NEW YORK STATE BAR ASSOCIATION

WORKSHOP V.

Moving Towards Civil Gideon

2014 Legal Assistance Partnership Conference

Hosted by:
The New York State Bar Association
and The Committee on Legal Aid

NYSBA

NEW YORK STATE BAR ASSOCIATION
2014 PARTNERSHIP CONFERENCE

V. IT WILL HAPPEN TO US ALL: AN ESSENTIAL GUIDE TO DELIVERING DISASTER LEGAL AID

AGENDA

September 12, 2014
1:30 p.m. – 3:00 p.m.

1.5 Transitional CLE Credits in 0.5 Ethics & 1.0 Skills.
Under New York's MCLE rule, this program has been approved for all attorneys, including newly admitted.

Panelists:
Christine N. Appah, Esq., Staff Attorney, Disaster Relief Unit, The Legal Aid Society
Sunny Noh, Esq., Supervising Attorney, Storm Response Unit, New York Legal Assistance Group
Fazeela Siddiqui, Esq., Staff Attorney, The Legal Aid Society
Anne Stephenson, Esq., Staff Attorney, Homeowner & Consumer Rights, Queens Legal Services/Legal Services NYC
Moderator: **Jennifer Ching, Esq.**, Project Director, Queens Legal Services/Legal Services NYC

I. Overview **1:30 pm – 1:35 pm**

II. Lessons Learned: Reflecting on the Legal Needs Post-Sandy **1:35 pm – 2:05 pm**
- a. Immediately After Sandy
- b. Current Needs
- c. Examples of How the Legal Needs of Sandy Survivors Differ From Traditional Legal Services Clients

III. Injustices in the Disaster Aid System **2:05 pm – 2:25 pm**
- a. Issues Facing Low-Income Homeowners and Renters
- b. Disparities Resulting from Predatory Practices in Insurance and Lending
- c. Public Fatigue

IV. Ethical Issues for Advocates Providing Disaster Legal Aid **2:25 pm – 2:55 pm**
- a. Overview
- b. Case Examples & Analysis
  - i. Competence/pro bono service
  - ii. Confidentiality
  - iii. Representing Multiple Persons/Respect for the Right of Third Persons
  - iv. Successor Counsel
  - v. Clients With Diminished Capacity

V. Question & Answer **2:55 pm – 3:00 pm**

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Substantive Outline

V. IT WILL HAPPEN TO US ALL: AN ESSENTIAL GUIDE TO DELIVERING DISASTER LEGAL AID

OUTLINE

I. OVERVIEW: WE WILL DISCUSS:

A. <u>What were some ways in which the Sandy response was successful – what worked?</u>

B. <u>What were some of our biggest challenges as a legal aid community?</u>

C. <u>What kind of cross-organization advocacy and organizing do we need to put into place now, and going forward, to ensure more effective disaster relief?</u>

D. <u>What do all the panelists wish had been in place when they started their work as "disaster legal services lawyers"?</u>

II. LESSONS LEARNED: LEGAL NEEDS POST-SANDY

A. <u>Needs in the Immediate Aftermath:</u>

1. Access to FEMA Assistance:

i. Relevant Law:

a) The Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93-288

b) 44 CFR Part 206 – Federal Disaster Assistance

ii. To be eligible for federal disaster relief benefits, people must have suffered specific types of losses in an area that has been declared a major disaster by the President.

iii. In NYS, Hurricane Sandy was declared a Major Disaster, per **Declaration No. 4085**, by President Obama on October 30, 2012.

a) FEMA, an agency of the Department of Homeland Security, was created in 1979 to shift disaster relief to a federal level.

b) After a disaster, the Governor must request a major disaster declaration from the President "on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary." 42 U.S.C. 5170, The Stafford Act, Title IV – Major Disaster Assistance Programs.

c) Major disasters are defined as "any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought), or, regardless of cause, any fire, flood or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude dot warrant major disaster assistance under this Act to supplement the efforts and available resources of States, local governments and disaster relief

organizations in alleviating the damage, loss, hardship or suffering caused thereby." 44 CFR § 206.2(a)(17).

iv. Federal disaster relief programs are intended to be utilized as a "last resort" after an applicant has applied for any insurance, charitable donations or other reimbursement to which they are entitled.

a) Federal Assistance to Individuals and Households – 44 CFR § 206.110 & 42 U.S.C. 5174.

