harassment committed by celebrities and politicians.

Lisa Bloom and Harvey Weinstein

One of the attorneys advising Harvey Weinstein concerning the sexual assault allegations of several women was Lisa Bloom, daughter of famed women's legal advocate Gloria Allred. In a statement to Buzzfeed News when she ceased advising him, Bloom said:

"All I can say is, from my perspective, I thought 'here is my chance to get to the root of the problem from the inside … and to get a guy to handle this thing in a different way.'"

"I can see that my just being associated with this was a mistake."

In the article in Buzzfeed News on October 14, 2017, Claudia Rosenbaum wrote: "In fact, it got worse, particularly from an attorney-client perspective. The next day, during an appearance on *Good Morning America*, she appeared to acknowledge that Weinstein had engaged in illegal behavior."

"It's gross, yeah," Bloom told *GMA*. "I'm working with a guy who has behaved badly over the years, who is genuinely remorseful, who says, you know, 'I have caused a lot of pain.'"

In November 2017, Bloom appeared on "The View" and admitted that her judgment about advising Harvey Weinstein was clouded because of a miniseries she was developing with his company. She stated: "When I was approached … I was thrilled. It's not a conflict legally for an attorney to have a business deal with a client. Ethically, it's not an issue."

Lisa Bloom and Kathy Griffin

At the same time that Bloom was dealing with fallout from her representation of Harvey Weinstein, she was also dealing with another public relations crisis—Kathy Griffin.

Comedian Kathy Griffin displayed awful humor by being photographed with a fake bloody head of President Donald Trump. She retained Bloom to represent her at a press conference about the controversy. Apparently, there was a breakdown of their attorney-client relationship resulting in a tweet from Griffin to Bloom, telling her to "pls stop calling me."

In her own Twitter response, Bloom revealed that she worked on statements to be made at the press conference but "Kathy then during the press conference spontaneously chose to put aside the notes we had worked so hard on together. . . She's the only client I've ever had who chose to extemporize at a press conference rather than to read from notes we prepared in advance."

Bloom also denied Griffin's claim about repeatedly calling Griffin: "Really? Bombarding? Please show me the call logs then. I sent one text to Kathy in the last three months and placed one call to Randy [Griffin's boyfriend] recently."

Griffin then had her own response when asked about her experience with Bloom:

"If you want my Lisa Bloom statement, anybody, OK, here it is. Yes, I got Bloomed! Yes, I did not have a good experiences with her. . . I'm not gonna sue Lisa Bloom. I

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don't think Lisa Bloom should be shot, like some people want to shoot me. So, there's my f—cking statement."

Duty to Preserve Confidential Information of a Client

The duty of the attorney to preserve the confidential communications of his or her client continues after the relationship with a client is terminated, and the attorney therefore must not use, or make available for use, any information obtained through that relationship against such a former client. *1B Carmody-Wait 2d § 3:385*

In *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 2084, 141 L.Ed.2d 379 (1998), Chief Justice Rehnquist held that the attorney-client privilege applied to confidential information even after the client passed away.

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); *Hunt v. Blackburn,* 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn, supra,* at 389, 101 S.Ct. at 682.

Rule of Professional Conduct 1.6 provides that:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);[1]
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).
>
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
>
> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime;
>
> (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
>
> (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
>
> (5)(i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
>
> (ii) to establish or collect a fee; or
>
> (6) when permitted or required under these Rules or to comply with other law or court order.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Rule of Professional Conduct 1.9 provides, in relevant part, that:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Civil Practice Law and Rules (CPLR) 4503(a) provides:

> 1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

In New York State Bar Association Committee on Professional Ethics Opinion 1057 (June 5, 2015), the issue was whether a client's confidential information could be revealed when the attorney is withdrawing from representation in court proceedings:

> The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider (1) whether withdrawal is mandatory or permissive; (2) whether withdrawal may be accomplished without significant disclosure to the court; (3) whether disclosure is ordered by the court; (4) the circumstances under which the information is to be disclosed (e.g., in open court or in camera); and (5) whether the client consents to the disclosure. The lawyer may test on appeal the validity of a court's order to disclose. Client documents filed with another court in other proceedings will be deemed confidential unless their existence is generally known in the community or in the legal profession.

Duty to Be Loyal to the Client

An attorney owes fidelity to his or her client, he or she owes his or her profession the duty not to dishonor it and he or she owes the administration of justice the duty not to bring it into disrepute. *See Packer v. Rapoport*, 88 N.Y.S.2d 118, 120 (Sup. Ct. 1949), *rev'd*, 275 A.D. 820 (1st Dep't 1949), and *aff'd sub nom*. *In re Pabst's Will*, 277 A.D. 1116 (1st Dep't 1950), and *aff'd sub nom. In re Pabst's Will*, 278 A.D. 649 (1st Dep't 1951).

The duty of loyalty to a former client is broader than the attorney-client privilege and an attorney is not free to attack a former client with respect to the subject matter of the earlier representation even if the information used in the attack comes from sources other than the former client. (*People v. Liuzzo*, 167 A.D.2d 963 (4 Dep't 1990); *see Wise v Consolidated Edison Co. of N.Y.*, 282 AD2d 335 (1st Dep't 2001) ("The ethical obligation to maintain the confidences and secrets of clients and former clients is broader than the attorney-client privilege, and exists without regard to the nature or source of information or the fact that others share the knowledge" (internal quotation marks omitted)), *lv. denied*, 96 N.Y.2d 717 (2001)).

Avoiding Conflicts of Interest

According to the General Principles underlying the Rules of Professional Responsibility, "loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client."

"The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."

Rule of Professional Conduct 1.7 provides that:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a

reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

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

(4) each affected client gives informed consent, confirmed in writing.[2]

The Court of Appeals stated, in *Greene v. Greene*, 47 N.Y.2d 447, 451 (1979), "It is a long-standing precept of the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law. For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (*see, e. g., Cardinale v. Golinello*, 43 N.Y.2d 288, 296, 401 N.Y.S.2d 191, 195, 372 N.E.2d 26, 30; *Eisemann v. Hazard*, 218 N.Y. 155, 159, 112 N.E. 722, 723; Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large."

An attorney has to be extremely careful to avoid any conflict of interest when advising a client and having a business relationship with the client at the same time.

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial trans-action with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons, business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of N.Y. Rules of Prof. Conduct, Rule 1.8(a), 22 NYCRR § 1200.0 must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the client. 7 N.Y. Jur. 2d Attorneys at Law § 461.

Endnotes

1 "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

2 (e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

The "Un-Orthodox" Divorce: Who Decides the Children's Religious Upbringing?

By Natalie N. Diratsouian

Today, culturally diverse and "interfaith" households are commonplace. While religious acceptance can raise some questions even within intact families, tensions may grow deeper when a parent's individual religious values evolve over time. What if parents once had an understanding as to the role of religion in their children's lives, but their previous belief system comes in conflict with their current lifestyle? When parents divorce, who makes the ultimate decisions about their children's religious upbringing and education where their views are at odds? Can one parent be forced to adhere to specific religious tenets in furtherance of the children's religious upbringing? A recent decision by the New York Appellate Division emphasized that the "best interests of the children" remains the paramount concern of the Family Court.

At the time of the Weisberger divorce,[1] the parties agreed to joint legal custody of their three children, with the mother maintaining primary residential custody and the father having visitation with the children on alternating weekends. Importantly, the parties' agreement contained a religious upbringing clause, requiring the children to be raised in adherence with Hasidic Judaism. The agreement allotted decision-making authority regarding the children's education to the father. Three years after the parties' divorce, the father moved to modify their custody arrangement to award him sole custody. His request was prompted by his ex-wife's having come out publicly as lesbian and permitting the children to violate various traditional tenets of Hasidic Judaism, including dress and diet. It was also revealed that the mother began living with a transgender man, who maintained extensive contact with the children.

After temporarily expanding the father's parenting time, the trial court held a hearing. The father objected to the children "being exposed to anyone who was openly non-religious, or to any intimate relationship that was not sanctioned by Jewish law." The mother testified that as a result of the temporary expansion of the father's parenting time, the children would often return from their father's home upset and confused regarding his lack of tolerance for her level of religious observance.

As a result of the hearing, the court determined that the mother was primarily responsible for taking care of the children's needs throughout their lives. Nonetheless, the trial court granted the father's motion, in part, by awarding him sole legal and residential custody. In conjunction with a shift of custodial rights, the court enforced the religious upbringing clause, requiring the mother to direct the children to practice full religious observance. Additionally, it directed the mother to practice full religious observance in the presence of the children, although the parties' agreement did not call for this.

On appeal, the appellate court analyzed whether there had been a change in circumstances warranting modification of the custody arrangement. It concluded that the trial court's custody analysis was improper due to its emphasis upon the parties' religious upbringing clause within their divorce agreement, rather than looking to what was in the children's best interests. The appellate court reasoned that religion may be considered in a custody dispute where the child's "actual religious ties" are better served by one parent. Additionally, the court articulated that the provision of specific religious upbringing for children within a custody agreement will be enforced, but only to the extent that it remains consistent with the best interests of the children.

Furthermore, the Appellate Division held that the trial court had erred in requiring the mother to practice full Hasidic religious observance while in the presence of the children. Although the parties have a right to agree to raise their children within a particular religion, a court may not compel a person to adopt any particular religious lifestyle. As the evidence did not support the conclusion that it was in the children's best interests to have their mother conceal her true beliefs and to force her to adhere to practices which do not comport with her beliefs, the Court refused to compel her to do so.

Ultimately, the court determined that the father should be permitted decision-making authority regarding the children's education and religious instruction. This arrangement was deemed to be in the children's best interests since the children spent their entire lives strictly observing Hasidic Judaism and they were fully immersed within the religious community. While the court directed that the parties were to make reasonable efforts to ensure that the children's religious requirements were met, each parent was permitted to exercise his or her personal religious discretion while the children are in his or her custody.

This case shines light upon the ever-evolving family dynamic within the context of current societal norms. Although sexual identity and religious practice are personal concerns related to the individual, parties may agree to a certain set of "rules" as they apply to their children. Nevertheless, these "rules" may not impinge upon personal freedoms and must correspond with the children's best interests in order to remain enforceable by the court.

Endnote

1 *Weisberger v. Weisberger*, ___ A.D.3d ___, 2017 N.Y. Slip Op. 06212 (2017).

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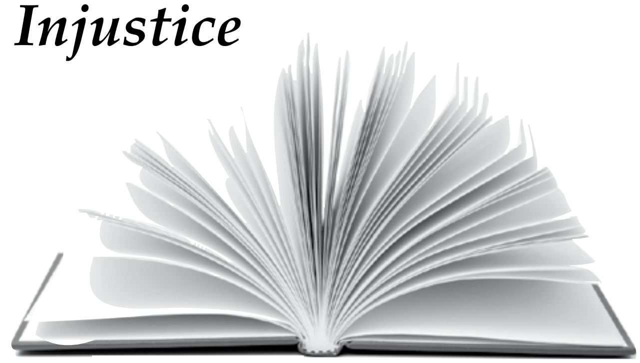
Book Review

Broken Scales: Reflections on Injustice

By Joel Cohen with Dale J. Degenshein
Introduction by Hon. Nancy Gertner (retired)
American Bar Association Press, 2017



Reviewed by Carla T. Main

Joel Cohen, a criminal defense attorney in New York City and former federal prosecutor, explores the nature of injustice in *Broken Scales*. Calling to mind Alexis de Tocqueville, who famously traveled America to elucidate the nature of its democracy and report back to the Continent, Mr. Cohen has traveled the nation and interviewed ten individuals who were the victims or perpetrators of injustice. The result is an extraordinary exploration of human frailty and its impact on judicial outcomes. *Broken Scales* is unlike the legions of other books that examine the inner workings of the American judicial system through application of constitutional standards or political science theories. Mr. Cohen explores with his subjects two fundamental inquiries. For perpetrators of injustice: Did you try to do right? And, for victims: Who wronged you?

Mr. Cohen's probing examinations into the heart of injustice show that it is in the breakdown of individual character that we find the greatest threat to the administration of justice. Through painstaking questioning, Mr. Cohen reveals that the stories of individuals wrongfully convicted and judges stymied in their careers are not the stuff of television drama. For the most part, there is no great evil at work in these stories. There is, instead, human weakness behind the miscarriages of justice discussed in *Broken Scales*: hubris, ambition, carelessness, prejudice, arrogance, cowardice, group-think, fear. This causes the stories in *Broken Scales* to take on a Biblical dimension: lives ruined because of a lie told, a weakness indulged, a fear not faced.

Each one-on-one dialogue with a victim or perpetrator of injustice is presented in a *verbatim* question and answer format. The reader sees the questions posed to and the actual words of the people Mr. Cohen spent time with. Among those interviewed were A. Martin Stroud III, a prosecutor in Louisiana who sent Glenn Ford, an innocent man, to death row where he languished for decades; Kenneth F. Ireland, Jr., sent to a Connecticut prison for rape and murder when he was 18 years old on the strength of perjured testimony, who was exonerated with DNA evidence after serving 21 years; Steven Pagones, investigated for eight months and pilloried in the press for an infamous sex and race crime fabricated by his accusers; and A. Ashley Tabaddor, an immigration judge born in Iran. She was told she could no longer preside in cases involving Iranians after attending a White House event for Iranian-American community leaders, to which she had received an unsolicited invitation.

Former Iowa Chief Judge Marsha Ternus voted with her fellow justices in a unanimous decision in 2009 in *Varum v. Brien*, which concluded that the Iowa Constitution did not permit the state to limit marriage to heterosexual couples. Even though the decision was final, Judge Ternus (and two other justices) were soon voted out of office in a well-funded campaign, "to send a message," Mr. Cohen writes.

In his interviews with judges, exonerated defendants and prosecutors who pursued the innocent, Cohen asks questions to divine the many ways in which the human heart responds to grave miscarriages of justice. Here we find both hope and despair, for there is forgiveness and well as consuming anger. Mr. Ireland, having spent his entire young adulthood in prison, is surprisingly calm. "I just want to enjoy life. I don't want stress," he says. He doesn't wish to confront the people who gave perjured testimony against him. "What am I going to say: …You ruined my life?...I don't need an apology."

Mr. Stroud feels guilt for sending Mr. Ford to death row on scant evidence. Mr. Ford served 30 years awaiting the death sentence before being exonerated. As Mr. Ford lay dying, Mr. Stroud apologized. But Mr. Ford was not

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ready to forgive him. "[Mr. Ford] knew he was dying, yes. And he had anger. He indicated that he was angry and hadn't worked through all of that yet," Mr. Stroud told Mr. Cohen, describing an encounter with the man he sent to death row, in their interview in *Broken Scales*.

"Reflecting on decisions made as a young prosecutor, Mr. Stroud said, "I didn't realize until many years later what an awesome decision we were making. And that's my whole problem with the death penalty now; human beings making a decision that another human being should be executed."

Mr. Stroud now defends individuals charged in death penalty cases. He has asked the Bar to take action against him regarding the Ford case.

Mr. Cohen chose to present the interviews in random order, rather than judge for the reader the relative importance of the injustices presented. That evaluative process, according to Cohen, should be part of the reader's thought process. As the book lays bare in multiple contexts, not only death row cases but other felonies, the opportunities for human error in the system are many. *Broken Scales* deftly demonstrates that where there are great disparities in resources or there is mendacity afoot, an appeal is unlikely to change the outcome.

Consequently, *Broken Scales*, without resort to rhetoric, makes a stunning indictment against the death penalty. By delving so deeply into an ugly corner of American life, Cohen has a done a great service by revealing the all-too-human ways in which injustice can creep into the body of a liberal democracy.

Top 10 Things New Litigation Attorneys Should Know to Survive Their First Day in the Courtroom

By Shannon Howley

Stepping into the courtroom presents new attorneys with an opportunity to build their most valuable asset: their reputation. However, there are several things new litigation attorneys should know before walking into court to maximize their potential for growth and avoid some common mistakes.

Shannon Howley

1. Obtain a Secure Pass ID: Be sure to get one prior to your first court appearance. Applicants must pay a $50 processing fee and undergo a thorough application process. However, obtaining one is crucial, as it allows holders to enter New York State courthouses without having to wait in long lines and pass through magnetometers.

2. Parking: Give yourself enough time to find parking and get to the courthouse before your case is called. Some courthouses in Upstate New York are known to have free parking lots adjacent to the courthouse with plenty of open spaces. On the other hand, off-street parking may be non-existent around other courthouses or may require you to walk several blocks from a parking garage down the street. If that is the case, perhaps you should plan to take an Uber/Lyft or at least pack sensible shoes for the trek.

3. Sign In: Once you've finally made it into the courthouse, make sure you sign in with the correct court deputy. Don't just take a seat in the lobby and wait for your case to get called. You won't be called unless the deputy knows you are present for the case.

4. Be Prepared to Wait: After you've run across several blocks to get to the courthouse on time, you may find that your case isn't called for another 45 minutes. Use your time wisely—whether that means meeting with your client, trying to work out a deal with opposing counsel, or bringing other cases to review. You will probably have plenty of time to wait for your case to be called, so make sure you are prepared.

5. Block off Time for Court: Along the same lines as the tip above, make sure you don't schedule anything else immediately after your court appearance. Your case may not only be called late, but it could take a bit longer in court as well. Perhaps the judge will ask the parties to step out to try to reach a resolution on their own, then report back to the judge in a half hour. If possible, try not to schedule any appointments that could end up conflicting with your court appearance.

6. Calendaring: Calendaring motion due dates can be a daunting task. Calculating the wrong due date can lead to missed deadlines. Beware of differences between federal and state court deadlines as well.

7. Know the Local Court Rules: Take some time to read and familiarize yourself with the local court rules. Do not assume that all local courts across the state operate the same way. Some judges require that you send them a hard copy of anything that has been e-filed; other judicial districts have a not implemented e-filing yet.

8. Judges Are Human: Not everyone's going to be nice to you or even professional 100 percent of the time. Just be prepared. As a new litigation attorney, the first impres-sion you leave can be a lasting one, especially if you act unprofessionally in someone else's courtroom. Try not to take anything personally, and do not be rude.

9. Proofread: Proofread everything carefully—from motion papers to letters to opposing counsel—before submission. Do not trust Microsoft Word or some other program to do it for you. Be sure to always "Shepardize" or "key cite" your cases before using them. Poor grammar can make you seem like a sloppy lawyer, and citing bad law can be damaging to your client.

10. Ask Questions: Often. Asking questions indicates that you are committed to being the best lawyer you can be. Also, it's better to learn now—the easy way—than to learn the hard way by making a mistake that could cost your client.

New litigation attorneys should always behave professionally toward their colleagues, act with diligence, and implement the highest ethical standards.

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The Accelerating Evolution of Title VII's Treatment of Sexual Orientation Discrimination

By Geoffrey A. Mort

Introduction

When the 1964 Civil Rights Act was passed, the statute prohibited sex discrimination in an amendment that added just three words, "because of sex," to the provision in Title VII prohibiting employment discrimination.[1] These three words, of course, provided little useful guidance to lawyers and litigants seeking to challenge what they believed to be sex discrimination in the workplace. During the years immediately after Title VII's passage, the Equal Employment Opportunity Commission failed to take the Act's ban of sex discrimination seriously, and moved slowly to address the early charges in this area that were filed.[2]

However, under pressure from the National Organization of Women and some of its own female staff attorneys, the EEOC began to deal more assertively with sex discrimination complaints and issued rulings in favor of such plaintiffs as flight attendants contesting no-marriage policies.[3] Very few people during Title VII's first two decades of existence, however, suggested that the statute's prohibition of sex discrimination extended to discrimination against gays and lesbians based on their sexual preferences, or sexual orientation discrimination.

In the half century since Title VII's passage, however, the law in this area has changed significantly, particularly since 2015. Indeed, following the U.S. Supreme Court's decision in *Obergefell v. Hodges*[4] legalizing same-sex marriage, some have ventured that we are on the cusp of having sexual orientation discrimination banned by federal law in much of the United States.[5]

This article discusses developments during the past two years, and particularly in 2017, that have moved the country closer to that point. For the first time, a federal circuit court of appeals has found that Title VII prohibits sexual orientation discrimination,[6] and another may be on the verge of doing so. These and other cases suggest that the traditional notion that Title VII's prohibition of sex discrimination applies only to discrimination on the basis of gender, and not sexual orientation, may soon become a thing of the past.

Ulane and Early Sexual Orientation Cases

The first major federal circuit case to address the question of whether Title VII covers sexual orientation discrimination was *Ulane v. Eastern Airlines, Inc.*[7] In deciding that Title VII does not prohibit discrimination based on sexual orientation, the *Ulane* court's reasoning was twofold: (1) the court stated that the "phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men,"[8] and (2) "[i]f the term sex as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."[9]

The second notion in particular was to become commonplace in the many subsequent circuit court decisions that arrived at the same conclusion as *Ulane.* In the years after *Ulane*, nearly every circuit court of appeals in the country decided that sexual orientation discrimination is not covered by Title VII.[10]

Supreme Court Decisions Cast Doubt on the Narrow Reading of Title VII

Two Supreme Court decisions over a nine-year span for the first time gave limited protection against workplace discrimination against gay and lesbian employees. The first is *Price WaterHouse v. Hopkins*,[11] where the Supreme Court found sex stereotyping to be a form of gender discrimination under Title VII. Although the plaintiff in *Price WaterHouse* was a female executive who was denied promotion because she did not conform to her male superiors' stereotypes about how women should dress and behave, some courts and attorneys realized that the decision could be used to combat workplace discrimination against gays and lesbians.[12] As discussed below, sex stereotyping discrimination as defined in *Price Waterhouse* increasingly became a preferred theory on which to challenge sexual orientation discrimination under Title VII.

The second Supreme Court decision is *Oncale v. Sundowner Offshore Services.*[13] In *Oncale,* the court recognized same-sex harassment as sex discrimination. The employee in *Oncale* was not gay, but was harassed by male co-workers who regarded him as insufficiently masculine. Thus, the rationale of *Oncale* could be used by gay employees subjected to harassment because of their appearance or behavior so long as they did not attribute the harassment to being gay. The reluctance of the lower federal courts to extend *Oncale* to discrimination based on one's status as a gay man per se created a paradox recognized by a number of courts[14] that in most circuits

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remains unresolved to this day. As the Seventh Circuit in *Hamm v. Weyauwega Milk Products, Inc*.[15] observed five years after *Oncale*, "the absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals."

Oncale, which in a sense was also a sex stereotyping or gender norm discrimination case, may have provided the impetus for one circuit to forthrightly apply its holding to gays and lesbians. In *Rene v. MGM Grand Hotel, Inc.,*[16] the Ninth Circuit found that a gay male employee harassed and taunted by co-workers for having feminine traits successfully pleaded a claim of sex discrimination under Title VII. *Rene* opened the door, albeit slowly, to a growing number of courts applying sex stereotyping principles in cases of sexual orientation discrimination.

"Second Generation" Sexual Orientation Discrimination Cases: Continued Reliance on Congressional Inaction as a Rationale

After *PriceWaterhouse* and *Oncale,* all but one of the circuit courts still continued to find that sexual orientation discrimination is not prohibited by Title VII. The Second Circuit so held in *Simonton v. Runyon,*[17] where it pointed out that "we are informed by Congress's rejection, on several occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences."[18] Failure by Congress to amend Title VII to specifically include the words "sexual orientation" was cited in *Ulane*, has been employed by a majority of other circuits to justify not construing Title VII to cover sexual orientation discrimination, and was relied on by the Second Circuit five years after *Simonton* in *Dawson v. Bumble & Bumble.*[19] Although the court in *Dawson* acknowledged that "it is often difficult to discern when [a plaintiff] is alleging that…adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these,"[20] it then announced that "[a] gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."[21] During the next decade, the "bootstrap" language would be used repeatedly by courts seeking to resist the use of sex stereotyping theory by plaintiffs allegedly subjected to sexual orientation discrimination.

The Second Circuit, of course, was not alone in continuing to follow *Ulane* after the *PriceWaterhouse* and *Oncale* decisions. The Sixth Circuit emphatically did so in *Vickers v. Fairfield Med. Center*:[22] "recognition of [the gay plaintiff's] claim would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation under a sex stereotyping theory [would be prohibited] if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." And, in *Etsitty v. Utah Transit Authority,*[23] the Tenth Circuit also rejected *PriceWaterHouse's* application to sexual orientation discrimination.[24]

District Courts Look Anew at Sexual Orientation Discrimination

Notwithstanding the near unanimity of the Circuit courts on the question of whether Title VII covers sexual orientation discrimination, a number of district courts have found the argument that "because of sex" does not encompass discrimination based on sexual preference to be illogical. Such decisions provided an underpinning to later circuit court cases that questioned the traditional reasoning on this issue.[25]

In *Boutillier v. Harford Pub. Sch.,*[26] the court allowed a lesbian teacher's sex discrimination case to proceed where the only evidence of her sexual orientation was that she was married to a woman, holding that the plaintiff "has set forth a plausible claim that she was discriminated against based on her nonconforming gender behavior."[27] The court in *Koke v. Baumgardner*[28] found a Title VII sexual orientation discrimination claim to be meritorious and cited to language in *Simonton* that an argument that sexual orientation discrimination can be perceived as discrimination based on sexual stereotypes was "substantial."[29]

Yet another district court decision that deviated from the circuit court "second generation" decisions was *Terveer v. Billington.*[30] The district court in *Terveer* denied a summary judgment motion where the plaintiff alleged that the defendant denied him promotions and created a hostile work environment because of his failure to conform to male sex stereotypes, basing his nonconformity solely on his status as a gay man. *See alsoVideckis v. Pepperdine University.*[31]

Hively v. Ivy Tech: The Seventh Circuit Recognizes Sexual Orientation Discrimination as Discrimination Per Se

In the fall of 2016, a Seventh Circuit panel heard an appeal from a district court decision dismissing the sexual orientation claim of a lesbian former community college professor who had been denied promotions and later terminated. In *Hively v. Ivy Tech Community College,*[32] the court reluctantly affirmed the district court on the grounds that, as a panel, "we must adhere to our prior precedent,"[33] i.e., *Ulane.* In doing so, however, the panel expressed grave reservations about the continued viability of *Ulane,* stating that "it seems unlikely that our society can continue to condone a legal structure in which employees can be fired…and otherwise discriminated against solely based on who they date, love or marry."[34]

All but inviting an *en banc* rehearing, the court criticized traditional case law on sexual orientation discrimination for creating a "paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."[35] On October 11, 2016, the Seventh Circuit set aside the panel's ruling that Title VII does not protect against sexual orientation discrimination because of *Ulane* and granted *sua sponte* an *en banc* rehearing.

En banc oral argument took place at the end of November 2016, and the full Seventh Circuit court issued its decision on April 4, 2017.[36] The court held that Title VII prohibits sexual orientation discrimination, stressing the "commonsense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."[37] The court further found that there is no difference between a gender nonconformity claim and a straightforward sexual orientation claim. In a concurrence, Judge Posner stated that what he called "judicial interpretative updating"[38] meaning revisiting and reinterpreting an existing statute, even where the reinterpreted version is not consistent with what Congress may originally have intended, is sometimes warranted and was clearly called for in *Hively.*

Is the Second Circuit Following in *Hively*'s Footsteps?

No fewer than four district court decisions holding that Title VII does not prohibit sexual orientation discrimination have been appealed to the Second Circuit in the last year: *Zarda v. Altitude Express,*[39] *Christiansen v. Omnicom Group, Inc.*,[40] *Cargian v. Breitling USA*[41] and *Magnusson v. County of Suffolk.*[42] *Zarda, Christiansen* and *Cargian* all resulted in affirmances based on *Simonton*, although a majority of the panel in *Christiansen* issued a concurrence suggesting that the entire Second Circuit should reconsider the issue *en banc.* Motions for an *en banc* rehearing were made in all three cases, and granted in *Zarda.* Oral argument was held on September 26, 2017.

Of course, the fact that the Second Circuit agreed to rehear *Zarda en banc* suggests that the court may be inclined to find that Title VII covers sexual orientation discrimination and thus become the second circuit to reach this conclusion. A number of *amicus* briefs have been filed, including one by the U.S. Department of Justice arguing against any expansion of Title VII to include sexual orientation discrimination.[43]

Conclusion

Regardless of what the Second Circuit decides in *Zarda, Hively* has created a split in the circuits that almost certainly will be resolved in the Supreme Court. Speculation as to the outcome of future Supreme Court cases is notoriously unreliable, particularly when the composition of the Court may change during the next few years. Certainly, there is reason to believe that the societal shift in favor of gay rights and greater acceptance of gays and lesbians suggest that extending the protection of federal anti-discrimination law to sexual orientation is only a matter of time. Particularly during the last three years, as discussed above, there has been considerable movement among the federal courts in that direction.

Nevertheless, should another conservative justice be appointed to the Supreme Court, the outcome of a case involving Title VII's coverage of sexual orientation discrimination is anything but assured. This is certain to be an issue that the legal community and the public at large will follow with rapt attention in the months and years to come.

Endnotes

1. 42 U.S.C. §2000e-2(a).
2. Gillian Thomas, Because of Sex 4 (2016).
3. *Id*.
4. 135 S. Ct. 2584 (2015).
5. Twenty-two states now prohibit sexual orientation discrimination in employment in both the public and private sectors, and another twelve ban it in the public sector.
6. 853 F.3d 339 (7th Cir. 2017).
7. 742 F.2d 1081 (7th Cir. 1984).
8. *Id.* at 1085.
9. *Id.* at 1087.
10. *See, e.g., Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252 (1st Cir. 1999); *Hopkins v. Baltimore Gas & Elec. Co.,* 77 F.3d 33 (4th Cir. 1996); *U.S. Dept. of Housing & Urban Dev. v. Federal Labor Relations Authority,* 964 F.2d 1 (D.C. Cir. 1992); *Blum v. Gulf Oil Co.,* 597 F.2d 936 (5th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.,* 876 F.2d 69 (8th Cir. 1989).
11. 490 U.S. 228 (1989).
12. *See, e.g., Doe by Doe v. City of Belleville, Ill.,* 119 F.3d 563 (7th Cir. 1997) (male employee who wore earring and was called "fag" or "queer" made sufficient allegation of gender-based sex stereotyping discrimination to defeat summary judgment).
13. 523 U.S. 75 (1998).
14. *See, e.g., Centola v. Potter,* 183 F. Supp. 403, 408 (D. Mass. 2002) ("the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear").
15. 332 F.3d 1058, 1067 (7th Cir. 2003).
16. 305 F.3d 1061 (9th Cir. 2002).
17. 232 F.3d 33 (2d Cir. 2000).
18. Id. at 35.
19. 398 F.3d 211 (2d Cir. 2005).
20. *Id.* at 217.
21. *Id.* at 212.
22. 453 F.3d 757, 764 (6th Cir. 2006).
23. 502 F.3d 1215 (10th Cir. 2007).
24. Sex Stereotyping with respect to sexual orientation has gradually gained acceptance. As of mid–2017, only three circuits, the Fourth, Sixth and Tenth, were either undecided or continued to reject the theory.
25. Of considerable significance is the EEOC's 2015 decision in *Baldwin v. Foxx,* EEOC Doc. 0120133080 (July 15, 2015). In *Baldwin,* the EEOC found that Title VII's "because of sex" language covers

sexual orientation discrimination. The Commission found that sexual orientation discrimination is discrimination *per se*, and also embraced sex stereotyping and associational discrimination as grounds upon which discrimination based on sexual preference could be challenged. The Commission stated that "'[s]exual orientation' cannot be defined or understood without reference to sex." Some courts thereafter followed *Baldwin's* reasoning in finding sexual orientation discrimination to be barred by Title VII. *See, e.g., Isaacs v. Felder Services, LLC,* 143 F. Supp. 3d (M.D. Ala. 2015).

26. 2014 U.S. Dist. LEXIS 134919 (D. Ct. Sept. 25, 2014).
27. *Id.* at *2.
28. 2016 U.S. Dist. LEXIS 1979 (S.D.N.Y. 2016).
29. *Simonton* at 37.
30. 34 F. Supp. 3d 100 (D.D.C. 2014).
31. 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (finding that "the line between sex discrimination and sexual orientation discrimination…does not exist, save as a lingering and faulty judicial construct").
32. 830 F.3d 698 (7th Cir. 2016).
33. *Id.* at 718.
34. *Id.*
35. *Id.* at 714.
36. 853 F.3d 339 (7th Cir. 2017).
37. *Id.* at 351.
38. *Id.* at 353.
39. *Zarda v. Altitude Express, Inc.*, No. 10 cv 04334 (E.D.N.Y. 2015).
40. 167 F. Supp. 3d 598 (S.D.N.Y. 2016).
41. 2016 U.S. Dist. LEXIS 139206 (S.D.N.Y. Sept. 29, 2016).
42. 2016 U.S. Dist. LEXIS 64897 (E.D.N.Y. May 17, 2016).
43. Michael D. Shear and Charlie Savage, *White House Lands 3 Punches Against Gay Rights in One Day*, N.Y. Times July 28, 2017, at A1.

Exes and the Attorney-Client Privilege

By C. Evan Stewart

Taylor Swift has never been shy about dissing her ex-boyfriends. For example, one of her biggest mega-hits is entitled "We Are Never Ever Getting Back Together."[1] Obviously, the message is quite clear that, in her world, there is a clear demarcation between the status of being a boyfriend and an ex-boyfriend. This article will explore the notion of whether—for purposes of the attorney-client privilege—there is (or should be) a similar demarcation between corporate clients and their ex-employees.[2]

The Starting Point

In 1981, the U.S. Supreme Court strongly affirmed the privilege in the corporate setting in *Upjohn v. United States*.[3] The *Upjohn* Court stressed the importance of there being "full and frank communications between attorneys and their clients," and that such communications are necessary to enable a lawyer to give "sound and informed advice." The Court also concluded that the privilege "promote[s] broader public interests in the observation of law and the administration of justice." As a consequence of these policies and interests, the Court barred from disclosure to the Internal Revenue Service corporate counsel's fact-oriented communications with employees regarding an investigation into questionable payments made to foreign government officials; and given an attorney's need to render "sound and informed advice," the Court specifically rejected prior precedent limiting the privilege to only certain employees.[4]

As important and as helpful as the Supreme Court's decision has been, one area the Court left open was whether the privilege extends to communication with ex-employees. Seven of the 86 people interviewed in the *Upjohn* investigation were no longer employees at the time of their interviews. Although *Upjohn* asked that the privilege also cover those individuals, the Court declined to extend the privilege to them because the lower courts had not addressed the issue.[5] Chief Justice Burger, in his concurrence, thought that the act of declining was regrettable, arguing that a former employee should also be covered when he or she "speaks at the direction of management with an attorney regarding conduct or proposed conduct within the scope of employment."[6]

Extending *Upjohn*

In the aftermath of *Upjohn*, a number of courts have decided to extend its rationale to former employees, so long as the privileged communications related to their tenure at the company (i.e., consistent with the Burger concurrence).[7] And the *Restatement* has also opined that communications with a former agent (a/k/a ex-employee) are privileged, *but only so long as* "the former agent has a continuing legal obligation to the principal organization to forward the information to the organization's lawyer."[8]

At the same time, several other courts have expressly declined to expand *Upjohn* to cover ex-employees.[9] And now another court has recently joined the latter's ranks, to a fair amount of brouhaha.

Washington Goes Rogue?[10]

On October 20, 2016, the Supreme Court of Washington—in an *en banc* decision, by a five to four vote—ruled that the attorney-client privilege does not extend to ex-employees. In *Newman v. Highland School District No. 203*,[11] a high school quarterback suffered a permanent brain injury in a football game; he (and his parents) thereafter sued the school district for negligence. Lawyers for the school district interviewed several former coaches and appeared on their behalf at their depositions. Plaintiffs moved to disqualify the lawyers on the ground of a conflict of interest. The trial court denied the motion, but also ruled the defense counsel could not "represent non-employee witness[es] in the future." Plaintiffs then sought discovery of communications between defense counsel and the former coaches during time periods when the coaches were unrepresented by defense counsel. The trial court granted that motion, ordering the school district to identify "exactly when defense counsel represented each former employee" and barring those lawyers from asserting the privilege with respect to any communications not encompassed by the representation period. At the same time, the trial court (i) did *not* rule that the communications during the representation period (i.e., the depositions) were *not* protected by the privilege; and, (ii) did *not* take issue with the notion that any communications with counsel *during* the coaches' employment were fully protected by the privilege.[12] The school district appealed the trial court's ruling to the Washington Supreme Court.

The majority decision for the *en banc* Washington Supreme Court started off by correctly noting that the U.S. Supreme Court expressly declined to resolve the ex-employee issue in *Upjohn*. It then ruled that the school district's argument to extend *Upjohn's* rationale was flawed "because former employees categorically differ from current employees."[13] Once the employer-employee agency

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relationship ends, "the former employee can no longer bind the corporation and no longer owes duties of loyalty, obedience, and confidentiality to the corporation."[14] And, as such, "a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party."[15]

The *Newman* majority, in rejecting the extension/expansion of *Upjohn*, noted that some courts have in fact gone in a different direction, based upon "the corporation's perceived need to know what its former employees know."[16] But it found this argument "unpersuasive" because that concern is universal—not only would a defendant perceive such a need: "[s]o might a plaintiff, so might a government."

> *"The reaction to the* Newman *decision by various talking heads in the media was as breathless as it was wrong."*

The *Newman* dissent strongly disagreed with the majority's analysis and outcome. The entirety of the dissent's position, however, was based upon a false construct: the dissent repeatedly (at least fourteen times) invoked *Upjohn's* "flexible"/"functional" approach to the corporate attorney-client privilege. But such an approach is simply *not* what the U.S. Supreme Court did; rather, the Court (i) expressly ruled that *all* current Upjohn employees were covered by the privilege and (ii) expressly declined to extend the privilege to *any* ex-employees. The notion that the U.S. Supreme Court provided a "functional framework for lower courts" to decide the issue for ex-employees in the aftermath of *Upjohn* has no jurisprudential grounding whatsoever, and the *Newman* dissent provided none.[17]

To its credit, the *Newman* dissent did "acknowledge that *Upjohn's* policies and purposes do not require us to consider former employees exactly as we consider current employees"—i.e., no agency relationship, no duties of confidentiality, loyalty, etc. But, in the dissent's view, those considerations (and the *Restatement (Third) of the Law Governing Lawyers*) are "incorrectly framed statements of the law, and [. . .] are inconsistent with the functional framework of *Upjohn*."

The Immediate Aftermath of *Newman* (a/k/a "Fake News")

The reaction to the *Newman* decision by various talking heads in the media was as breathless as it was wrong.[18] One oft-quoted commentator called the majority's decision incorrect, inconsistent with *Upjohn*, and . . . "troubling": "the decision is a bad idea for Washington and bad for other courts to follow."[19] Another oft-quoted commentator similarly opined that the majority's decision is inconsistent with *Upjohn* and "takes the distinct minority view."[20] The foregoing punditry may constitute the "conventional wisdom" (at least at first blush), but what is the "straight scoop"?

The "Straight Scoop"

The "straight scoop" consists of at least two things. The first is the state of the law *vis-à-vis* ex-employees; and it is fair to say that there currently exist four states, three of which are on the right side of the privilege. As an initial matter, the *Upjohn* Court's decision not to extend the privilege to ex-employees is still what the Supreme Court's take is on this subject; *nothing* has happened over the last 36 years to change that state of affairs. Thus, it is simply incorrect factually to say that the *Newman* majority's decision is "inconsistent" with *Upjohn*.[21]

Next up, the *Restatement's* view is also undoubtedly correct. For example, if an ex-employee has—as a matter of fact—binding legal obligations to keep company information gained during his or her employment confidential and to cooperate with respect to said information with company counsel (obligations, for example, set forth in a severance agreement), then those "continuing legal obligations" should, of course, be binding and legally enforceable.

The third and fourth states of play (the conflicting courts) are opposite images of each other, and only one can be correct. The problem with those courts that have extended *Upjohn* to cover ex-employees is that they do not understand *Upjohn* or the basic building blocks of the privilege itself.[22] First off, the rationale proposed to justify the extension—the "need to know"—is not rooted anywhere in the privilege, and (quite frankly) is absurd on its face. As the *Newman* majority correctly noted, every party to a litigation has a "need to know"; that "need" does not constitute a basis to protect from disclosure information or communications (of whatever nature). Equally important (and also, as pointed out by the *Newman* majority) is the fact that at least one of the 5 Cs is missing; [23]—in the case of ex-employees, the missing C is that there is *no client*. Thus, the *Newman* majority was on the money in observing that (in the absence of anything else) "a former employee is no different from other third-party fact witnesses to a lawsuit, who may be freely interviewed by either party."