1) Provides "financial assistance, and if necessary, direct assistance to eligible individuals and household who, as a direct result of a major disaster or emergency, have uninsured or under-insured, necessary expenses and serious needs and are unable to meet such expenses or need through other means." *44 CFR § 206.110(a).*

(a) Temporary Housing Assistance – *44 CFR § 206.117*

(i) Hotel Program

(ii) Rental Assistance

(b) Home Repair Assistance – *44 CRF § 206.117(2)(b)*

(c) Other Needs Assistance – *44 CFR § 206.119.*

(i) Medical or Dental Expenses

(d) Transportation Expenses

(e) Funeral Expenses

(f) Moving and Storage Expenses, only if utilized to avoid additional disaster damage or during the pendency of disaster-related repairs.

(g) Personal Property, including clothing, household items, furnishings and/or appliances, tools, equipment required by an employer as a condition of employment, supplied required for educational purposes like computers and other supplies, clean up items like dehumidifiers.

(h) Group Flood Insurance

2. The NYC Legal Services Community's Response:
   a. Staffing Recovery Centers – Fighting for a seat at the table
   b. Education – Survivor, Volunteers and Pro Bono advocates
      i. Applying for FEMA
         a) An applicant <u>or one household member</u> must be a U.S. Citizen or Qualified Alien to receive federal disaster benefits
            1) For example, undocumented parents can apply on behalf of U.S. citizen children

2)The applicant or member of the household must have valid Social Security Number and appropriate immigration status

3)If a household member is eligible, undocumented family members need not worry about filing the application – it will not result in reporting to USCIS or ICE

b) Qualifying immigration status means: a U.S Citizen, Qualified Alien or Non-Citizen National (rare)

c) Qualified Aliens include: Lawful Permanent Residents (green card holders), refugees and asylees, battered spouses and children with VAWA self-petitions filed or pending, U visa holders

ii. Applying for SBA

a) Low-interest loans to homeowners, renters and businesses to replace or make permanent repairs to personal property, real property and businesses in a declared disaster area

b) SBA Personal Property Loans (up to $40,000) for repair or replacement of clothing, furniture, cars, appliances, and other items damaged or destroyed in the disaster

1)Available to both homeowners and renters

c) SBA Home Loans (up to $200,000) for permanent repair or replacement of home to its pre-disaster condition

1)Available to homeowners for damage to a *primary* residence

d) SBA Business Physical Disaster Loans (up to $2 million) for replacement or restoration of damaged property to pre-storm condition, including real property, machinery/equipment, fixtures, inventory and leasehold Improvements

1)Available to non-farm businesses and most private, nonprofit organizations

e) SBA requires available collateral for loans over $14,000

iii. Filing Insurance claims

a) Lack of responsiveness from Homeowners Insurance

b) Floor Insurance "Rapid Claims Process" pursuant to FEMA Bulletin W-12092, dated November 9, 2012.

iv. Applying for Disaster Unemployment Assistance – 42 U.S.C.5177

a) Must be unemployed for a reason directly related to the storm, but includes independent contractors and the self-employed

b) Available for a maximum of 27 weeks – for Sandy, October 31, 2012 – May 5, 2013).

c) Complicated process – application through regular NYS Unemployment Assistance application.

v. Notice to landlords of constructive eviction

a) "Where any building, which is leased or occupied, is destroyed or so injured by the elements, ... as to be untenable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred w/o his/her fault or neglect, quit & surrender possession of the premises ... and he or she is not liable to pay the lessor or owner rent for the time subsequent to the surrender. Any rent paid in advance or which may have been accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender." NY Real Property Law § 227

b) Waiver of RPL Sec. 227 per lease is unenforceable as against public policy. *Schwartz, Karlan & Gutstein v. 271 Venture*, 172 A.D.2d 226 [1 Dep't 1991])

c) Legal surrender should be noticed in writing, corresponding with return of keys and demanding security deposit back within 30 days.

d) Tenant must surrender premises without "unreasonable delay" or tenant waives constructive eviction claim.

1)"Unreasonable delay" – is assessed case by case, but practically courts have held that "several months" or 5.5 months is too long to claim constructive eviction.

c. Emergency Food Access – Disaster Supplemental Nutrition Assistance (D-SNAP) – 42 U.S.C. 5179.

i. One month of food stamp benefits to eligible disaster survivors

ii. Higher household income caps

iii. Sandy D-Snap designated for specific zip codes in impacted regions

iv. Applications in person at only two locations:

a) Brooklyn: 495 Clermont Avenue, Brooklyn, NY (Downtown Brooklyn)

b) Staten Island: 465 New Dorp Lane, Staten Island, NY

v. Transportation in impacted regions still severely compromised during application period.