But while this last point is clearly correct, it is not the end of the inquiry concerning ex-employees and whether there *can be* instances where such individuals *could be* covered by the privilege. To understand this notion, it is necessary to point out how an indecipherable (and wrong) decision by the Washington trial court in *Newman* highlights the everyday process of corporate counsel representing the company *and* the legal interests of employees (both current and former). It is also necessary to identify a handful of courts that (like the Washington trial court) do not understand or like that everyday process.

The *Newman* trial court did *not* find that the school district's lawyers had a conflict in representing the coaches at their depositions, or that they had committed an ethical violation in doing so; indeed, it is well-established that "[a]ssuming there is no conflict of interest, defense counsel… may represent former employees."[24] At the same time, the trial court opined that the multiple representations reflected "a very poor decision," and ruled that the lawyers could not represent the coaches going forward. This seemingly Solomonic decision was simply wrong—either the earlier representation was wrong, unethical, and should have been sanctioned, or the earlier representation was not improper, not unethical, and could continue.[25]

So why did the *Newman* trial court err in this regard, an error that then teed up the ex-employee/privilege issue for the Washington Supreme Court? I believe it is because it is one of a handful of judicial decisions that reflect a fundamental misunderstanding of (and thus antipathy to) corporate counsel *also* representing individual employees (current and ex) when there is no conflict of interest by and between these multiple clients. The practice of representing corporations and individual employees (assuming no conflict of interest) goes on all the time, is perfectly hunky dory, and is employed by experienced lawyers of all stripes (including me).[26] But some courts do not like it, and lawyers who (like me) frequently engage in this practice need to be on notice of these outlier judicial decisions.

One such case is *Aspgren v. Montgomery Ward & Co.*,[27] in which a federal judge in Illinois wrote that a lawyer may "create an appearance of impropriety" by offering to represent a former employee gratis, "because such an offer may encourage a former employee to seize on the opportunity of free representation without evaluating the advantages of independent counsel." Of course, if that were correct—and it is *not*—the exact same "appearance of impropriety" would also cover offering to represent *current* employees as well.

In a somewhat related vein is the infamous case of *Rivera v. Lutheran Medical Center*.[28] While faithful readers of this august *Journal* may remember that I have (more than once) tried to take a two-by-four to this truly wacky decision,[29] and while there is judicial authority directly contrary to *Rivera*,[30] a brief reminder of that case is in order.

In *Rivera*, a prominent law firm was retained by a hospital to defend a sexual/employment discrimination claim. Shortly thereafter, the firm contacted current and former employees who had direct, first-hand knowledge of the facts. Assuring those individuals that the firm saw no conflict of interest between them and the hospital, the lawyers offered to represent each of them at the hospital's expense, and all the individuals agreed. In the early stages of discovery, the plaintiff's lawyer discovered the multiple representation arrangement and moved to disqualify the law firm from representing the individuals, citing purported ethical violations.

The Kings County (New York) trial judge did not agree that the firm had violated any conflict of interest rules (there was in fact no evidence that the multiple representations constituted a potential or actual conflict of interest). Instead, the judge found that the lawyers had violated the "non-solicitation" rule (which today is Rule 7.3). That rule bars attorneys from soliciting clients directly (e.g., in person) unless the prospective client "is a close friend, relative, former client or current client."

By its explicit rationale (*see* Comment 1 to ABA Model Rule 7.3), this rule has *no* application to the *Rivera* situation; the rule is expressly designed to prohibit ghoulish ambulance chasing. Unfortunately, on appeal, the Appellate Division, Second Department affirmed the trial judge's ruling in a terse, succinct, and short-winded opinion.

Rivera is, of course, dead wrong.[31] At the same time, however, it is obviously a precedent that plaintiff's counsel might try to latch onto to make life difficult for some defense lawyers in the future. And not only does *Rivera* threaten wholly proper multiple representations, its wacky reasoning also underscores hostility to the privilege attending to such representations. As Michael Corleone once implored, "Just when I thought I was out . . . they pull me back in."[32]

Endnotes

1. This song went quintuple platinum, and is one of the best-selling singles in the world. It appears on Swift's fourth album *Red* (Big Machine 2012) (written by T. Swift, M. Martin & Shellback). And in her prior album, *Speak Now* (Big Machine 2010), she trashed another former lover, John Mayer, with the thinly veiled song about their breakup: "*Dear John*" (written by T. Swift). That song "really humiliated" Mayer and "made [him] feel terrible." *Rolling Stone* (June 6, 2012). Mayer, of course, is not the only recipient of a "*Dear John*" song. *See, e.g.*, "*Dear John Letter*" by Whitney Houston (*Just Whitney* (Arista Records 2002) written by K. Briggs, D. Reynolds, P. Stewart & W. Houston); "*A Dear John Letter*"—the original single was by Jean Shepard and Ferlin Husky (Capitol Records 1953) written by B. Barton, F. Owens & L. Talley—this song has been covered by many artists, including Pat Boone, who had a #44 hit with it in 1960 (Dot Records).
2. Because of widespread confusion concerning the privilege—among practitioners, legal academics, and judges (with a few notable exceptions, e.g., Judge Pierre Leval)—I have been writing and speaking about the privilege for over 30 years. *See, e.g.*, "*Defending the Attorney-Client Privilege*," Case & Comment (1986); "*Whither the Attorney-Client Privilege?*" New York Law Journal (Oct. 22, 1990); "*The Corporate Attorney-Client Privilege: Is Nothing Sacred?*" The Corp. Crim. & Const. L.R. (April 5, 1991); "*Corporate Counsel and Privileges: Going, Going…*," New York Law Journal (July 11, 1996); "*The Attorney-Client Privilege: The Best of Time, the Worst of Times*," The Professional Lawyer (1999); "*The Attorney-*

Client Privilege and Email: Strange Bedfellows?" The Computer and Internet Lawyer (March 2007); "*Will Waiving the Privilege Save It*?," New York Business Law Journal (Spring 2007); "*Pandora's Box and the Bank of America*," New York Law Journal (Nov. 4, 2009); "*Attorney-Client Privilege: Ohio Takes a Bite Out of the Big Apple*," New York Law Journal (Sept. 7, 2012); "*Attorney-Client Privilege: Misunderestimated or Misunderstood*?," New York Law Journal (Oct. 20, 2014); "*The D.C. Circuit: Wrong and Wronger*," New York Business Law Journal (Winter 2015).

3. *See generally Upjohn v. United States,* 449 U.S. 383 (1981).
4. The Supreme Court subsequently reinforced the teachings of *Upjohn* in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). In *Swidler & Berlin*, the Court rejected the argument that the attorney-client privilege could be vitiated after the client's death in certain criminal proceedings. Citing the broad purposes of the privilege, the Court observed that "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel" and that "[w]ithout assurance of the privilege's posthumous application the client may very well not have made disclosures to his attorney at all."
5. *See Upjohn,* 449 U.S. at 394, *supra* note 3.
6. *See id.* at 403.
7. *See, e.g., Amarin Plastics, Inc. v. Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987); *Denver Post Corp. v. Univ. of Colo.*, 739 F.2d 874 (Colo. 1987); *Allen v. McGraw*, 106 F.3d 582 (4th Cir. 1997); *United States v. Chen*, 99 F.3d 1495) (9th Cir. 1996); *Shew v. Freedom of Info. Comm'n*, 714 A.2d 664 (Conn. 1998); *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999); *Surles v. Air France*, 2001 U.S. Dist. LEXIS 10048, at *17 (S.D.N.Y. July 19, 2001); *United States ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554 (E.D. Pa. 2004); *Winthrop Res. Corp. v. CommScope, Inc. of N. Carolina*, 2014 WL 5810457, at *3 (W.D.N.C. Nov. 7, 2014).
8. *Restatement (Third) of the Law Governing Lawyers*, Section 123, comment e (2000). *See Shew v. Freedom of Info. Comm'n*, 714 A.2d 664 (Conn. 1998) (follows the *Restatement* standard).
9. *See, e.g., Clark Equipment Co. v. Lift Parts Manufacturing Co.,* 1985 U.S. District LEXIS 15457, at * 14 (N.D. Ill. Sept. 30, 1985); *Connolly Data Sys., Inc. v. Victor Techs., Inc.,* 114 F.R.D. 89 (S.D. Cal. 1987); *Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000). *See also* and *compare Connolly* (attorney's work product is not waived when shown to ex-employee) with *Clark Equipment* (attorney's work product is waived when shown to ex-employee).
10. The State of Washington often charts its own, idiosyncratic path. Witness the Electoral College vote of 2016 –Hillary Rodham Clinton won the State's popular vote, but four electors were "faithless": three voted for Colin Powell, and one voted for Faith Spotted Eagle! Other "faithless" electors in 2016 were one in Hawaii for Bernie Sanders; two in Texas—one for Ron Paul and one for John Kasich.
11. *See generally Newman v. Highland Sch. Dist. No. 203*, 186 Wash. 2d 769, 381 P.3d 1188 (2016). The intermediate Washington State Court, the Court of Appeals, declined discretionary review of the trial court's ruling; the entire Supreme Court, however, decided to weigh in.
12. There was no dispute between the parties on either of these two points. *Id.* at n.1. *See In re Coordinated Pretrial Proceedings in Petrol. Prods. Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); *Peralta v. Cendant Corp.,* 190 F.R.D. 38, 41 (D. Conn. 1999). Nor was there any challenge to the trial court's ethical rulings. As such, the only issue up on appeal was whether the pre-representation period was immune from discovery.
13. The Washington Supreme Court was evaluating this issue not only in the context of *Upjohn* but also upon its own prior precedent, which tracks *Upjohn. See Youngs v. PeaceHealth*, 179 Wash.2d 645, 316 P.2d 1035 (2014).
14. For this proposition, the *Newman* majority cited (correctly) the *Restatement*.
15. For this proposition, the *Newman* majority cited the decisions identified, *supra* note 9.
16. The *Newman* majority cited the decisions identified, *supra* note 7.
17. The above-cited language from the dissent purports to have precedential authority. Such authority, however, is merely Chief Justice Burger's concurrence. *See* note 1 in the dissenting opinion. To the extent the *Upjohn* Court talked about a "case-by-case" basis, the decision said only this: "Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas." 449 U.S. at 396. That off-hand commentary hardly invited lower courts to expand *Upjohn's* ruling to include ex-employees.
18. *See* J.C. Rogers, *No Privilege for Lawyer's Talks With Ex-Employees*, ABA/BNA Lawyer's Manual on Professional Conduct 627 (November 2, 2016).
19. This commentator is a lawyer who works for the Association of Corporate Counsel, Amar Sarwal. Readers of this space will know that my views and that of Mr. Sarwal are not terribly in sync. *See* C.E. Stewart, *The D.C. Circuit: Wrong and Wronger*!, New York Business Law Journal 33-34 n.19 (Winter 2015).
20. This commentator is a lawyer who has published a treatise on the attorney client privilege and work product doctrine, Thomas Spahn. Readers of this space will know that my views and that of Mr. Spahn are not terribly in sync and I do not rely upon his treatise. *See id*. at 34, n. 45.
21. *See supra* notes 17-20 and accompanying text.
22. Those decisions are set forth *supra* note 7.
23. It is well-settled, unambiguous law that there must be: (1) a client; (2) a communication; (3) confidentiality; (4) counsel (an attorney); and (5) counsel (the giving of legal advice by an attorney). *See* C.E. Stewart, "*Attorney-Client Privilege: Misunderestimated or Misunderstood*," New York Law Journal (October 20, 2014). All of the Five C's must be present for the privilege to exist.
24. *See* M. McRae, K. Smith, and A. Raimundo, *Scope of Employment*, Los Angeles Lawyers 23 (April 2013). Accord M.J. Dell, *Ethical Considerations in the Representation of Multiple Clients*, Practicing Law Institute (May 7, 2015); ABA Formal Opinion No. 08-450 (April 9, 2008). *See also Holloway v. Arkansas*, 435 U.S. 475, 482 (1978).
25. As noted earlier (*see supra* note 12 and accompanying text), this ruling was not challenged by the parties and was not an issue up before the Washington Supreme Court.
26. *See supra* note 24. Of course, if there *is* a conflict of interest between the corporate client and an individual employee (current or ex), the corporate lawyer must stand down from a multiple representation. *See* C.E. Stewart, *Thus Spake Zarathustra (and Other Cautionary Tales for Lawyers)*, New York Business Law Journal (Winter 2010).
27. *See Aspgren v. Montgomery Ward & Co.,* 1984 U.S. Dist. LEXIS 21892, at *10-13 (N.D. Ill. Nov. 19, 1984).
28. *See Rivera v. Lutheran Medical Center,* 22 Misc. 3d 178, 866 N.Y.S. 2d 520 (Sup. Ct. Kings Co. 2008), *aff'd*, 73 A.D. 3d 891, 899 N.Y.S. 2d 859 (2d Dept. 2010).
29. *See* C.E. Stewart, *Squaring the Circle: Can Bad Legal Precedent Just Be Wished Away?*, New York Business Journal (Winter 2014); C.E. Stewart, *Just When Lawyers Thought It Was Safe to Go Back Into the Water*, New York Business Law Journal (Winter 2011).
30. *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2010 WL 1558554 (W.D. Okla. April 19, 2010); *FHFA v. Nomura Holding America Inc., et al.*, 11 Civ. 6201 (S.D.N.Y. March 4, 2015).
31. Beyond the articles cited *supra* in note 29, *see also* C.E. Stewart, *The Rivera Precedent: What You Don't Know Can Hurt You*, Business Law Today (May 2015); C.E. Stewart, *How a Bad Ruling Can Spoil a Whole Bunch of Cases*, New York Law Journal (January 8, 2009).
32. Unfortunately, this quote is from *Godfather Part III* (Paramount 1990), which is a terrible movie. On the other hand, all of life's important lessons can be learned from *Godfather* (Paramount 1972) and *Godfather Part II* (Paramount 1974).

Inside the Courts

An Update from Skadden Securities Litigators

Class Actions—Class Certification

Southern District of Ohio Grants Institutional Investors' Motion for Class Certification and Appointment as Lead Plaintiffs in Securities Fraud Class Action

Willis v. Big Lots, Inc., No. 12-cv-604 (S.D. Ohio Mar. 17, 2017

Judge Michael H. Watson granted the plaintiffs' motion for class certification and appointed two institutional investors as lead plaintiffs in a securities fraud class action brought against a closeout retailer and its officers under Sections 10(b) and 20(a) of the Securities Exchange Act and Securities and Exchange Commission Rule 10b-5. The plaintiffs alleged that the company provided false and misleading information to investors regarding the retailer's performance and prospects during the class period, which artificially inflated the retailer's stock price. The defendants opposed class certification, arguing that the institutional investors did not have claims typical of all class members, they were not adequate representatives for the class, and individual damages and reliance issues would predominate over class-wide issues.

The court rejected the defendants' argument against typicality, reasoning that the plaintiffs' claims—which depended on the fraud-on-the-market reliance theory—were typical of the class, and the institutional investors—who used investment advisers—were not subject to any unique non-reliance defenses because investment advisers still rely on publicly available information, including a stock's market price. Because all class members had an interest in proving the retailer's stock was artificially inflated during the class period regardless of their specific purchase and sale dates, the court rejected the defendants' argument that the institutional investors were inadequate class representatives because they sold their interests prior to the end of the class period. The court swiftly dismissed the defendants' other adequacy arguments, pointing to the institutional investors' active commitment to the case.

Finally, the court concluded that individual inquiries regarding reliance and damages would not predominate. Because the plaintiffs advanced a methodology for calculating damages on a class-wide basis that was consistent with their theory of liability, the court found that individual damages issues would not predominate over class-wide issues. The court also determined that plaintiffs could invoke the rebuttable presumption of reliance set forth in *Basic v. Levinson*, 485 U.S. 224 (1988). The defendants attempted to rebut this presumption, arguing that the company's stock price was inefficient because it did not increase in a statistically significant manner at the time of the alleged misrepresentations. Citing the U.S. Supreme Court's statement in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), that price impact may be rebutted with "evidence that the misrepresentation (or its correction) did not affect the market price of the defendant's stock," the court adopted the "price maintenance theory," reasoning that a misrepresentation may also have a price impact by maintaining a stock's artificially inflated price. The court concluded that the defendants failed to rebut the basic presumption because they failed to show that there was no statistically significant price impact following the corrective disclosures. Accordingly, the court certified the class and appointed the institutional investors as class representatives.

ERISA

Sixth Circuit Affirms Dismissal of Plaintiffs' ERISA Claims Against ESOP Fiduciaries

Saumer v. Cliffs Nat. Res. Inc., No. 16-3449 (6th Cir. Apr. 7, 2017)

The Sixth Circuit affirmed the district court's dismissal of an Employee Retirement Income Security Act (ERISA) class action brought against the fiduciaries of a mining company's employee stock ownership plan (ESOP). The plaintiffs, participants in the ESOP, alleged that the fiduciaries breached their duty of prudence under ERISA by retaining the company's stock as an investment option because (1) the company's risk profile and business prospects dramatically changed due to the collapse of iron ore and coal prices during the class period, and (2) the defendants possessed inside information, which showed that the company's stock was overvalued. The district court granted the defendants' motion to dismiss.

Relying on the U.S. Supreme Court's opinion in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Sixth Circuit affirmed the dismissal. Because "*Dudenhoeffer* plainly holds that a fiduciary may rely on market price as an unbiased assessment of a security's value," the court disposed of the plaintiffs' argument that the company's risk profile would be determinative of the company's stock value. The court rejected the plaintiffs' argument that a "special circumstance" rendered reliance on the market price imprudent in this case because *Dudenhoeffer* also stated that "fiduciaries may prudently 'assume' that stock markets provide the best estimate of a security's value." Finally, the court rejected the plaintiffs' non-public information claims, concluding that the plaintiffs failed to allege an alternative action that a prudent fiduciary in the same circumstance "would not have viewed as more likely to harm the fund than to help it." Instead, the alternative actions that were alleged—disclosing the nonpublic information or ceasing investment in the company's stock—could have caused a further collapse in the company's stock price, the court concluded.

S.D.N.Y. Dismisses ERISA Excessive-Fee Claims With Prejudice

Walker v. Merrill Lynch & Co., Inc., No. 15-cv-1959 (PGG) (S.D.N.Y. Mar. 31, 2017)

Judge Paul G. Gardephe dismissed breach of fiduciary claims under Section 404 of ERISA against Merrill Lynch for the second time, this time with prejudice. The plaintiff was a participant in Clifford Chance LLP's 401(k) plan (the Plan) and alleged that Merrill Lynch, a service provider to the Plan, breached its fiduciary duties in structuring the Plan to offer predominantly high-fee, actively managed mutual fund investment options and collecting excessive service fees from the mutual funds, some of which were managed by Merrill. The court held that the complaint did not adequately allege that Merrill was an ERISA fiduciary with respect to the plan because there was no allegation that Merrill had discretionary authority over the Plan's assets. While Merrill had in the past acted as the Plan's investment adviser, Merrill had ceased serving in that role before the class period began. Merrill's current role was limited to providing individualized investment advice to participants rather than selecting funds for the Plan. Thus, it was the Plan trustees, not Merrill, that had fiduciary authority over the challenged decision to include allegedly high-cost, actively managed funds in the Plan. Further, Merrill's agreement with the Plan expressly provided that it was not the fiduciary responsible for the selection of the investment options available under the Plan. The court further rejected the argument that Merrill was a fiduciary because it had the power to set its own compensation, reasoning that it did not control the Plan's negotiation and approval of those terms—the Plan sponsor was free to take or leave Merrill's services.

Fiduciary Duties—Mergers and Acquisitions

Delaware Court of Chancery Dismisses Stockholders' Challenge in Transaction With Gold and Silver Producer

In re Paramount Gold and Silver Corp. Stockholders Litig., No. 10499-CB (Del. Ch. Apr. 13, 2017)

Former stockholders of Paramount Gold and Silver Corporation sued members of its board of directors, challenging a transaction that Paramount entered into with Coeur Mining. Paramount, which owned two mining projects, spun one off into a separate entity and distributed approximately ninety-five percent of the new entity's shares to Paramount's stockholders. Paramount also agreed to a merger that would then hold a second mining project. In connection with that merger agreement, Paramount entered into a royalty agreement that gave Coeur a 0.7 percent royalty interest in the second mining project in exchange for $5.25 million.

The plaintiffs' primary argument was that *Unocal* enhanced scrutiny should apply to the transactions because the royalty agreement, when combined with the termination fee provision in the merger agreement, constituted an unreasonable deal protection device. In granting the defendants' motion to dismiss, the court disagreed, finding that (1) the terms of the royalty agreement did not prevent any interested party from making a competing bid for Paramount; and (2) the termination fee in the merger agreement (3.42 percent of the estimated merger value) was itself concededly reasonable. The court also concluded that because the stockholder vote approving the transaction was fully informed, under *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), the business judgment rule protected the Paramount board's decision to approve the merger agreement. The court further held that even if *Corwin* did not apply, the plaintiffs failed to state a non-exculpated claim for breach of fiduciary duty against the defendants.

Delaware Court of Chancery Holds That Plaintiff Adequately Pleaded Bad Faith, Breach of Duty of Loyalty in Merger Challenge Involving Large Cash Payments for Directors

In re Saba Software, Inc. Stockholder Litig., C.A. No. 10697-VCS (Del. Ch. Apr. 11, 2017)

In a challenge of the merger of Saba Software with Vector Capital Management, after the SEC alleged that former Saba executives had engaged in a fraudulent scheme to inflate Saba's earnings, Saba agreed to restate its financials but announced it would not complete the restatement before the SEC's deadline. The board subsequently pursued a sale process and approved Vector's offer. The SEC then issued an order to deregister Saba's stock, and by the time the stockholders voted to approve the merger, Saba's shares had been deregistered. When the board approved the merger, the directors granted themselves equity awards that would be cashed out upon consummation of the merger in the place of prior awards that had been canceled due to the deregistration.

The court denied the directors' motion to dismiss. First, the court rejected the defendants' argument that *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015) applied because the complaint adequately pleaded that the stockholder vote approving the merger was coerced and not fully informed. The court found that Saba's proxy disclosures contained two material omissions and that the vote was coerced because the stockholders faced the "Hobson's choice" of "keeping their recently deregistered, illiquid stock or accepting the Merger price" and thus had "no practical alternative but to vote in favor of the Merger." Because *Corwin* was inapplicable, the court determined that *Revlon* enhanced scrutiny would apply. This case appears to be the first in which the Court of Chancery refused to apply *Corwin* to dismiss at the pleading stage a post-merger deal case for money damages that would otherwise invoke *Revlon*. Having found that *Revlon* applied, the court held that the plaintiff adequately pleaded bad faith and a breach of the duty of loyalty by alleging that the directors rushed the sale process and stockholder vote and awarded themselves large cash payments.

Initial Public Offerings

E.D.N.Y. Dismisses Claims That Online Retail Company Violated Securities Laws in Connection With IPO

Saleh Altayyar, et al. v. Etsy Inc., et al., No. 15-cv-2785-AMD (E.D.N.Y. Mar. 16, 2017)

Judge Ann M. Donnelly dismissed with prejudice claims that an online peer-to-peer commerce company violated Section 10(b) of the Securities Exchange Act by making material misstatements and omissions in connection with the company's April 16, 2015, initial public offering (IPO). The company's share price allegedly dropped after the company's quarterly earnings disclosures and an analyst report suggesting that the company's growth was harmed by counterfeit goods being sold through the company's online platform as well as by increased competition. The plaintiffs alleged that, although the company's registration statement and previous periodic filings emphasized the company's commitment to providing a platform for artisans and small-batch manufacturers and preventing counterfeit manufacturers, certain confidential witnesses purportedly stated that the company failed to implement adequate controls for preventing mass-produced and counterfeit goods.

The defendants argued that the plaintiffs had failed to sufficiently plead fraud and scienter under the applicable heightened standards. The court agreed, finding that although the "allegations might show that [the company's] compliance practices were imperfect [. . .] and that its managers knew of ongoing infringement problems," the plaintiffs failed to "establish that the challenged values statements were objectively false or disbelieved when [the company] made them." Further, the court found that the company's statements about its values and counter-infringement policies were aspirational and accompanied by sufficient cautionary language about the limits of preventing infiltration by purveyors of counterfeit goods.

Misrepresentations

Ninth Circuit Holds That CEO's Conduct in Violation of Corporate Code of Ethics Is Not Actionable Securities Fraud

Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co., No. 14-16433 (9th Cir. Jan. 19, 2017)

In an issue of first impression, the Ninth Circuit held that a CEO's violation of the corporate code of ethics he publicly touted did not give rise to an actionable claim for securities fraud.

After 2006, the CEO of Hewlett-Packard (HP) spearheaded a revision of HP's ethical standards. According to the complaint, "HP reinforced the importance of its corporate code of ethics, the Standards of Business Conduct (SBC)," and the CEO "took many opportunities to proclaim HP's integrity and its intention to enforce violations of the SBC." Notwithstanding these reinforcements and proclamations, the CEO allegedly was forced to resign in 2010 after an investigation revealed that he had covered up a "very close personal relationship" with an adult film actress, including doctoring expense reports to hide their relationship. The actress allegedly also claimed that the CEO had disclosed confidential information to her about an impending merger. Following the CEO's resignation, HP's stock price dropped, resulting in an alleged loss of $10 billion to shareholders.

The putative class action raised two theories: (1) the defendants' public statements about business ethics and the SBC were material misrepresentations, given the CEO's conduct, and (2) the defendants' failures to disclose the CEO's conduct constituted a material omission.

In affirming the dismissal of the action, the panel first determined that the defendants' affirmative statements during the class period were not false or misleading because they were not "objectively verifiable statements." Rather, the statements were "inherently aspirational." The court reasoned that a "contrary interpretation [. . .] is simply untenable, as it could turn all corporate wrongdoing into securities fraud." Second, the court concluded that, even if the statements were misleading, they were not material because "[i]t simply cannot be that a reasonable investor's decision would conceivably have been affected by HP's compliance with SEC regulations requiring publication of ethics standards."

Finally, with regard to the plaintiffs' omission theory, the court held that there could not have been a material omission because there was no duty to disclose the CEO's conduct. As the panel explained, the "promotion of ethical conduct at HP did not reasonably suggest that there would be no violations of the SBC by the CEO or anyone else." Absent an impression that everyone at HP was in full compliance with the ethical standards, the defendants were under no duty to disclose the CEO's conduct, even if it violated HP's ethical code.

District of Colorado Grants Dismissal of Claims Against Food Distributor

Okla. Police Pension & Ret. Sys. v. Boulder Brands Inc., No. 15-cv-00679-MSK-KMT (D. Colo. Mar. 28, 2017)

Judge Marcia S. Krieger dismissed claims that a food manufacturer and distributor violated Section 10(b) of the

Securities Exchange Act by allegedly making false and misleading statements regarding the company's promotional efforts to increase sales of its high-margin products, such as margarines, oils and spreads, as opposed to its low-margin products, such as gluten-free and other "natural" products. The plaintiffs also alleged that the company failed to disclose various operational difficulties it was experiencing in fulfilling orders and meeting customer demands. The company allegedly led investors to believe that it was committed to maintaining strong profits from its high-margin product business when it was actually decreasing promotional spending on that product line.

The court found that these allegations did not demonstrate a misrepresentation because the company had previously told investors that it was decreasing promotional spending on those products. Further, the company's statement that it was decreasing support was indefinite as to the extent and timing of the change and did not demonstrate an actual change had taken place at the time the statement was made. The court also found that that the plaintiffs failed to adequately plead that the company had misled investors about its operational abilities. The court reasoned that the complaint did not show that the company's statements about improving its margin were rendered misleading by failing to disclose warehouse problems because the company could have conceivably improved margins even without fixing the warehouse problems. The company's statements about its improved customer service capabilities also were not inconsistent with its operational difficulties and were in any event an "accurate reporting of historical successes." Lastly, the company's statements regarding its profit projections were not actionable because the plaintiffs failed to allege that those projections were false at the time they were made or that the company's expectations were unrealistic.

S.D.N.Y. Upholds Some Securities Fraud Claims Arising From Alleged Bribery Abroad

In re Eletrobras Sec. Litig., No. 15-cv-5754 (S.D.N.Y. Mar. 25, 2017)

Judge John G. Koeltl upheld some securities fraud claims brought by purchasers of U.S. exchange-traded securities of Centrais Eletricas Brasileiras S.A. arising from the company's alleged involvement in bribery and other corruption, but dismissed others against an individual defendant. As an initial matter, the court held that the class could include both holders of American depositary shares (ADS) and bonds because "[w]hile the accompanying levels of risk between ADSs and bonds do differ," the difference was not sufficient to defeat certification. As to claims under Section 10 of the Securities Exchange Act, the court held that the plaintiffs had adequately alleged that the company had made misstatements about its code of ethics. The company allegedly cited its code of ethics to demonstrate "the strength of its internal controls and its commitment to transparency and ethical conduct," but the court found those statements to be misleading because the comments stood in "stark contrast" to explanatory notes in subsequent annual reports, which purportedly demonstrated "bribery and bid-rigging" and "a lack of effective internal controls over its corruption prevention program."

The court also held that the plaintiffs had plausibly alleged that the company's annual reports contained misstatements regarding the company's financial condition. Although these misstatements may have been small numerically and immaterial by quantitative standards, the court held that they were qualitatively material because some of the company's officers had suffered criminal consequences in connection with the allegedly illegal activity, the company overhauled its governance system thereafter—entirely replacing its board of directors and management—and management attempted to downplay the purported misconduct in the wake of media reports regarding the illegal activity.

However, the court granted one individual defendant's motion to dismiss because the plaintiffs had not adequately pleaded scienter. This officer had publicly stated that he signed the code of ethics and was involved only with one of the company's smaller subsidiaries, in contrast to other defendants who signed the company's annual reports, were aware of the internal audit purportedly revealing significant lack of controls within the company and held positions more proximate to the alleged corruption. The court also dismissed claims based on scheme liability against three of the officers but maintained the claim against the company. Scheme liability requires that a defendant commit a deceptive act in furtherance of an "alleged scheme to defraud" that is distinct from any alleged misstatements. The court dismissed this claim against three of the officers because the plaintiffs had not pleaded that they participated in an "inherently deceptive" act separate to the misrepresentations at issue. However, the court held that the plaintiffs had adequately pleaded that a fourth officer had participated in bribery, and the court also imputed this action to the company. Although the company argued that it had not benefited from the actions of the officer—and thus intent should not be imputed pursuant to the "adverse interest exception"—the court found that the company had "likely benefitted at least in part from the alleged deceptive scheme by receiving political advantages derived from such illicit payments."

In a related case involving bribery allegations, *In re Braskem S.A. Securities Litigation*, No. 15-cv-05132 (S.D.N.Y. Mar. 30, 2017), the court granted a motion to dismiss, in part, finding that alleged misstatements regarding the company's culture and ethics were not actionable because the statements were made in routine filings and not to "fend off inquiries about wrongdoing." However, the court denied the motion to dismiss with respect to representations regarding the pricing of certain petroleum products in light of an alleged bribery scheme permitting the company to obtain the products at below-market prices.

PSLRA

First Circuit Affirms Dismissal of Putative Securities Class Action Against Biogen Inc.

In re Biogen Inc. Sec. Litig., No. 16-1976 (1st Cir. May 12, 2017)

The First Circuit affirmed the dismissal of claims under Section 10(b) of the Securities Exchange Act alleging, according to confidential witnesses, that Biogen and certain of its current and former officers intentionally misled the public regarding the impact on drug sales resulting from the company's earlier announcement that a patient treated with the drug had died from complications associated with the rare neurological disease progressive multifocal leukoencephalopathy (PML). The First Circuit held that the complaint failed to meet the rigorous pleading standards for allegations of scienter under the Private Securities Litigation Reform Act. The court observed that the statements attributed to confidential witnesses "are so lacking in connecting detail that they cannot give rise to a strong inference of scienter" and that "[t]he statements do not even begin to quantify the magnitude of the sales decline at the company level," nor do they "explain with any precision whether the sales decline resulted from higher discontinuations, fewer new starts, changes in the market, or some combination of these factors." The First Circuit concluded that "the confidential witness statements are consistent with the defendants' public disclosures," which "repeatedly returned to the PML incident as one factor impacting [the drug's] performance."

Registration Statement Liability

Safe Harbor Provision of Regulation D's Rule 508(a) Available to Defendant in SEC Enforcement Action

SEC v. Levin, No. 15-14375 (11th Cir. Feb. 23, 2017)

The Eleventh Circuit reversed in part the district court's grant of summary judgment to the SEC, holding that the safe harbor provision of Regulation D's Rule 508 is available to defendants in SEC enforcement actions. The defendant allegedly became involved in a Ponzi scheme, wherein investors were solicited to purchase fake settlement agreements supposedly reached in sexual harassment and whistleblower suits. The defendant allegedly issued promissory notes stemming from this Ponzi scheme to ninety investors. The promissory notes were not registered with the SEC.

The SEC brought an enforcement action, alleging, among other things, that the defendant sold unregistered securities in violation of Sections 5(a) and (c) of the Securities Act. The defendant argued that the promissory notes were exempt from registration because they were protected by the safe harbor provision of Rule 508(a) of Regulation D. The SEC countered that the provision was available only in private actions.

The district court granted summary judgment for the SEC, and the Eleventh Circuit reversed. Relying on "the plain language of the regulation and regulatory history," and employing various canons of statutory construction, the court held that Rule 508(a) "preserves the safe harbor in SEC enforcement actions." Moreover, because there were disputes of fact as to whether the defendant was entitled to the protections of the safe harbor provision under the circumstances, the court remanded the case for further proceedings.

S.D.N.Y. Dismisses Claims Against Chinese-Based Steel Processing Company

Pehlivanian, et al., v. China Gerui Advanced Materials Grp., et al., No. 14 Civ. 9443 (S.D.N.Y. Mar. 29, 2017)

Judge Edgardo Ramos dismissed claims that a Chinese-based steel company violated Section 10(b) of the Securities Exchange Act and Sections 11 and 12 of the Securities Act by allegedly misrepresenting the terms of a land acquisition transaction and the acquisition of a collection of antique porcelain. The plaintiff alleged that statements regarding the company's land acquisition were "a complete fraud" because the land use rights were never transferred to the company; that the statements regarding the porcelain transaction contained material omissions, such as the provenance of the collection and what steps were being taken to liquidate it; and that the company had failed to file financial statements with the SEC since January 2015, even though the company had made filings with a Chinese regulator, purportedly demonstrating that the company had prioritized its requirements under Chinese law over U.S. requirements. In turn, the defendants argued that the complaint was merely an attempt "to improperly disguise corporate mismanagement allegations as securities fraud allegations."

The district court ruled that the complaint failed to "identify specifically which of Defendants' statements are false or misleading" because the company's annual reports made clear that the transaction was still in progress. Regarding the porcelain transaction, the court determined that the defendants had no duty to disclose the allegedly omitted details. Finally, regarding the claim that the company's Securities and Exchange Commission (SEC) filings were false and misleading, the court found that even if the company did prioritize its regulatory filings in China after January 2015, the company's statements in previous SEC filings could not be false or misleading based solely on that fact because "[t]he truth of a statement made in the registration statement is adjudged by the facts as they existed when the registration statement became effective." The court dismissed the Securities Exchange Act claims because there were no adequately pleaded materially false or misleading statements, and it dismissed the Securities Act claims because the plaintiff failed to adequately plead that the registration statements at issue (from 2009 through 2013) were false and misleading.

Reliance

E.D.N.Y. Dismisses Claim Against Attorney in Connection With Allegedly Misleading Opinion Letters

Orlan et al. v. Spongetech Delivery Sys., Inc., et al., No. 10-CV-4093 (E.D.N.Y. Mar. 24, 2017)

Judge Dora L. Irizarry dismissed claims by investors of a sponge company alleging that an attorney violated Section 10(b) of the Securities Exchange Act by writing more than 90 opinion letters containing materially false and misleading statements and omissions regarding the removal of restrictive legends from shares of the company. The plaintiffs alleged that once the restrictive legends were removed, the shares flooded the market, diluting the value of their share prices. The plaintiffs further alleged that the attorney misleadingly advised the stock transfer agent that the restrictive legends could be removed by either improperly representing (1) that certain entities affiliated with the company had held the securities for six months or longer when they had not, or (2) that certain affiliated entities were nonaffiliated entities. The district court dismissed the claims because the plaintiffs did not sufficiently allege that they considered or relied on his opinion letters when deciding whether to invest in the company (or were even aware of the opinion letters at the time of purchase). Although the defendant had allegedly admitted some of the alleged conduct before the SEC, the court found that "the admissions were not pled with particularity as Plaintiffs failed to attach the actual SEC record of testimony or specific citations thereto." Because the plaintiffs had failed to plead reliance, the court determined that the plaintiffs had failed to plead materiality and loss causation.

Sanctions

S.D.N.Y Denies Motion for Sanctions in "Abusive Litigation" Case

Zagami v. Cellceutix Corp., No. 15 Civ. 7194 (S.D.N.Y. Mar. 29, 2017)

Judge Katherine Polk Failla denied a motion pursuant to Fed. R. Civ. P. 11 for sanctions against the plaintiff in a lawsuit that defendants argued amounted to "abusive litigation." The court had previously dismissed the plaintiff's case in its entirety. Pursuant to the Private Securities Litigation Reform Act, sanctions are mandatory if Rule 11 is violated and a violation occurs whenever the non-frivolous claims that are joined with frivolous ones are insufficiently meritorious to save the complaint as a whole from being abusive. In this case, the court found that the "[p]laintiff raised several claims with legitimate, if ultimately unavailing, legal arguments." The court credited certain allegations regarding the misrepresentation of a key individual's educational background and certain public statements made by that person. The court also credited allegations that the defendant had misstated the effectiveness of one of its drugs, and it stated that the claim had "failed largely for pleading insufficiencies." Further, the court found that the plaintiff's claims regarding certain scientific terminology "were permissible attempts to seek clarity in the law" and stated that the plaintiff's argument regarding the need for additional disclosures was not "objectively unreasonable." Likewise, the court held that it was not unreasonable for the plaintiff to rely, in part, on a lengthy and detailed internet post, even though the source was anonymous. In addition, the court noted that consideration of the iterations of the three complaints filed in the action demonstrated that the plaintiffs had attempted to plead a cognizable claim.

SEC Enforcement Actions

'Relief Defendants' May Not Defeat Jurisdiction by Merely Asserting a Claim of Entitlement to the Disputed Funds

SEC v. Messina, No. 15-55325 (9th Cir. Mar. 21, 2017)

In an issue of first impression, the Ninth Circuit held that "relief defendants" cannot defeat jurisdiction in federal court simply by asserting an ownership interest in disputed money.

The SEC is authorized to bring civil enforcement actions seeking equitable relief against those violating the Securities Exchange Act. In these actions, federal courts may order disgorgement from non-violating third parties who have received proceeds of others' violations to which the third parties have no legitimate claim. These non-violating third parties are "relief defendants." For a court to exercise jurisdiction over relief defendants (and ultimately obtain disgorgement), the SEC must show that the relief defendants (1) received ill-gotten funds and (2) do not have a legitimate claim to those funds.

Vincent J. Messina, a lawyer, had a client who was allegedly engaged in a worldwide pyramid scheme that defrauded investors out of $57 million through unregistered securities offerings. The SEC claimed that Messina received $5 million from his client's unlawfully obtained funds and sought to disgorge that money from him. Messina maintained that the $5 million was merely a loan from his client, not the proceeds of illegal activity. Messina argued that the district court did not have jurisdiction over him to order disgorgement because he asserted a "facially colorable" claim to the disputed funds as a loan.

After a two-day evidentiary hearing, the district court granted the SEC's motion for disgorgement, holding that it had jurisdiction over Messina because Messina did not have a legitimate claim to those funds. The Ninth Circuit affirmed, holding that relief defendants may not divest a district court of jurisdiction to proceed against them simply by asserting a "facially colorable" claim of entitlement to the disputed funds. Rather, the relief defendant must demonstrate "an interest both 'recognized in law' and 'valid in fact.'" Here, Messina failed to make that showing, given the district court's factually supported finding that the $5 million "loan" was a sham.