3. Evacuation and Emergency Shelter – NYC and FEMA Hotel Program

a. *Alycia Sapp et al v. City of New York* – Extended program several months

4. Harnessing overwhelming charitable resources

a. For Example: Occupy Sandy – *See* Occupy Sandy: A Movement Moves to Relief, New York Times, November 9, 2012 (http://www.nytimes.com/2012/11/11/nyregion/where-fema-fell-short-occupy-sandy-was-there.html?pagewanted=all).

B. Current Needs:

1. Mortgage distress

a. Defaults prior to Sandy

b. Defaults post-Sandy

i. Sandy Forbearances – *See* "Homes Underwater: Forbearance Alternatives for Sandy-Affected Homeowners," Prepared by Franklin Romeo and Jennifer Ching, February 4, 2013.

ii. Impact of mortgage distress in Recovery Programs

a) *Lis Pendens* issue in Build It Back

b) New York Rising Interim Mortgage Assistance Program

2. Consumer fraud

a. Licensed Contractors – Utilizing the DCA Trust Fund

i. "Home Improvement Contractor"

ii. "Home Improvement Salesperson"

b. Unlicensed Contractors

c. Mechanics Liens

i. Statutorily created remedy to protect contractors who provide home improvements.

ii. Contractor is able to place a lien on real property if work is actually performed but not paid for.

iii. The lien can only be taken for materials actually furnished and labor actually performed, not for the full value of a breach of contract. NY Lien Law §4.

iv. Once the lien is filed, the contractor has the right to commence a foreclosure action and, if successful, force a sale of the property to pay off the lien. NY Lien Law §24.

3. Insurance disputes

a. Homeowners' Insurance – Subject to NYS Insurance Law and Department of Financial Services

i. NYS Mediation Program – AAA

b. Flood Insurance – Administered by Write-Your-Own Private Insurers, but subject to Standard Flood Insurance Policy.

i. Proof of Loss Extensions

a) Extended to one year from date of loss – FEMA Bulletin, w-12092, dated November 12, 2012.

b) Extended an additional six months, for a total of 18 months from date of loss – FEMA Bulletin, w-13060a, dated September 26, 2013.

c) Extended an additional six months, for a total of 24 months from the date of loss – FEMA Bulletin, w-14017, dated April 28, 2014.

ii. Statute of Limitations to litigate

a) The National Flood Insurance Act of 1968, as amended, enacted a one year statute of limitations for a national flood insurance policyholder to bring a lawsuit after the policyholders first full or

partial denial/disallowance. 42 U.S.C. 4072; 42 U.S.C. § 4001 et. seq.

b) FEMA denies that the Proof of Loss extensions impact the statute of limitations to litigate – *See* FEMA Bulletin, w-13069, dated November 21, 2013.

4. Recovery Program advocacy
    a. Build It Back
    b. New York Risking
5. Defense of recoupments
    a. FEMA Recoupments
        i. May seek recoupment if: (i) assistance was provided erroneously (e.g. duplication of benefits, even if due to FEMA's error); (ii) applicant spent the funds for an unauthorized purpose; (iii) funds were to be intended as a bridge until other proceeds became available (*e.g.*, while waiting for insurance proceeds).

        ii. FEMA must attempt to recover improper payments as set out in the Department of Homeland Security's debt collection regulations at 6 C.F.R. § 11.1 et seq., and the Department of the Treasury's debt collection regulations at 31 C.F.R. § 901.2 et seq.

        iii. Clients may also be charged collection fees and interest begins to accrue after 30 days if not paid in full - 1% with 6% penalty if unpaid after 90 days.

        iv. Client may (i) repay within 30 days with no interest or penalties; (ii) request compromise or repayment plan; (ii) request hardship waiver; or (iv) appeal on the merits.

            a) Request an Oral Hearing – If client's appeal involves an issue of <u>credibility</u> or <u>veracity</u>, or if FEMA cannot decide on the appeal based on the records provided.