Securities Fraud Pleading Standards

S.D.N.Y. Dismisses Putative Class Claims Against Fast-Food Retailer

Ong v. Chipotle Mexican Grill, Inc., No. 16 Civ. 141 (KPF) (S.D.N.Y. Mar. 8, 2017)

Judge Katherine Polk Failla dismissed claims that a fast-food retailer specializing in Mexican food violated Section 10(b) of the Securities Exchange Act by allegedly failing to disclose certain conduct related to the company's food handling processes that led to several E. coli outbreaks at restaurants across the United States and a related investigation by the Centers for Disease Control and Prevention (CDC). The plaintiffs specifically alleged that the company failed to disclose (1) its transition from using central commissary kitchens to prepare and process food to in-store processing and the increased risk of food-borne illness outbreaks resulting from that change; (2) the existence (and extent of) certain E. coli outbreaks that occurred at the company's restaurants and the status of the CDC's subsequent investigations into the outbreaks; and (3) the associated changes in the company's risk factors and the impact of the outbreaks on the company's financial performance and future.

Judge Failla concluded that the plaintiffs did not adequately plead that the company failed to disclose a heightened risk from the company's transition to in-store preparation because the company had transitioned to in-store production well before the first E. coli outbreak, suggesting that the transition did not actually heighten the company's risk. The court also reasoned that the company's generalized statement regarding its food-safety programs were inactionable puffery.

As to the company's statements that health officials had concluded that there was "no ongoing risk" related to the E. coli outbreak, the court concluded that the statements may have been "half-truths" at the time they were made in light of the ongoing CDC investigation. Likewise, the court found that the company's representation that there had been no material changes in its risk factors also may have been misleading in light of four E. coli outbreaks identified at the time. The court also determined that the company had not disclosed the potential impact on financial performance as a result of the outbreaks. However, the court expressed skepticism that any of the statements above was material and would have "altered the total mix of information available" to investors in light of the highly publicized nature of the outbreaks. Further, the court held that the plaintiffs had failed to adequately plead a strong inference of scienter. The court noted that stock sales by the company's executives did not indicate motive because the transactions were several months before the outbreaks occurred, and the more compelling explanation was that the executives sold their stock because they were receiving decreased salaries from the company. Further, the company's statement that there was "no ongoing risk" related to the E. coli was forward-looking and not inconsistent with the CDC's backward-looking statement that it was still investigating the causes of the outbreak and the infected persons. In addition, the court determined that the company did not need to make specific disclosures regarding the impact of the outbreaks on future financial performance in light of its other disclosures regarding the outbreaks.

Scienter

Sixth Circuit Affirms Dismissal of Securities Fraud Class Action Brought Against Officers, Directors, and Principal Shareholders of Kitchenware Company and Its Underwriters

IBEW Local No. 58 Annuity Fund v. EveryWare Global, Inc., No. 16-3445 (6th Cir. Feb. 21, 2017)

The Sixth Circuit affirmed the dismissal of claims brought under Sections 10(b) and 20(a) of the Securities Exchange Act, SEC Rule 10b-5, and Sections 11, 12(a)(2) and 15 of the Securities Act against officers, directors and principal shareholders of a now-bankrupt kitchenware company and its underwriters. The plaintiffs claimed that the defendants made material misrepresentations and omissions in the company's 2013 earnings projections, investor presentations, registration statement and prospectus as part of a so-called "pump and dump" scheme.

The Sixth Circuit affirmed the dismissal, concluding that the plaintiffs' Securities Exchange Act claims failed to meet the heightened pleading standard for scienter and that their Securities Act claims failed to plausibly allege any material misrepresentations by the defendants. The Sixth Circuit adopted the district court's reasoning that the plaintiffs failed to plead particularized facts giving rise to a strong inference of scienter because they failed to plead that (1) the CEO had actual knowledge that the 2013 earnings projections were false or misleading, or (2) the defendants acted with "a mental state embracing intent to deceive, manipulate, or defraud." The Sixth Circuit also adopted the district court's reasoning that the plaintiffs failed to plausibly plead facts showing that the company's registration statement and prospectus contained material misrepresentations.

Northern District of Illinois Denies Motion to Dismiss Misrepresentation Claims Against Biopharmaceutical Company and CEO

Rubinstein v. Gonzalez, No. 14-cv-9465 (N.D. Ill. Mar. 10, 2017)

Judge Robert M. Dow, Jr. denied a motion to dismiss a class action brought against a biopharmaceutical company and its CEO for alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act and SEC Rule 10b-5. The class action plaintiffs alleged that the defendants acted at least recklessly in misrepresenting that the primary rationale for a failed merger involving a corporate tax inversion was strategic, rather than to obtain favorable tax treatment. The plaintiffs identified three statements as misleading or containing omissions of material fact: (1) comments by the CEO on an investor call that tax benefits were not the primary rationale for the transaction; (2) statements in an SEC filing that listed tax benefits as one of 10 strategic benefits of the merger; and (3) statements by the CEO in a letter to employees of the target company, after U.S. tax authorities had taken actions to prevent corporate inversions, that the biopharmaceutical company planned to pursue the merger. Because the merger was abandoned after U.S. tax authorities acted to limit inversions, the plaintiffs alleged that these statements understated the importance of the merger's tax benefits.

The district court determined that the plaintiffs failed to plead that the comments on the investor call and statements in the SEC filing were misrepresentations because the tax benefits did not have to be the primary rationale for the transaction for the company to terminate the transaction after those benefits were eliminated. The district court also reaffirmed its prior ruling that the plaintiffs adequately pleaded that the letter to the target employees was a misrepresentation. The district court next concluded that the plaintiffs adequately pleaded that the defendants acted with scienter based on allegations the defendants acted recklessly in issuing the letter before performing a detailed consideration of the change in U.S. tax rules and its effect on the transaction. In support of this conclusion, the court cited a later statement from a board member that the letter was issued to calm employee unrest at the target.

Whistleblower Protections

Ninth Circuit Joins Second Circuit in Expanding Dodd-Frank Whistleblower Protections

Somers v. Dig. Realty Trust Inc., No. 15-17352 (9th Cir. Mar. 8, 2017)

A divided Ninth Circuit panel joined the Second Circuit in expanding Dodd-Frank whistleblower protections to apply not only to those who disclose potential violations to the SEC but also to employees who report internally. The Ninth Circuit's decision deepens a circuit split, after the Fifth Circuit in 2013 held that the Dodd-Frank anti-retaliation provisions protect only whistleblowers who report to the SEC.

The plaintiff allegedly made several complaints to senior management at his employer, the defendant, regarding possible securities law violations. The plaintiff did not report any of his concerns to the SEC. He was subsequently fired.

The plaintiff brought suit against his former employer, alleging violation of Section 21F of the Exchange Act, the anti-retaliation provision of the Dodd-Frank Act. The defendant moved to dismiss on the grounds that, under Dodd-Frank, a "whistleblower" is defined only as someone who reports to the SEC. The district court denied the defendant's motion to dismiss, and the Ninth Circuit affirmed.

The court reasoned that the definition of "whistleblower" found in Dodd-Frank—which includes only those employees who report potential wrongdoing "to the Commission"—is not dispositive. Rather, as the U.S. Supreme Court stated in *King v. Burwell*, 135 S. Ct. 2480 (2015), "[t]he use of a term in one part of a statute 'may mean a different thing' in a different part, depending on context." That is so even where the statute contains a "definitional provision" specifically defining the term. On this point, the court also relied on a 2011 regulation issued by the SEC interpreting Section 21F, which defines the term "whistleblower" to include those who report potential wrongdoing internally. That regulation and interpretation, the court stated, was "entitled to deference."

"The court reasoned that the definition of 'whistleblower' found in Dodd-Frank—which includes only those employees who report potential wrongdoing 'to the Commission'—is not dispositive."

Finally, the court explained that provisions of "Sarbanes-Oxley and the Exchange Act mandate internal reporting before external reporting," and "[l]eaving employees without protection for that required preliminary step would result in early retaliation before information could reach the regulators." Such a result would cut against legislative intent to safeguard investors in public companies and the whistleblowers themselves.

The plaintiff's petition for a writ of certiorari was granted by the Supreme Court on June 26, 2017.

Autonomous Transportation: A Brave New World

By Adam Dolan

The world is evolving. We're constantly creating and inventing new gadgets and tools that supposedly make our lives easier and more efficient. Cameras in our phones, fitness applications that track our physical activity, even vacuum cleaners that clean the house for us. And now we've developed self-driving cars. As we continue to advance and improve technology, what will that mean for the laws that govern our operation of motor vehicles? How will it impact case and statutory law? What about criminal implications? Where do we go from there? How do we apply the laws? What laws do we apply? How will a car that drives itself impact a drunk driving charge if the driver can legitimately say "I wasn't driving, the car was!"

Currently, New York State Vehicle and Traffic law defines a motor vehicle as "Every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power."[1] Interestingly, a review of definitions listed within the New York State Vehicle and Traffic law does not include the term "operation." It does, however, contain the definition of "driver." Driver is defined as every person who operates or drives or is in actual physical control of a vehicle.[2] Right away, we can see a problem developing.

"After all, if we argue that a person within a vehicle isn't to blame for an accident due to the fact the vehicle was autonomous, then who is to blame?"

For clarification, perhaps the best place to look is within the criminal justice area of the law. After all, vehicular-based crimes all involve the element of "operation," so it makes sense that such a term would be defined within this area of the law. In New York, the term "operate" as used in Vehicle and Traffic Law is broader than term "drive" and extends to situation where the motorist begins to engage the motor for purpose of putting vehicle into motion.[3]

In Connecticut, "operation" refers to certain actions. They include any action that intentionally could set the motor power of the vehicle in motion. This can refer to doing something as simple as putting your car key in the ignition. Also, it might include starting the engine with a remote.[4]

In Massachusetts, a person "operates" a motor vehicle not only while doing all of the well-known things that drivers do as they travel on a street or highway, but also when doing any act that directly tends to set the vehicle in motion. A person is "operating" a motor vehicle whenever he or she is in the vehicle and intentionally manipulates some mechanical or electrical part of the vehicle— like the gear shift or the ignition—which, alone or in sequence, will set the vehicle in motion.[5] This can mean that an intoxicated individual found asleep behind the wheel of a parked car on a public road, with the key in the ignition and the engine on, can be found to have "operated" a motor vehicle.[6]

"By eliminating the human driver, autonomy could cut the operating costs of such systems by 70 percent."

So what does the rise of autonomous driving vehicle mean for both civil matters and criminal matters? What can a company expect if they purchase or create a fleet of self-driving vehicles? Will they need to still have an employee present within the vehicle for the purposes of transporting merchandise? What if that person is involved in an accident? Have we even arrived at the point where a company needs to start thinking about this? How realistic is it that self-driving vehicles can be used for long-distance travel?

Going one step further, will it be Vehicle and Traffic Laws that are automatically applied? What about products liability law? After all, if we argue that a person within a vehicle isn't to blame for an accident due to the fact the vehicle was autonomous, then who is to blame? The vehicle manufacturer? The software company that developed the code that "drives" the car? Is it a combination of both vehicle and traffic law and products liability law? Will this lead to an entirely new subsection of a law? How close are we to this even occurring?

In 2015 Delphi Automotive Plc went coast-to-coast using a self-driving Audi Q5.[7] Tesla Motors Inc., BMW, Ford and Volvo have also promised to have fully autonomous motor vehicles on the road by 2022.[8] Boston Consulting Group has predicted that the autonomous vehicle market will increase to $42 billion by 2025 and account for a quarter of global sales by 2035.[9] Uber is testing a number of autonomous Volvo XC90 SUVs. Ford stated its first self-driving cars will go to ride-hailing and ride-sharing services in 2021.[10] General Motors plans to test autonomous models with similar ride hailing fleets in Arizona.[11] Finally, on February 14, 2017, automakers General Motors and Toyota, along with ride sharing group

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Lyft, tried to get a little love from Congress by asking Congress to set nationwide self-driving car standards.[12]

"Without changes to those regulations, it may be years before the promise of today's technology can be realized and thousands of preventable deaths that could have been avoided will happen," said Mike Abelson, vice president of global strategy at GM, in written testimony.[13] "It is imperative that manufacturers have the ability to test these vehicles in greater numbers."[14]

"However, this section specifically excludes technology that already exists, such as active safety systems or driver assistance systems, including blind spot assistance, crash avoidance, emergency braking, parking assistance, etc."

Gill Pratt, CEO of the Toyota Research Institute, stated that there is a "patchwork of policy initiatives at the state level" and as more States develop such laws and regulations, additional impediments are being created towards the development of self-driving cars.[15] Autonomy also is getting a boost from U.S. regulators, who in December proposed new rules requiring cars to be embedded with computer chips to allow them to communicate with each other to help avoid accidents. Vehicle-to-vehicle communications, known as V2V, could arrive within five years and make driverless cars smarter and safer.[16]

"Every government agency we work with has been waiting for this rule," said Jim Barbaresso, national practice leader for intelligent transportation systems for consultant HNTB Corp.[17] For Delphi and its partners Mobileye NV and Intel Corp., the first application of their self-driving system could be an airport tram or a rental-lot bus. By eliminating the human driver, autonomy could cut the operating costs of such systems by 70 percent.[18]

Although the Department of Transportation released a set of general national guidelines for self-driving vehicles last September, language within the Federal Automated Vehicle Policy "provides unclear or even conflicting direction" to States on their role in regulating this next-generation technology, Pratt said.[19]

Why such a push? Why are companies seeking out clear directions before proceeding? The benefits of self-driving vehicles range from convenience and reduced congestion to fuel-efficiency gains. However, technology and automotive companies also claim there is a long-term promise of dramatic reductions in traffic accidents and road fatalities, which topped 35,000 in 2015.

This would seem to be a huge benefit for insurance companies. A reduction in traffic accidents and fatalities would lessen the impact on insurance companies bottom line. However, how do you account for the fact that not every car on the road will be self-driving? How do you apportion fault in an accident involving both a self-driving car and one driven by a person? And going back to one of my original questions—how do the laws as they are currently written provide for these scenarios? Whom do you hold responsible?

New York has started to try and figure that out. On January 10, 2017, the New York State Senate introduced bill A01037. The bill was an act to amend the vehicle and traffic law in relation to authorizing the testing and operation of autonomous motor vehicles upon public highways. It also sought to amend the General Obligations Law as it related to the liability of motor vehicle manufacturers for vehicles that were ultimately converted to autonomous motor vehicles.[20] The bill has been signed into law.

However, the bill, if it does pass, will add new sections to the Vehicle and Traffic Law that are designed to encourage the testing and ultimately the use of autonomous vehicles in New York State. Section 100-e is titled "Autonomous Technology." It discusses the technology that would be installed on a motor vehicle that has the capability to drive without the active control or monitoring by a human operator.[21] However, this section specifically excludes technology that already exists, such as active safety systems or driver assistance systems, including blind spot assistance, crash avoidance, emergency braking, parking assistance, etc.[22]

Section 100-f defines what an autonomous motor vehicle is and section 507-a defines the term "operation" for purposes of a motor vehicle.[23] For the purposes of this chapter, a person is deemed to be operating an autonomous vehicle in autonomous mode when that person causes the vehicle's technology to engage.[24] The bill also states that it is irrelevant whether the person is present within the vehicle at that time.[25]

For vehicle manufacturers, the section of largest import is Title 3, section 9-303. This section specifically addresses the liability of the original manufacturer of the technology, and the distributor or the dealer of the motor vehicle that was converted to an autonomous vehicle by a third party after delivery. The bill states that such manufacturers, distributors or dealers shall not be liable and shall have an absolute defense to and shall be discharged from any cause of action commenced by any person for damages due to an alleged defect caused by the conversion of such vehicle to an autonomous vehicle.[26] The section also provides a defense for these same parties for any cause of action for damages that is due to an alleged defect caused by any equipment installed in a motor vehicle by the person who converted such vehicle to an autonomous vehicle, unless the defect is alleged to have been present in the motor vehicle as originally manufactured.[27]

What we're seeing in terms of this bill, and what already exists within established case law, is that operation of the vehicle will remain a somewhat human responsibility. However, it will not take long for an individual to challenge the definition of "operation" given the nature of the vehicles. Unlike "operation" as it exists currently, the very purpose of autonomous vehicles is that a person does not have to drive. This may end up being a distinction raised in criminal matters and in civil matters if a person is accused of "operating" an autonomous vehicle that is involved in an accident or where a driver is found to be intoxicated. What it may also lead to is massive amounts of pre-trial litigation involving significantly greater amounts of electronic data discovery and much broader demands for electronically stored information, or ESI.

> *"Ultimately, given the way the laws have been drafted to date and those laws that are being proposed, it seems likely that liability will continue to ultimately rest with a vehicle's owner or its driver, barring some catastrophic software failure."*

Despite these questions, and despite the high costs associated with developing this technology, the ultimate benefit would hopefully be the eventual demise of contested motor vehicle accident litigation. If all vehicles eventually become automated, with software that monitors speed, monitors traffic control devices, lane changing, stop and go traffic, the ability to prosecute a dubious claim involving a motor vehicle becomes exponentially more difficult. No longer would a plaintiff be able to claim that a car struck him while he was in a crosswalk, slammed into the rear of his vehicle at a high rate of speed, or sideswiped his or her vehicle without the other party simply retrieving the saved data, presenting it to the court and either disproving or proving plaintiff's contention.

Between budget approvals for further testing of autonomous vehicles,[28] to technology that continues to expand at breakneck speed, it is an exciting and interesting time in the transportation field. However, where as in the past, insurers were concerned mainly with the capabilities of their clients' drivers and their ability to avoid accidents, the proliferation of self-driving vehicles will add myriad new wrinkles to areas of insurance within the coming years. Normal straightforward liability and collision coverage for fleets will soon need to address whether the vehicles are self-driving or not; additional sections will need to be introduced that reflect the potential liability for the technology's manufacturer, its distributor, it's end-user. Ultimately, given the way the laws have been drafted to date and those laws that are being proposed, it seems likely that liability will continue to ultimately rest with a vehicle's owner or its driver, barring some catastrophic software failure. It's a fast moving world nowadays in transportation. As Ferris Bueller once said, "Life moves pretty fast. If you don't stop and look around once in a while, you could miss it." Insurers should be looking around. They're not going to want to miss this.

Endnotes

1. New York State VTL § 125.
2. *Id*. at § 113.
3. *People v Totman*, 208 A.D.2d 970, 971, 617 N.Y.S.2d 234, 235 (3rd Dept. 1994).
4. The issue of whether one operates a motor vehicle within the meaning of § 14-227(a) is to be determined on a case-by-case basis, making proof of operation…a factual determination." *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 344-45, 757 A.2d 561 (2000). "There is no requirement that the fact of operation be established by direct evidence." *Id*. at 345.
5. *Commonwealth v. Ginnetti*, 400 Mass. 181, 184, 508 N.E.2d 603, 605 (1987); *Commonwealth v. Uski*, 263 Mass. 22, 24, 160 N.E. 305, 306 (1928).
6. *Commonwealth v. Sudderth*, 37 Mass. App. Ct. 317, 319-320, 640 N.E.2d 481, 482-483 (1994).
7. https://www.bloomberg.com/news/articles/2015-01-08/driverless-car-global-market-seen-reaching-42-billion-by-2025.
8. *Id.*
9. *Id.*
10. https://www.bloomberg.com/news/articles/2016-08-16/ford-aims-to-offer-fully-autonomous-ride-sharing-vehicle-by-2021.
11. *Id.*
12. http://www.forbes.com/sites/alanohnsman/2017/02/14/gm-toyota-and-lyft-urge-congress-to-set-nationwide-self-driving-car-standards/#594aac127144.
13. *Id.*
14. *Id.*
15. *Id.*
16. https://www.bloomberg.com/news/articles/2017-01-03/it-s-aye-robot-as-driverless-cars-finally-steer-near-showrooms.
17. *Id.*
18. *Id.*
19. *Id.*
20. State of New York, 2017 Regular Session, A01037 (N.Y. 2017-2018).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. https://www.governor.ny.gov/news/governor-cuomo-announces-autonomous-vehicle-testing-begin-new-york-state.

New York State Bar Association Committee on Professional Ethics

Opinion 1133 (10/3/17)

Topic: Client Files: Lawyer's Right to Contact Prospective Clients

Digest: A lawyer who is the transferee and solely a custodian of client files arising from a transaction other than a sale of law practice may communicate with the prior lawyer's clients if the lawyer does not review confidential information in the files more than reasonably necessary to identify the contact information of the prior lawyer's clients and complies with the rules governing advertising and solicitation of prospective clients.

Rules: 1.0(a), 1.6(a), 1.15(c), 1.17(c), 7.1 and 7.3

FACTS

1. The inquirer has custody of approximately eight hundred executed Last Will & Testaments, which the inquirer received when prior counsel, to accept employment elsewhere, closed his one-person private law practice. Before closing that practice, the prior attorney wrote to each affected client. In this letter, the prior attorney notified each client of the client's "right to" the client's files "in my possession," which, the letter noted, might include "your original Last Will and Testament, Power of Attorney, and/or Trust." The letter explained that the client had "the right to retrieve your files from my office—or to have them sent to another attorney of your choosing—at any time" up to a date approximately four months after the closing of the lawyer's practice, the office of which, the letter said, would remain "staffed to respond to your inquiries." The letter said that a failure to retrieve the files before this deadline would be deemed "consent to transfer of the files to" the inquirer.

2. In this same letter, counsel said that "arrangements" had been made with the inquirer "to assume responsibility for your files." The letter said that the author was "confident" that the inquirer was able to "to continue to serve you with the same level of care and expertise you have come to expect." The letter provided the address, telephone number, and email address of the inquirer. The letter also underscored that the client should retain a copy of the letter with the client's estate documents.

3. The "arrangements" between the inquirer and prior counsel included no exchange of consideration between them. No financial or other thing of value was a part of the inquirer's assumption of "responsibility" for the inquirer's custodial role in maintaining possession of those files not earlier retrieved by recipients of the prior counsel's letter, including, for instance, no arrangement for the prior counsel to share in future fees, if any, that the inquirer may receive from the prior counsel's clients. The inquirer did no more than take physical possession of client files previously held by a lawyer who was required to close an office that had held the documents and who notified clients both of their right to obtain their files and the location of the files once the prior counsel was no longer able to maintain them.

4. The inquirer now wishes to communicate with the individuals whose files the inquirer holds, and in doing so to offer the inquirer's legal services in such matters as the clients may desire.

QUESTION

5. May a lawyer write to a prior lawyer's clients offering legal services, after the prior lawyer (a) transferred the clients' estate planning documents to the inquiring lawyer and (b) informed the clients of the transfer?

OPINION

6. Comment is required on a number of issues that this inquiry raises.

7. One is whether the transfer of the files to the inquirer was the sale of a law practice within the meaning of Rule 1.17 of the New York Rule of Professional Conduct (the "Rules"), which regulates the transfer of a law practice through a sale. We conclude that, in the circumstances presented to us, no sale occurred. We note with approval that prior counsel's letter was consistent with various client-protection provisions of Rule 1.17, among them giving the clients the right to retain future counsel of their choosing or to take possession of their files, Rule 1.17(c)(1), providing that consent to the transfer to the second attorney would be presumed if not subject to objection within a comfortable period greater than that (90 days) set in Rule 1.17(c)(2), and providing, though incompletely, the identity and contact information of the inquirer, Rule 1.17(c)(5) (requiring information about bar admissions, years of practice, and disciplinary history). If the facts presented here amounted to a sale of a law practice, we would detect a failure of strict adherence to Rule 1.17.

8. That prior counsel complied, and in our view properly so, with many of Rule 1.17's provisions does not alter the character of the "arrangement" that prior counsel made with the inquirer. This was not a sale of a law

practice but the creation of a custodial relationship. The inquirer was to hold the files pending further developments. Whether an attorney-client relationship exists is a mixed question of fact and law beyond our jurisdiction, but we can say with confidence that mere possession of files does not alone create one (a storage company does not become a person's lawyer by holding that person's client files).

9. We turn, then, to the inquirer's duties going forward. To start, ordinarily, a lawyer who comes into possession of the property of a third party has an ethical obligation under Rule 1.15(c) promptly to notify the third party; here, the prior counsel already did so, but the inquirer still has an ongoing duty to preserve that property. N.Y. State 1002 (2014). Thus, the inquirer must maintain the files unless and until a client retrieves them or the inquirer gives notice to the affected clients of some other disposition. The question remains whether the inquirer may contact these persons to offer the inquirer's legal services.

10. We conclude that the inquirer may do so if the inquirer complies with Rule 1.6(a) on protecting client confidential information, and with Rules 7.1 and 7.3, which govern, respectively, advertising and solicitation of prospective clients.

11. We have previously concluded that Rule 1.6(a), which dictates a lawyer's obligations to preserve confidential information, does not prohibit the inquirer from inspecting estate documents, but only as may be reasonably necessary to contact the affected person(s). N.Y. State 1035 (2014) (a lawyer who received wills in the sale of a law practice previously held by prior counsel, but who had not contacted the affected persons in accordance with Rule 1.17, could review the files only as reasonably necessary to communicate with those persons for directions on the disposition of the files); N.Y. State 1002 ¶ 9 (2014) (a lawyer who received wills as executor of an estate could "access or disclose the confidential information in the wills insofar as reasonably necessary to dispose of the wills"); *see* N.Y. State 341 (1974) (an "attorney who retires from practice may transfer executed Wills and other files to another attorney, but the receiving attorney holds them only as a custodian," it being "generally unethical" for the lawyer "to examine the Wills or files without the client's consent"). Hence, the inquirer, as custodian, may examine the files as may be reasonably necessary to ascertain the identity and addresses of the individuals who should be contacted about the files, but the inquirer may not, absent informed consent from the prior lawyer's clients or successors, review the files to recommend, for example, unsolicited advice about improvements in or updates to the estate planning.

12. Here, the inquirer wishes to go beyond merely contacting the prior lawyer's clients—the prior lawyer, after all, had already provided the inquirer's information to those clients—and wishes in addition to offer the inquirer's legal services. Because the purpose of the communication would be to promote the inquirer's legal services, the communication would be an "advertisement" within the meaning of Rule 1.0(a), which defines the term to mean "any public or private communication made by or on behalf of a lawyer" about that lawyer's services, "the primary purpose of which is for the retention of the lawyer." By reason of Rule 7.1, an advertisement may not contain statements that are "false, deceptive or misleading" or otherwise violate the Rules. Among these is Rule 7.1(f), which requires that any written advertisement identify itself as "Attorney Advertising," Rule 7.1(h), which requires that the advertisement contain the name of the lawyer and the lawyer's principal office address, and Rule 7.1(k), which requires that the advertisement be maintained for a period of three years. Other components of Rule 7.1 may also apply.

13. The inquirer's proposed communication would also fall within the meaning of "solicitation" under Rule 7.3, which defines the term to mean an advertisement "directed to, or targeted at," a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer" and "a significant motive for which is pecuniary gain." Rule 7.3 sets forth various requirements on solicitations, among them the obligation to file the written solicitation with the disciplinary committee having authority over the lawyer (Rule 7.3(c)(1)), and to retain the names and addresses of all recipients for at least three years (Rule 7.3(c)(3)). If the inquirer abides by these Rules, together with those set forth above, then we conclude that the inquirer may proceed with the proposed communication with the prior lawyer's clients.

14. This opinion is intended to address only the obligations of a lawyer who receives client files in a custodial capacity other than in the course of a sale of a law practice. Nothing we say here is meant to alter the prescriptions of Rule 1.17 on such sales.

CONCLUSION

15. A lawyer who is solely a custodian of client files arising from other a transaction than from a sale of law practice may communicate with the prior lawyer's clients if the lawyer does not review the confidential information in the files more than reasonably necessary to contact those prior clients and complies with the rules governing advertising and solicitation of prospective clients.

(19-17)

Opinion 1134 (10/6/17)

Topic: Attorneys' fees: Use of credit card to secure payment in domestic relations matter

Digest: Whether an attorney may use a client's credit card to secure payment of fees and expenses in a domestic relations matter presents a question on the meaning of 22 NYCRR Part 1400, which is an issue of law beyond this Committee's jurisdiction.

Rules: 1.5(d)(2).

FACTS

1. The inquiring attorney represents parties in domestic relations matters. The attorney's standard retainer agreement complies, on the inquirer's view, with the provisions of 22 NYCRR 1400, which is a court rule requiring that engagement letters in domestic relations matters contain certain features. The inquirer now wishes to add to the inquirer's standard form of engagement a provision that, if any amount for which the client has been billed remains unpaid for a period of more than twenty days, then the attorney is authorized to charge the client's credit card, the pertinent information on which the client has previously supplied the lawyer, for the full unpaid amount.

QUESTION

2. May an attorney's retainer agreement in a domestic relations matter authorize the attorney to charge the client's credit card for any amount for which the client has been billed but which remains unpaid more than twenty days after issuance of the bill?

OPINION

3. In N.Y. State 1112 (2017), we determined that a lawyer's retainer agreement may provide (a) that the client could secure payment of the lawyer's fee by credit card, and (b) that the lawyer could bill the credit card the amount of any unpaid legal fees, costs, or disbursements that the client failed to pay within twenty days after issuance of the lawyer's bill for those amounts, as long as the charge complies with requirements set forth in our prior opinions, including that the client is expressly informed of the right to dispute any of the lawyer's bills (and to request arbitration if court rules so require) before the lawyer charges the client's credit card, and that no charge is made for any disputed portion of the lawyer's bill. We did not address the implications of this conclusion with court rules governing fee arrangements, including those that apply in domestic relations matters. We now conclude that such court rules take precedence over the New York Rules of Professional Conduct (the "Rules") as interpreted in that Opinion.

4. Our role is limited to interpreting the Rules; we do not opine on issues of law. Rule 1.5(d)(2) provides that a "lawyer shall not enter into an arrangement for, charge or collect" a fee that is, among other things, "prohibited by law or rule of court." Thus, whether the lawyer's proposed use of a credit card to secure payment in a domestic relations matter depends on whether the practice would violate a law or rule of court.

5. In domestic relations matters, the New York courts have mandated certain client protections not necessarily applicable in other matters. Most notable of these is 22 NYCRR 1400.5, which says in relevant part:

> (a) An attorney may obtain a confession of judgment of promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee only where:
>
> (1) the retainer agreement provides that a security interest may be sought;
>
> (2) notice of an application for a security interest has been given to the other spouse; and
>
> (3) the court grants approval for the security interest after submission of an application for counsel fees.

6. For us to resolve the lawyer's inquiry would require us to decide whether the inquirer's proposed credit card arrangement constitutes a "security interest" within the meaning of this court rule. Under Rule 1.5(d)(2), whether a lawyer may include the proposed language in an engagement letter in a domestic relations matter depends on whether the language violates 22 NYCRR 1400.5. This question is solely an issue of law beyond our jurisdiction to decide.

CONCLUSION

7. A lawyer may secure payment of legal fees and expenses in a domestic relations matter unless doing so violates a law or rule of court, which is a question of law beyond the jurisdiction of this Committee to resolve.

20-17

Opinion 1135 (10/10/17)

Topic: Limitations on solicitation by solo practitioner who is both a lawyer and certified public accountant.

Digest: Professional services that are not distinct from legal services are subject to the prohibition against in-person and telephonic solicitation.

Rules: 5.7(a), (c), 7.1, 7.3(a), (b), (c)

FACTS

1. The inquiring attorney is licensed in New York as both a lawyer and a certified public accountant. The inquirer plans to open a solo practice offering a range of state and local tax services, and to offer these services, both legal and accounting, as an integrated operation.

2. According to the inquirer, the vast majority of the services to be offered are those that either a lawyer or an accountant may legally perform. Each of these professions, for instance, may handle a tax audit defense or certain administrative matters before tax authorities. Limits exist, however: For instance, an accountant may not represent a person in court proceedings, which only a lawyer may do, and a lawyer may not conduct an audit of a company's financial statements, which, we are told, only an accountant may do.

3. The inquirer wishes to communicate by telephone to offer, unsolicited, his accounting services to persons or entities lacking any prior personal or professional relationship with the inquirer. We accept for purposes here the inquirer's statement that the accounting profession does not forbid an accountant to call a stranger to offer accounting services. The inquirer is prepared to disclose on each call that the inquirer holds a law license but, for purpose of the call, is proposing to be retained solely as an accountant. Nevertheless, the inquirer acknowledges that, in many tax disputes, an early and not insignificant tactical decision is whether to address the tax controversy through administrative channels or instead through legal proceedings. The inquirer seeks guidance on whether the proposed telephone calls, even though apparently permitted by the accounting profession, conflicts with the New York Rules of Professional Conduct (the "Rules").

QUESTION

4. May a lawyer who is also a certified public accountant make unsolicited calls to potential clients for matters that could be handled by either a lawyer or certified public accountant?

OPINION

5. Rule 5.7 permits a lawyer to offer both legal and nonlegal services to the public. In N.Y. State 938 ¶ 5 (2012), we pointed out that Rule 5.7(c) defines "nonlegal services," for purposes of Rule 5.7, to mean "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Questions about services comprising the unauthorized practice of law are outside the orbit of this Committee's reach, and so we offer no opinion on that subject. To analyze the question presented, however, we accept without deciding that the aforementioned tax services do not constitute the unauthorized practice of law, and that a nonlawyer may lawfully provide these services.

6. Rule 5.7 distinguishes between two types of "nonlegal services." Rule 5.7(a)(1) addresses "nonlegal services" that a lawyer offers "that are not distinct from legal services" the lawyer offers to clients; Rule 5.7(a)(2) addresses "nonlegal services" that a lawyer offers "that are distinct from legal services" the lawyer offers to clients. The applicability of the Rules turns on whether the services are "not distinct" or "distinct" from each other. If the former, then the Rules apply to everything the lawyer does in performing those "not distinct" nonlegal services; if the latter, then the Rules apply only in certain circumstances with the use of disclaimers. The threshold question, then, is whether the nonlegal tax services the inquirer proposes to offer here are "not distinct" or "distinct" from the legal services the lawyer offers to potential clients

7. The Rules do not define the word "distinct" but the dictionary does. To be "distinct" is to be "not alike, different, not the same, separate, clearly marked off." *Webster's Unabridged Dictionary* 534 (2d ed. 1979). These are terms of comparison. Rule 5.7(a)(1) identifies the subjects to compare: the service provider (the lawyer), the substance of the service to be provided (legal or nonlegal), the proposed recipient of the service (the potential client), and, by necessary implication, the manner or means by which the lawyer offers the service (the degree of integration of the two services). Our prior opinions teach that, when a substantial congruence of these factors exists, then the Rules apply to everything the lawyer does. *See* N.Y. State 1026 (2014) (services are "not distinct" when a lawyer offered nonlegal mediation services in domestic relations matters in which the retainer agreement offered to "represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement"); N.Y. State 832 ¶ 6 (2009) (even though, in offering the sale of shelf corporations, a nonlawyer may be entitled to provide advice about them without engaging in the unauthorized practice of law, "when a lawyer provides such advice it becomes the provision of legal services," in which event the Rules "would apply both to the legal advice and to the sale of the corporations"); *cf.* N.Y. State 992 ¶ 21 (2013) (a lawyer may not circumvent the Rules "and practice law by a designation that the attorney is employed in a 'non-legal capacity' even if a non attorney may perform the same legal services").

8. Here, the identity of the service provider, the substance of the services to be provided, the prospective recipient of the services, and the manner or means in which the lawyer wants to offer the services substantially overlap. In such circumstances, we read Rule 5.7(a)(1) to mean that the lawyer's accounting services are not distinct from those of the lawyer's legal services. As Comment [1] under Rule 5.7 explains, "The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provisions of nonlegal services when that may not

be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter." Accordingly, we believe that all the Rules apply to the inquirer's conduct even when the inquirer is offering tax services that an accountant as well as a lawyer may properly perform.

9. This includes the Rules' prohibition on the unsolicited in-person contact with potential clients. Rule 7.3(b) defines "solicitation" as "any advertisement of behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Rule 7.3(a)(1) prohibits any "solicitation" by "in-person or telephone contact," with limited exceptions inapplicable here. Comment [9] to Rule 7.3 explains that, "in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients," among them "the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration," a risk equally present "in telephone contact or in real-time or interactive computer-accessed communication."

10. On the facts before us, Rule 7.3(a)(1) prohibits the inquirer's proposed offering of services that are not distinct from the inquirer's legal services by way of unrequested in-person telephone communications to potential clients lacking any personal or professional relationship with the inquirer.

11. Rule 7.3 also contains in subdivision (c) several other restrictions on solicitations, which while not the subject of this inquiry, would apply to a lawyer in the inquirer's position. Among these is the duty to file the solicitation with the relevant disciplinary authorities, Rule 7.3(c)(1), and to retain a list of the names and addresses of all recipients for at least three years, Rule 7.3(c)(3). The regulations of lawyer advertising, set out in Rule 7.1, would also apply, including the requirement of Rule 7.1(a)(1) against communications that are "false, deceptive or misleading," and of Rule 7.1(f) that any written communication qualifying as a solicitation be labeled as "Attorney Advertising."

CONCLUSION

12. Rule 7.3 prohibits a lawyer who is also a certified public accountant from offering by telephone unsolicited tax-related services to persons with whom the lawyer lacks any pre-existing relationship when the tax-related services are not distinct from legal services and offered by the lawyer as part of the lawyer's integrated practice.

(21-17)

Opinion 1136 (10/13/17)

Topic: Law Firm Marketing: Sponsorship of Events

Digest: Subject to legal restraints, a law firm may sponsor parties, sporting events, or games of chance provided that the law firm complies with applicable rules governing lawyer advertising and solicitation.

Rules: 7.1, 7.3

FACTS

1. The inquiring law firm concentrates in employment law matters, including workers' compensation and personal injury cases. To promote its name, the firm wishes to embark on certain activities. Specifically, the firm wants to hold a party or reception for members of a local labor union, and, in addition, to sponsor a sporting match for union members at which the players would wear uniforms or T-shirts bearing the firm's name. During the sporting event, the playing field would display a billboard or banner featuring the firm's name and contact information, and players and spectators could avail themselves of free refreshments at the firm's expense. For the more general public, the firm wants also to conduct a lottery or raffle with a prize such as tickets to concerts or sporting events, with the winner required to pick up the prize at the firm's office.

QUESTIONS

2. May a law firm sponsor and bear the cost of a party or sporting event for targeted potential clients in which the firm's name is prominently displayed by various means?

3. May a law firm conduct a raffle or lottery for which the law firm pays the cost of any prize on condition that the winner retrieve the prize from the law firm's office?

OPINION

4. This Committee's charter confines us to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not issue opinions on questions of law. Whether the conduct of particular sporting events, raffles, or lotteries is lawful in this State is thus beyond the scope of this opinion. For our purpose, we assume without resolving that such activities comply with law, and limit ourselves to the ethical issues that the inquiry raises.

5. These ethical issues rest mostly on the implications of the proposed activities under the regulations

of advertising and solicitation set forth in Rules 7.1 and 7.3, respectively. Because by definition under Rule 7.3 (a) a "solicitation" must be an "advertisement" within the meaning of Rule 1.0(a), the preliminary question is whether any of the proposed activities qualify as an "advertisement." Rule 1.0(a) says, in relevant part, that an "advertisement" consists of "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Of significance here, however, is Comment [8] accompanying Rule 7.1's proscriptions on lawyer advertising, which notes that some "communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the firm name, logo, and contact information printed on them do not constitute 'advertisements' within the meaning of this Rule [7.1] if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter."

6. Our prior opinions have lent weight to this Comment in scenarios not unlike those this inquiry presents. Of particular pertinence is N.Y. State 937 (2012), in which the inquirer wished to cooperate with a local hospital to provide a promotional gift, such as a calendar or a pen branded with the law firm logo, as part of the welcoming package given to all hospital patients. Focusing on Rule 1.0(a)'s emphasis on the "primary purpose" of the communication, we said there that "when the intent of a communication is to educate recipients about legal developments or to raise general brand awareness, that intent will be considered its primary purpose. Thus, even if such communications are more fundamentally motivated by the aim of increasing the lawyer's business, they are not advertising within the meaning of the Rules." *Id.* ¶ 4. Likewise, in N.Y. State 1095 (2016), we said that "large building signs" bearing the firm's name "do not constitute 'advertisements,'" but were instead "for the purpose of general awareness and branding and thus are not subject to Rule 7.1." *Id.* ¶ 12. *See also* N.Y. State 1017 ¶ 8 (2014) (use of a law firm's initials in sponsorship of a little league baseball team did not constitute an impermissible use of a trade name).

7. We have also previously considered and, subject to legal issues, approved the offering of a prize by a law firm when the primary purpose of doing so is other than retention of the lawyer in a matter. In N.Y. State 873 (2011), the inquiring lawyer proposed to give visitors connecting to the lawyer's social media outlets the chance to win a prize for doing so, untethered to any obligation to retain the lawyer. There we said that, although "business development might be the inquirer's ultimate goal in offering the prize," this alone "would not trigger the Rules on advertising any more than it would trigger those Rules if, for example, the inquirer were to join a local Chamber of Commerce, Kiwanis Club, or bar association, or if the inquirer were to take other steps to expand the inquirer's social circle with the aim of meeting potential new clients." *Id.* ¶ B1; *see* Rule 7.1, Comment [6] ("Not all communications made by lawyers about the lawyer or the law firm's services are advertising.")

8. Simply put, nothing in the Rules creates a barrier to lawyer networking among potential clients, heightening awareness of the lawyer or law firm's name in the community, conducting social events for discrete groups, or engaging in actions that may have the long-term beneficial effect of enhancing the lawyer or law firm's profile and profitability.

9. Nevertheless, Rules 7.1 and 7.3 erect boundaries on the comportment of a lawyer or law firm undertaking such activities. A law firm may hold a party or a sporting event to promote the firm's name, but its lawyers may not use those occasions to engage in in-person solicitation of its guests unless those guests fall within one of the exclusions in Rule 7.3(a)(1) (forbidding in-person or other real-time solicitation unless the recipient is "a close friend, relative, former client or existing client"). A written invitation to participate in those events, or in a lottery or raffle, may not seek the law firm's retention in a matter unless the communication complies with Rule 7.3(c)'s regulations on, among other things, submitting the written communication to local disciplinary authorities and retaining a list of the name and addresses of all recipients for a period of at least three years. The law firm may require the winner of any prize to retrieve the same from the law firm's office, but again may not use that opportunity to solicit the winner's legal matters (as opposed to, say, using the moment for a photo opportunity with the winner for release to the press to raise public awareness of the firm). Consequently, while the proposed sponsorships are alone untroubling under the Rules, the law firm's actions in conducting them could cross the line into advertising and solicitation requiring adherence to Rules 7.1 and 7.3.

CONCLUSION

10. A law firm's sponsorship of receptions, sporting events, and raffles or lotteries, if permitted by law, constitute permissible branding activities outside the meaning of "advertising" under the Rules, provided that the primary purpose of the activities is enhancing the firm's name recognition and the activities do not involve solicitation of potential clients or ongoing advertisement of the law firm's services.

23-17

Opinion 1137 (10/23/17)

Topic: Law firm name; "of counsel" lawyers

Digest: A law firm with one principal and two "of counsel" lawyers may call itself "A & Associates" as long as the "of counsel" lawyers meet the test for the designation "of counsel," which requires a close, continuing, and personal relationship with the firm.

Rules: 1.10(a). 7.5(a), 7.5(b), 8.4(c)

FACTS

1. The inquirer, Lawyer A, practices in a law firm, A&B that has two partners and two attorneys—C and D—designated "of counsel." Lawyer B plans to leave the firm at the end of the year. The inquirer asks whether it is permissible to call the new firm "A & Associates." The inquirer characterizes the relationship of the two "of counsel" lawyers as "continual day-to-day." Both are covered by the firm's malpractice insurance policy.

QUESTION

2. May a lawyer designate the lawyer's firm "A & Associates" when the only other lawyers in the firm are designated as "of counsel" lawyers?

OPINION

3. Rule 7.5(b) of the N.Y. Rules of Professional Conduct (the "Rules") provides that "a lawyer in private practice shall not practice under a trade name" or "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name."

4. Comment [1] to Rule 7.5 says that, "to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status."

5. Rule 8.4(c) provides that "A lawyer or law firm shall not . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

6. The question raised here is whether using the firm name "A & Associates" as the name of the law firm would be a trade name or misleading when the inquirer does not have any partners, and the other lawyers who work at the firm are "of counsel" to the firm.

"Of Counsel" Lawyers

7. For purposes of this opinion, we assume that the two lawyers who are designated "of counsel" are properly so designated. *See* Rule 7.5(a)(4) ("A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate.") As we explained in N.Y. State 955 ¶ 6 (2005):

> Whether the relationship meets the "continuing relationship" test is fact-specific and no additional information is provided in this inquiry. Thus, as long as the inquiring firm is satisfied that the "continuing relationship" test is met, it may have an "of counsel" relationship with a lawyer.

See also N.Y. State 788 at note 5 (2005) ("We have interpreted the 'of counsel' relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis'"); N.Y. State 773 (2004) (*quoting* N.Y. State 262 (1972)); ABA Op. 90-357 (1990) (The use of the title "of counsel," or variants of that title, in identifying the relationship of a lawyer with another lawyer or firm is permissible as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading). *See also* Rule 7.5, Cmt. [1] ("Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.")

8. Whether lawyers C and D each have the close, regular, personal relationship required to merit the title "of counsel" is a question of fact that the inquirer must determine.

"Of Counsel" Lawyers as "Associated" with the Firm

9. If lawyers C and D are properly designated "of counsel," then the next question is whether they are "Associates" for purposes of calling the law firm "A & Associates." One objective of the Rules is to ensure that the public is not deceived about the identity, responsibility, or status of the individuals using a law firm name. *See* N.Y. State 732 (2000); N.Y. State 636 (1992); N.Y. State 459 (1977); N.Y. State 495 (1978); *Matter of Shepard*, 92 A.D.2d 978, 459 N.Y.S.2d 632, 633 (3d Dept. 1983); *see also* EC 2-11 (Ethical Considerations under the predecessor of the Rules provided that "[t]he name under which a lawyer practices may be a factor in the selection process. The use of a trade name or an assumed name could mislead non-lawyers concerning the identity, responsibility, and status of those practicing thereunder").

10. The Rules do not define the terms "associate" or "associated." The term "associate" often conveys the status of a junior lawyer who is not a partner or principal but is regularly employed by the firm. *See* ABA Formal Op. 90-357. Nevertheless, both the Rules and our prior opinions indicate that lawyers with other relationships to the firm are "associated" with the firm. For example, in N.Y. State 715 (2004), in which we considered the rules applicable to temporary lawyer working with a firm, we indicated that conflict rules apply to lawyers who are "of counsel" to a firm: "The Code does not define the term 'associated.' Although the concept extends beyond lawyers who are partners, associates or 'of counsel' in a firm,

it does not apply to all lawyers who are in any way 'connected' or 'related.'"

11. Rule 1.10(a) provides that, while lawyers are associated in a firm, none of them may knowingly represent a client when any one of them, practicing alone, would be prohibited from doing so under Rule 1.7, 1.8 or 1.9. Both this Committee and the courts have concluded that "of counsel" lawyers are "associated" with a firm for purposes of the conflict of interest rules. *See* N.Y. State 876 (2004) (conflicts of interest will be imputed to all lawyers in all firms with which a lawyer is associated as a partner, associate or of counsel); N.Y. State 793 (2006) (under the former Code of Professional Responsibility, conflicts imputed to an attorney under DR 5-105(D), other than personal conflicts under DR 5-101(A), will also be imputed to all lawyers in any firm with which the attorney has an of counsel relationship); N.Y. State 788 (2005), N.Y. State 773 (2004) (lawyers who are "of counsel" to a law firm are "associated" with the law firm for purposes of former DR 5-105(D)); *Nemet v. Nemet*, 112 A.D.2d 359, 360, 491 N.Y.S.2d 810, 811 (2nd Dep't) (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602, 490 N.E.2d 554 (1985); Restatement (Third) of the Law Governing Lawyers § 123 cmt. c(ii) (1998) (same).

12. Accordingly, in the context of selecting a name for a law firm, we do not believe that the public would assume that the term "Associates" is limited to persons who are non-partner employees of the firm assigned the title of "associate." If, for instance, the inquirer elects to identify C and D on the firm's letterhead or website, the inquirer may fulfill the requirement of Comment [1] to Rule 7.5 to be "scrupulous in the representation of professional status" by clarifying that lawyers C and D are "of counsel." *Compare* N.Y. State 931 (2012) (name of law firm of solo practitioner cannot include "and Associates" based on employment of paralegal).

CONCLUSION

13. A law firm with one principal and two "of counsel" lawyers may call itself "A & Associates" as long as the "of counsel" lawyers meet the test for the designation "of counsel" that they have a close, continuing, and personal relationship with the firm.

(28-17)

Opinion 1138 (11/8/17)

Topic: Use of English language translation of lawyer's surname in law firm name.

Digest: A lawyer who is engaged in a solo practice and admitted to practice under the lawyer's given surname may not use an English language translation of that name in the name of the lawyer's law firm.

Rules: 7.5(b), 8.4(c)

FACTS

1. The inquirer is a solo practitioner whose legal surname is the name that appears as the lawyer's name on the official roll of attorneys that the Clerk of the Court of the Appellate Division maintains. That name, is, in the inquirer's view, unduly alien to the ears and eyes of the English-speaking public whom the inquirer seeks to attract as clients. The inquirer wants to adopt an English language translation of this surname as the name of the lawyer's firm, while also identifying the lawyer, using the lawyer's real name, as an attorney "with" the firm. As a hypothetical example, if the inquirer appears on the official roll of attorneys as "Yohan Schmidt," and the English language translation of that name is John Smith, then the inquirer proposes to identify the firm as follows: "The Smith Law Office with Attorney Yohan Schmidt."

QUESTION

2. May an attorney substitute an English language translation of the lawyer's surname in the name of the lawyer's firm when the lawyer is admitted to practice and listed on the roll of attorneys under the lawyer's actual surname?

OPINION

3. Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules") provides in pertinent part that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer, or lawyers practicing under such name, or firm name containing names other than those of one or more of the lawyers in the firm." This Rule serves to protect the public from being deceived about the identity, responsibility, or status of those who use the firm name. N.Y. State 732 (2000) (principal goal of predecessor of Rule 7.5(b) is to avoid misleading the public); Cmt. [1] to Rule 7.5 ("to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact"); see Rule 8.4(c) (prohibiting conduct involving "deceit or misrepresentation").

4. In N.Y. State 740 (2001), this Committee concluded that "using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name" within the meaning of Rule 7.5(b). In N.Y. State 869 ¶ 7 (2011), we noted also that "the prohibition against tradenames is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." In keeping with these opinions, this Committee has said that firm names may not include a variant on the lawyer's name created by conjoining the lawyer's initials with an abbreviation of the lawyer's surname because the proposed firm name deviated substantially from the lawyer's actual name and was therefore impermissible. N.Y. State 948 ¶ 4 (2012) (a lawyer may not

use AbDoe Law as the firm name for a lawyer enrolled as Ann-Bonnie Doe).

5. N.Y. State 948 nevertheless recognized that some variations on names may deviate so slightly from the original as not to offend Rule 7.5(b). Thus, in N.Y. State 1003 ¶ 9 (2014), we concluded that a lawyer who practiced under the lawyer's full name may use a law firm name that includes only the lawyer's middle initials and last name, without including the lawyer's first name, provided that the proposed firm name does not violate the additional prohibition contained in Rule 7.5(b) against practicing under a firm name that is "misleading as to the identity of the lawyer or lawyers practicing under such name." Likewise, in N.Y. State 872 ¶ 9 (2011), we said that a lawyer may use the English language translation of the lawyer's surname on business cards, in informal communications, and on the lawyer's website, if doing so was not misleading and was compliant with other applicable statutes and court rules regarding attorney firm names and name changes.

6. Here we face a different issue—whether an English language translation of the inquirer's surname, even if juxtaposed to the inquirer's actual surname to identify the lawyer individually—is a permissible proxy for the name of the law firm. We have little doubt that a law firm may in advertising accurately describe its lawyers, their names, and their areas of concentration in languages other than English. But these matters are not the issue here. The sole issue here is whether it is misleading for a law firm to use as its name an English language translation of the lawyer's actual surname, by which the lawyer is admitted to the bar and listed on the official roll of attorneys.

7. We conclude that the answer is yes. The English language translation of the inquirer's last name in the firm name is more than a slight deviation from the inquirer's actual surname. The English language translation of the surname has a greater possibility to mislead the public than simply translating a first name to English or dropping a lawyer's first name and using initials to identify the lawyer. In both N.Y. State 1003 and N.Y. State 872, the firm name used the lawyer's legal surname. The public could the readily see that the lawyer had the same name as the firm. Here, because the proposed firm name is different from the lawyer's legal last name under which the inquirer practices, it is far more likely to mislead the public. This is particularly so when, as here, the inquirer proposes to juxtapose the firm name containing the English language translation of the inquirer's last name next to the inquirer's chosen firm name. This placement could deceive the public into believing that the lawyer is not the sole lawyer in the firm—for instance, that two different lawyers named Yohan Schmidt and John Smith practice there—or that it is not the lawyer's firm. Cf. N.Y. State 869 ¶ 13 (2011) (Rule 7.5(b) permitted a solo practitioner named John Smith to use the firm name "The Smith Law Firm" because the name would clearly and accurately identify the one lawyer named Mr. Smith practicing under the firm name). By contrast, the proposed use of a translated surname here would not clearly and accurately identify the one lawyer practicing under the firm name.

CONCLUSION

8. A lawyer who appears on the official roll of attorneys under the lawyer's given surname may not use a different name in the lawyer's firm name, even if the name is a reasonable English translation of the lawyer's actual surname.

(24-17)

Opinion 1139 (12/11/17)

Topic: Attorneys' Fees; Securing Fees and Expenses by Confessions of Judgment

Digest: Prior to conclusion of a pending matter, a lawyer may agree with a client to modify an engagement agreement with the client to provide, as security for legal fees and expenses already due and owing in a fixed amount on which the parties agree, for the exception and filing of a confession of judgment, and the execution and recording of a collateral mortgage with a security interest, if the lawyer complies with rules governing business transactions with a client and thereafter abides by the general rules governing conflicts.

Rules: 1.0(f), 1.0(j), 1.5(a), 1.5(d)(5) & (f), 1.7, 1.8(a), 1.16(c)(5) & (d)

FACTS

1. The inquiring law firm represents two individuals and a company as defendants in a pending and hotly contested dissolution proceeding; the two individuals are principals of the client company, as to which the Court has appointed a Receiver. The law firm is owed a substantial amount in attorneys' fees and expenses incurred over more than a year in defense of the inquirer's clients. The Receiver holds funds consisting of, among other things, the proceeds from the sale of real property previously owned by one of the inquirer's clients. With the clients' joint consent, the firm has asked the Receiver and the Court to permit the Receiver to release funds to pay the inquirer's outstanding fees and expenses. The adverse party objects to the release of receivership funds for this purpose, and to date the firm remains unpaid.

2. The inquirer does not wish to abandon the clients, but is concerned that, in light of the likely expenses of the receivership, as well as creditors with potential claims with priority over any claim for defense fees and costs, there may be insufficient funds remaining to pay the in-

quirer's outstanding invoices. The firm recognizes that the clients are in a financially parlous condition, struggling to make ends meet, which is among the reasons why the inquirer does not want to impose the economic burden that the firm's withdrawal from the representation would impose on them. Having discussed the matter with the clients, the inquirer proposes to have each client execute, and to have the inquirer file or record as the case may be, client affidavits confessing judgment and a collateral mortgage with a security interest, in each instance limited to the fixed amount, on which the parties agree, currently due and owing to the law firm for services already performed.

3. The inquirer intends to notify the Receiver of these transactions, and anticipates that the Receiver will notify the Court and the adverse party. The law firm's engagement letter with the clients makes no provision for these security arrangements.

QUESTION

4. May a law firm agree with its clients to amend its existing engagement letter with the clients during the pendency of a matter to provide for the clients to execute, and for the law firm to file or record, affidavits confessing judgment and collateral mortgages as security for accrued but unpaid attorneys' fees and expenses in a fixed amount on which the parties agree?

OPINION

5. Our role is to interpret the New York Rules of Professional Conduct (the "Rules"), not to opine on issues of law, including laws addressing creditor rights. Accordingly, for our purposes, we assume without deciding that the proposed security arrangements, as well as the contemplated notice of them, do not violate any statute or rule governing Court-supervised receiverships, including the rights of any third parties or arrangements between the inquiring firm and clients subject to the receivership. We note, too, that nothing in this opinion is intended to apply to fee arrangements in a domestic relations matter, in which special rules control. Rule 1.5(d)(5)(iii) (a lawyer may not enter into an arrangement for any fee in a domestic relations matter that "includes a security interest, confession of judgment or other lien without," among other things, "approval from a tribunal after notice to the adversary"); *see* N.Y. State 1134 (2017) (whether a lawyer in a domestic relations matter may use a credit card to secure legal fees is a question of law under 22 N.Y.C.R.R. Part 1400).

6. In N.Y. State 910 ¶ 19 (2012), this Committee said that "[r]etainer agreements, like all contracts, may be amended with the agreement of the lawyer and the client." We cautioned, however, that "such an amendment raises ethical concerns, because [the] lawyer is often in a position to take unfair advantage of the client." There, as here, the inquirer sought to amend an existing retainer agreement to provide for, among other things, arrangements (including a confession of judgment) to secure payment of the lawyer's fees and expenses. We noted there that, though certain amendments could be considered "normal fee negotiations" subject only to the regulations of Rule 1.5, which govern all fee agreements, "others are considered a 'business transaction with a client'" that are subject to the "higher scrutiny of Rule 1.8." We identified a number of factors that determine whether a particular amendment warranted this heightened level of review. *Id.* ¶¶ 20-24; *see* N.Y. State 1051 ¶ 16 (2015) (applying factors to conclude that Rule 1.8(a) applies to a change in a contingency fee agreement enabling the lawyer to be paid out of the proceeds of a third-party loan made as an advance against the client's later recovery in a structured settlement).

7. The considerations germane to assessing the applicability of Rule 1.8(a)—among them, the timing and circumstances of the proposal, the sophistication of the client, the beneficiary of the amendment (lawyer or client), whether the client has deliberately disregarded an obligation to pay—are fact-intensive, but we need not resolve them, for the requirements of Rule 1.8(a) would apply to the inquirer's proposed security arrangements even if part of the original retainer agreement. Comment [16] on Rule 1.8 says as much: "When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a)." *See* Cmt. [4C] (Rule 1.8(a) applies "when a lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee"); N.Y. State 1104 (2016) (initial engagement letter securing legal fee with a promissory note is subject to Rule 1.8(a)); ABA 11-458 (2011) (amendment to fee arrangements that involve a lawyer acquiring an interest in client property is subject to Model Rule 1.8(a)). Thus, even if some of the factors outlined in N.Y. State 910 might justify an amendment here with reference only to Rule 1.5, the proposed security arrangements require adherence to Rule 1.8(a).

8. Rule 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:
>
> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by that client;

> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

9. Here, the interests of the inquirer and the clients are "differing" within the meaning of Rule 1.0(f), which defines "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to the client, whether it be conflicting, inconsistent, diverse, or other interest." However much the parties may now view the arrangement as a means to maintain their attorney-client relationship, the entry of confessions of judgment and the recording of mortgages with a security interest places the lawyer in direct adversity to the clients. Similarly, while a client may not reasonably expect a lawyer to exercise professional judgment on the client's behalf in the negotiation of a routine retainer agreement, circumstances may exist in which such an expectation arises depending on the sophistication of the client, the complexity of the arrangement, whether the matter is ongoing, and whether the client has independent counsel to assess the transaction. *See* N.Y. State 1104 ¶ 5. That here the law firm is proposing a somewhat elaborate amendment to the parties' agreement amid an ongoing representation of otherwise unrepresented clients in a hotly contested litigation is likely to create a reasonable expectation that the law firm is exercising its professional judgment on the clients' behalf. *See* N.Y. State 1055 n. 1 (2015) (client expectation likely when, for example, client has no other counsel, and the lawyer is acting for the client in the matter); N.Y. State 913 ¶ 7 (2012) (client likely to rely on lawyer when lawyer is receiving equity in client's company as a fee).

10. Rule 1.8(a)(1) requires that the terms of the transaction be fair and reasonable to the clients. The fairness and reasonableness of the proposed arrangement depends primarily on "the circumstances reasonably ascertainable at the time of the transaction." N.Y. State 913 ¶ 12. This turns on facts and circumstances beyond our ability to evaluate based on the inquiry. For now, we note only that, as we said in N.Y. State 477 (1977), the amount of the confession of judgment (and by necessary implication, the amount of the mortgage) must be "commensurate with the value of the services rendered," which means that the fee may not be excessive in violation of Rule 1.5(a), and that the lawyer must "scrupulously observe the provisions" of ethical rules "bearing upon legal fees," including obtaining the clients' agreement to the amount. In addition, here, the inquirer intends to limit the amount of the security interest, whether by a confession of judgment or a collateral mortgage with a security interest, to the amount of fees and expenses currently due and owing for services already performed. We therefore need not address whether Rule 1.8(a) would permit the parties agree to agree on an amount higher than the accrued but unpaid invoices. *Compare* N.Y. State 910 ¶ 12 ("a confession of judgment to secure attorneys fees may be taken only as a form of security and not of payment, and that it may be taken only to secure payment for services previously rendered") *with* ABA 02-427 (2002) (not *per se* improper for a lawyer to take a security interest for the payment of fees "earned or to be earned").

11. Rule 1.8(a)(1) requires, too, that the law firm completely and lucidly explain the transaction in writing to the clients in language that the clients may reasonably grasp. This requirement is entwined with the requirements of Rule 1.8(a)(3), which says in part that the clients must give their "informed consent, in a writing signed by the client, to the essential terms of the transaction." Rule 1.0(j) defines "informed consent" as an "agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." The "requirements for client consent to conflicts under [Rule] 1.8(a) are at least as stringent as those under Rule 1.7(b)," the rule on general conflicts. N.Y. State 1055 ¶ 8.

12. In Opinion 910, we approved a lawyer obtaining a confession of judgment provided that, among other things, "the client clearly understands the character, effect and purpose of the confession of judgment. This includes the potential effect of a confession of judgment on the client's credit standing and employment opportunities." Publicly docketed confessions of judgment, and a UCC-recorded mortgage with security interest, are potent creditor tools that may have a substantial harmful impact on the client-debtors, among them an injurious effect on banking accounts, the ability to obtain or maintain credit lines, and to sustain business operations. Without attempting an exhaustive list of information that may be "adequate" in these circumstances, components of the information to be relayed may include: (a) whether the firm intends to seek entry of a judgment based on the client affidavits confessing judgment; (b) whether and to what extent the entry of a judgment starts the accrual of statutory post-judgment interest; (c) whether the clients' affidavits effect a waiver of their right, if any, to arbitration of fee disputes as set forth in Rule 1.5(f) and 22 N.Y.C.R.R. Part 137 *et seq.*, a question of law on which we do not opine; and (d) whether a reasonable alternative exists to address the law firm's unpaid invoices—for instance, holding but not filing the security documents. Our concern is that the clients be fully advised of all the material consequences of the proposed course of conduct and any reasonably

viable alternative to enable the client to make an informed choice.

13. We are mindful of the opposing interests at stake. Inhering in the concept of informed consent is freedom of choice, that is, circumstances that are not so coercive as to negate any meaningful election. Here, the clients' difficult financial position may leave them no option but to accede to the law firm's request if the only alternative is the law firm's withdrawal from representing them in the pending matter. Yet a law firm has a right to be paid for services rendered in accordance with the parties' agreement. Rule 1.16(c)(5) permits a law firm to withdraw from a representation when a client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees," albeit here, under Rule 1.16(d), only with permission of the Court if the rules of the Court so mandate. In our view, if a law firm has a right to withdraw from a representation consistent with Rule 1.16(c)(5)—the inquirer so assumes and we proceed on that assumption—then a proposed amendment to a retainer agreement securing the clients' existing obligations to the law firm does not create circumstances in which informed consent is beyond the contemplation of Rule 1.8(a).

14. The balance of Rule 1.8(a) reinforces the import of the provision for informed consent. Rule 1.8(a)(3) prescribes that, in the same writing setting forth the essential terms of the transaction, the lawyer must also describe the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. *See* N.Y. State 958 ¶ 12 (2013) (lawyer's charging of a finder's fee must be fully set forth in writing to the client compliant with Rule 1.8(a)). Here, the lawyer's role is the preparation of the security documents, and the law firm appears poised to act for the client in effecting those transactions. The transactions are for the benefit of the law firm, no matter that the clients may wish the law firm to refrain from withdrawal. This fact enhances the significance of Rule 1.8(a)(2), which obligates the law firm to advise the clients, in writing, of the desirability of seeking, and giving the clients a reasonable chance to obtain, independent counsel to advise them on the proposed security arrangements. Although Rule 1.8(a)(2) does not require the clients actually to retain separate disinterested counsel, case law exists to suggest that the absence of one may facilitate challenges to business transactions with clients. *See, e.g.*, *McMahon v. Eke-Nweke*, 503 F. Supp. 2d 598, 604 (E.D.N.Y. 2007) (analysis under predecessor of Rule 1.8(a)).

15. The focus of the inquiry, and hence this opinion, is on the inquirer's ethical duties in obtaining the proposed amendment to the parties' existing engagement agreement. Nevertheless, one further consideration merits mention. If the parties agree to the proposed amendment consistent with Rule 1.8(a), the inquirer, in continuing to represent the clients, is still bound by Rule 1.7 governing general conflicts of interest. Rule 1.7(a)(2) provides that a lawyer shall not represent a client, except as permitted by Rule 1.7(b), if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Thus, the inquirer should consider whether the firm's security interests affect the firm's ongoing representation of the clients in the dissolution proceeding. It is possible, for instance, that in some circumstances either delay or expedition of the proceedings could enhance the value of the inquirer's security interests. *See* N.Y. City 2000-3 (2000) ("An attorney's inquiry into her potential ethical obligations arising out of a transaction in which the attorney accepts securities for fees does not end with [the rule on business transactions with clients]). Unique issues of potential conflicts of interest also may arise as a result of such arrangements."); *see also* Rule 1.8 Cmt. [4D] ("An exchange of securities for legal services will also trigger the requirements of Rule 1.7 if the lawyer's ownership interest in the client would, or reasonably may, affect the lawyer's exercise of professional judgment on behalf of the client").

CONCLUSION

16. A law firm may seek its clients' agreement to modify its retainer agreement with the clients during the pendency of a current matter to secure payment, by confessions of judgment and collateral mortgages, of fully earned but unpaid legal fees and expenses in an amount on which the parties agree, if the law firm complies with the rules governing business transactions with clients and is mindful of ongoing obligations to avoid general conflicts of interest.

(26-17)

Opinion 1140 (12/11/17)

Topic: Conflicts; representation of testifying expert witness

Digest: A law firm may draft a will for a testifying service provider who treats individuals represented by the firm in workers' compensation claims. The law firm is not ethically required to volunteer disclosure of the firm's representation of the witness to others, although the law firm may be required to assure truthful testimony (or remediate false testimony) if the question emerges before a tribunal.

Rules: 1.0(f), 1.6, 1.7, 3.3(a) & (c), 4.1.

FACTS

1. The inquiring law firm represents injured workers in workers' compensation matters. A health care service provider, who has both a professional and a long-time social relationship with the lawyers in the firm, has asked the firm to draft wills for him and his wife and will pay the firm's normal legal fees for this work. The service provider

treats some of the injured workers who are represented by the law firm. There is no referral arrangement, formal or informal, between the service provider and the law firm.

2. Occasionally, the service provider is asked to testify at a hearing before a Workers' Compensation Law Judge about the treatment the service provider intends to render or has rendered to an injured worker whom the law firm represents, typically when, whether before or after the treatment has started, the insurance carrier denies coverage. The testimony usually addresses whether the provider's treatment falls within the Workers' Compensation guidelines and includes the scope of or need for the particular treatment the service provider renders to the injured worker. The law firm, representing the injured worker, calls the service provider as a witness on behalf of the firm's client.

QUESTION

3. May a law firm draft wills for a testifying expert and his wife and, if so, must the firm disclose its attorney-client relationship with the witness to opposing counsel, the tribunal, or anyone else, in those matters in which the expert is called to testify on behalf of the firm's client?

OPINION

4. Rule 1.7(a) of the New York Rule of Professional Conduct (the "Rules") provides:

> [A] lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) the representation will involve the lawyer in representing differing interests; or
>
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

Rule 1.0(f) defines "differing interests" to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest."

5. Lawyers owe duties of loyalty and independent judgment to their current clients. Conflicts of interest may undermine and impair a lawyer's loyalty or exercise of independent judgment on behalf of a client. Comment [2] to Rule 1.7 provides that resolution of a conflict of interest problem "requires a lawyer, acting reasonably, to (i) identify clearly the client or clients, [and] (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation." Comment [8] to Rule 1.7 says that the "mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference of interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

6. In our view, drafting a will for a person the inquirer employs as an occasional expert is not discordant with the firm's concurrent representation of clients whom the service provider treats and on whose behalf the service provider may testify. The proposed representation (drafting a will) does not implicate differing interests, is not adverse to the firm's representations workers' compensation claims matters, and is not factually or legally related to the claims of the firm's injured clients. No reason emerges to suppose that drafting of estate documents for the provider will adversely affect the firm's professional judgment in representing any other current client (unless the provider's testamentary plans affects one of the injured workers—a situation we imagine would rarely if ever arise). The "mere possibility" of a future conflict between the workers' compensation clients and the service provider and his spouse does not require disclosure and consent from the respective clients.

7. Neither the law firm's interest in receiving its routine fee for drafting wills or any follow-on work, nor its longstanding social relationship with the service provider, poses a "significant risk" of impairing the lawyer's ability to exercise professional judgment on behalf of its clients in workers' compensation matters—for instance, in deciding whether to call the service provider as a witness—so as to engender a "personal interest" within the meaning of Rule 1.7(a). N.Y. State 901 ¶ 12 n. 3 (2011) (concurrent representation of a corporation on business matters and of a corporate officer in acquiring a summer home in which the corporation has no stake does not constitute a personal interest conflict).

8. Nor does anything in the Rules require the law firm to disclose to anyone that the firm has represented the service provider in estate matters. Obviously, if a workers' compensation client or opposing counsel asks the law firm about any relationships between the law firm and the witness, the law firm has an obligation to assure that the response is truthful. *See* Rule 4.1 (a lawyer "shall not knowingly make a false statement of fact" to a third person). This obligation is subject to the confidentiality requirements of Rule 1.6(a), which may require the service provider's informed consent to disclosure, particularly because estate matters are often sensitive. In proceedings before a tribunal, however, Rule 1.6(a)'s duty of confidentiality may yield to other concerns. For example, if a tribunal asks about any relationship between the expert witness and the law firm, the law firm must be honest with the tribunal and must assure that the witness is honest as well, including correcting untrue testimony if necessary. *See* Rule 3.3(a) & (b) (a lawyer "shall not make a false statement of fact" to a tribunal, and must take "reasonable remedial measures" if lawyer comes to know that a witness offered by the lawyer has testified falsely). In the event of false testimony, Rule 3.3(c) overrides the duty of confidentiality; that Rule says the duties in Rules 3.3(a) & (b) "apply even if compliance

requires disclosure of information otherwise protected by Rule 1.6." N.Y. State 1123 ¶¶ 8-10 (2017) (noting obligation to disclose confidential information if necessary to correct false information submitted to a tribunal). Subject to these considerations, however, we see nothing in the Rules that compels the voluntary disclosure of an attorney-client relationship between the law firm and its testifying expert.

CONCLUSION

9. A law firm may draft wills for a testifying service provider who treats clients of the firm without disclosure to or consent of the respective clients. The law firm is not ethically required to disclose the firm's representation of the witness to others, although the law firm may be required to assure truthful testimony (or remediate false testimony) if the question emerges before a tribunal.

(25-17)

Opinion 1141 (12/15/17)

Topic: Conflicts of Interest; imputation of conflicts to co-counsel

Digest: Separate law firms that act as co-counsel in discrete matters are not associated in the same firm for purpose of imputing all conflicts of each firm to the other.

Rules: 1.0; 1.6, 1.7, 1.8, 1.9, 1.10, 6.1, 7.2.

FACTS

1. The inquiring attorney, who is admitted in New York, teaches at an accredited law school in New York. The attorney is involved in the law school's clinical education program, which considers itself a large law firm with different divisions working on particular types of matters. The inquirer supervises one of these divisions, which handles only one type of matter: engaged, *pro bono publico*, in pursuing claims on behalf of indigent clients at hearings before an administrative agency. The inquirer wishes to have the students in the inquirer's clinic division collaborate as co-counsel with a New York not-for-profit legal services organization. The clinic and the legal services organization are financially separate, operate out of different offices, maintain their own files, do not share any overlapping personnel, and represent numerous clients other than those in which they serve as co-counsel. Although the faculty supervisors' positions are constant, the students who participate in the clinic do so for only a semester or two, and thus turnover of student personnel is a characteristic of the program.

2. The inquirer is concerned that, if the legal clinic and legal service organization collaborate as co-counsel, then the N.Y. Rules of Professional Conduct (the "Rules") may treat the law school's entire clinical program and the legal services organization as a single firm for conflicts purposes. Specifically, the inquirer seeks guidance on whether the clinic must clear all its clients with the legal service organization (and *vice versa)*, or must instead check only those clients in matters in which the two serve as co-counsel.

QUESTION

3. When a law school clinic acts as co-counsel with a legal services organization in particular matters involving the same types of claims, must the clinic clear conflicts for all of its clients with those of the legal services organization, or only those clients involved in the matters in which the two serve as co-counsel?

OPINION

4. Rule 1.0(h) defines a law firm to include, among other things, any "association authorized to practice law" and "lawyers employed in a qualified legal assistance organization." Rule 1.0(p) defines a "qualified legal assistance organization" to mean one of the organizations listed in Rule 7.2(b)(1)-(4), the first of which is a legal aid office "operated or sponsored by a duly accredited law school." Under the forerunner of the Rules—the New York Code of Professional Responsibility (the "Code")—we said that a law school legal clinic qualifies as a "law firm," N.Y. State 794 ¶ 8 (2006) ("the rules governing law firms are equally applicable to the law school's legal clinic"), and that the clinic must be considered a single law firm for purposes of conflict imputation, despite separate divisions, if the students in the clinic share common offices, files, work areas, and information, N.Y. State 794 ¶ 16. No changes in the Rules from the Code alter this conclusion. *See* N.Y. State 876 ¶ 6 (2011) (when the provisions of the Code and the Rules are similar or identical to each other on matters relevant to the inquiry, opinions under the Code apply with equal force). Accordingly, the question is whether two separate law firms acting as co-counsel on a series of matters implicates Rule 1.10, governing the imputation of conflicts when lawyers are "associated" in a law firm, specifically conflicts arising under Rules 1.7 (governing concurrent conflicts of interest in general), Rule 1.8, (addressing conflicts in specific circumstances), and Rule 1.9 (outlining duties to former clients).

5. In the circumstances presented, the answer is no.

6. Very briefly stated, Rule 1.7(a) prohibits a lawyer from representing a client if "a reasonable lawyer would conclude either" that the representation "will involve the lawyer in representing differing interests" or if a "significant risk" exists that a "lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." This prohibition is subject to exceptions outlined in Rule 1.7(b), among them where the affected client gives informed consent confirmed in writing. Rule 1.8 is a litany of standards in specific conflict situations, none of which this inquiry raises. Rule 1.9 prohibits a lawyer to be "materially adverse" to a former client in "the same or substantially related matter" without informed consent confirmed in writing. Rule 1.10 says that, while "lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them would be prohibited from doing so" by

Rules 1.7, 1.8, or 1.9. Thus, the imputation standard in Rule 1.10 extends the conflicts provisions of the foregoing Rules only when lawyers are "associated" in the same law firm.

7. The Rules do not define the term "associated." In general, however, to be "associated in a firm" means to be a member of, employed by, "of counsel" to, or "affiliated" with the law firm, in each instance reflecting a close and continuing relationship with the firm to warrant imputation of the conflicts of any one lawyer in the firm to the other lawyers there. *See* N.Y. State 876 ¶ 13 (2011) (when "two law firms are both associated with lawyers at a third firm, the conflicts of each firm are imputed to the lawyers in all three firms as if they were a single law firm"); NY State 793 (2006) ("of counsel" relationship gives rise to imputation); N.Y. State 773 (2004) (same); ABA 90-357 (1990) (same); N.Y.C. 2000-4 (2000) (use of the term "affiliated" denotes relationship that is "close and regular, continuing and semi-permanent" requiring imputation of conflicts). Substance, not form, controls; merely maintaining separate practices, free of connective titles, does not invariably elude the concerns animating Rule 1.10's imputation provisions. *Consolidated Theatres v. Warner Bros. Cir. Man. Corp.*, 216 F.2d 920, 927 (2d Cir. 1954) ("we have never believed that labels alone—partner, clerk, co-counsel—should control our decisions in so sensitive an area [as imputation of conflicts]").

8. Thus, for instance, an office sharing arrangement between two separate practitioners could give rise to imputing the conflicts of each practice to the other. *Compare* N.Y. City 80-63 (1980) (solo practitioners sharing an office in which each has ready access to information of the other's practice imputes the conflicts of each to the other) *with* N.Y. State 881 ¶ 12 (2011) (the "occasional use of" telephone lines or conference space "does not, by itself render the inquirer 'associated in'" another lawyer's firm "for purposes of the rule on imputation of conflicts"). *See* Rule 1.10, Cmt. [2] ("two practitioners who share office space and occasionally consult or advise each other would not ordinarily be regarded as constituting a firm," unless they "present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm").

9. Motions to disqualify law firms based on some form of association with counsel of record, though legal issues beyond our jurisdictional charter, afford some insight into the imputation rule. Some of these courts refer to their analysis as a "functional" approach, which is analytically indistinguishable from the ethics opinions of this and other Committees that stress the nature of the relationship not the names that the firms choose to characterize that relationship. Illustrations include: *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1975) (disqualifying two law firms representing adverse interests while sharing a common partner such that shared confidences are presumed); *The Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977) (disqualifying successor back-up counsel with which conflicted counsel had ongoing communications about the matter); *Homestead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127 (2005) (denying disqualification where there was an "attenuated and remote" "of counsel" relationship between the lawyer and counsel acting for the adversary and holding that "no presumption of confidence sharing" arises between a firm receiving confidential information and "a separate firm serving as co-counsel," absent evidence to the contrary); *Benevida Foods, LLC v. Advance Magazine Publishers, Inc.*, 2016 U.S Dist. LEXIS 81186 (June 15, 2016) (disqualifying co-counsel who conferred with a prospective client about a matter but did not comply with Rule 1.18 on protecting confidential information received in such consultation but denying disqualification of co-counsel who conferred with, but received no confidential information from, disqualified counsel about the matter); *Dietrich v. Dietrich*, 136 A.D.3d 461 (1st Dept. 2016) (denying disqualification when counsel of record is co-counsel with a potentially disqualified lawyer on an unrelated matter).

10. The predominant theme of these cases and ethics opinions is the protection of client confidential information within the meaning of Rule 1.6. The term "co-counsel" ordinarily means attorneys or firms jointly representing a client or clients with respect to a particular litigation or transaction. The relationship is episodic rather than enduring. Exchange of confidential information between co-counsel is a necessary incident to serving the interests of their mutual client(s). We see nothing in the proposed relationship to justify the merger of the two entities for all conflicts.

11. None of the criteria typically seen in merging firms for conflicts purposes—common personnel or finances, shared office space, ready access to client files, regular and substantial overlap of clients—is present in the co-counsel relationship contemplated here. That the legal clinic plans to bring in the legal services organization as co-counsel in only discrete types of matters does not change this result; in private for-profit practice, it is not at all unusual for a law firm litigating in a foreign forum regularly to choose the same local law firm to act as its local co-counsel in that forum, without fear that all the conflicts of one firm would be imputed to the other firm. *See* ALI, Restatement of the Law Governing Lawyers (Third), §123, Cmt. c(iii) (co-counsel who associate for purposes of handling a particular matter are not subject to vicarious disqualification). In light of the Rules' strong encouragement of voluntary *pro bono* legal services, codified in Rule 6.1, it cannot be said that the arrangement proposed here requires stricter standards.

CONCLUSION

12. Serving as co-counsel in particular matters does not mean that a law firm legal clinic is "associated in" the same firm as a legal services organization for purpose of the imputation provisions of Rule 1.10. Consequently, when the clinic and organization serve as co-counsel in a matter, the Rules require the clinic and organization to clear conflicts individually and separately, only in matters in which the two serve as co-counsel.

(29-17)

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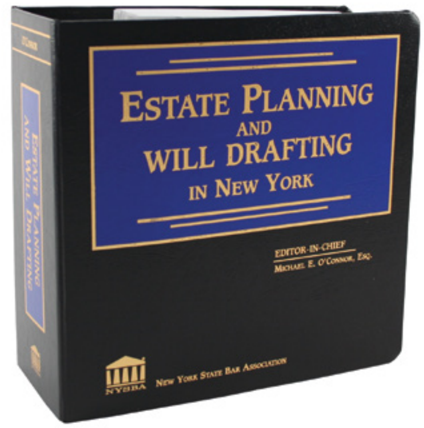

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