        v. **<u>Post-Katrina</u>**: <u>Disaster Assistance Recoupment Fairness Act of 2011</u> (DARFA): After significant problems following the 2005 Gulf Coast Hurricanes, as well as a class action lawsuit, the FEMA Disaster Assistance Recoupment Fairness Act was enacted in December of 2011, allowing FEMA grantees who allegedly received improper payments to apply for hardship waivers:

            a) > 80% of DARFA applicants were approved for waivers

            b) This waiver program only covered disaster payments received between 8/25/05 and 12/31/10

    b. FEMA Flood Insurance Request Repayments
        i. *See Florida Farm Bureau General Ins. Co. v. Voncille Jernigan*, 2010 WL 3927816 (N.D. Fla. Sept. 30, 2010)
        ii. *See* FEMA Bulletin, w-13007, dated February 12, 2013
    c. Potential recoupment of recovery program funds

6. Access to permanent housing
    a. Fair Housing – Landlords refusing to accept subsidy programs, i.e., TDAP - discrimination based on source of income in violation of NYC Human Rights Law (amended in 2008 to incorporate Local Law, No. 10).
    b. Used of acquired land – NYC Acquisition Program and NYS Buyout Program.

C. Examples of How the Legal Needs of Sandy Survivors Differ From Traditional Legal Services Clients

1. Insurance law
2. Recovery programs
3. High income populations
4. Programmatic obstacles

III. INJUSTICES IN THE DISASTER AID SYSTEM

A. Issues facing low-income homeowners and renters

1. Nondiscrimination in Disaster Assistance: "The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status." - 42 U.S.C. 5151
2. Conflicts – Homeowners v. Tenants
3. Documentation:
    a. Challenges of producing documentation for access to programs – identification, proof of residency, proof of income, proof of maintenance, etc.
    b. Challenges of producing/retaining documentation during recovery – lower cost repairs, payments in cash, etc.
4. Disaster Benefits Access
    a. FEMA benefits generally, particularly Rental Assistance for renters
    b. SBA Loans – undocumented head of household
    c. Temporary Shelter Program – FEMA and NYC Hotel Program
    d. DSNAP – limited transportation access
        i. *Alechea Toney-Dick v. Robert Doar of NYC HRA*, SDNY 12-Civ-9162
5. Recovery Programs Access
    a. DHAP v. TDAP
        i. TDAP Private
    b. BIB and NYR
        i. Limited access for low income populations
        ii. Added administrative obstacles – i.e., TDAP meetings (single office in downtown Manhattan) v. BIB meetings (neighbor offices)

B. Disparities resulting from predatory practices in insurance and lending

C. Public fatigue

IV. ETHICAL CONSIDERATIONS FOR ATTORNEYS IN DISASTER RELIEVE SERVICE DELIVERY

A. Introduction

1. Lawyers working in disaster relief situations are faced with unique challenges:
    a. Clients are in a state of crisis and need assistance with unexpected legal problems.
2. Lawyers must provide the best assistance possible with reduced resources and site specific problems:
    a. Lawyers must work in sometimes difficult work conditions.
    b. Incomplete/missing information.
    c. The clients may not have access to key information or may have challenges maintaining communication with their lawyer in the aftermath of the disaster.
    d. Staffing issues.
        i. Disaster relief lawyers will often have to depend on the assistance of volunteers. The availability of volunteers may vary by location.
3. The goal of this ethics presentation is to help disaster relief lawyers to learn to identify, manage and reduce some of the ethical risks in their law practice.
4. We will focus on five ethical issues and their corresponding rules. We will use the NY Rules of Professional Conduct, parts of the Canons, Ethical Considerations and the Disciplinary Rules to help to guide our discussion.
    a. Competence/ *Pro Bono* Service (NY Rules of Professional Conduct 1.1; 6.1; and 6.5)
    b. Confidentiality (NY Rules of Professional Conduct 1.6)
    c. Representing multiple persons /Respect for the rights of third persons (NY Rules of Professional Conduct 1.7 and 4.4)
    d. Successor Counsel (NY Rules of Professional Conduct 4.2)
    e. Clients with diminished capacity (NY Rules of Professional Conduct 1.14)

B. Case Problems and Analysis

1. **Competence/Pro Bono**
    a. **NY Rules of Professional Conduct - Rule 1.1**
        i. Disaster relief legal work can be very diverse; a single client's issues can span over several areas of law.
            a) Practitioners should recognize that this is an evolving area of the law, and as such, they should be prepared for its fast pace and changing nature.
            b) The populations that we service are already vulnerable and natural disasters can often exacerbate pre-existing situations.
            c) Disaster relief work may include a certain amount of non-legal service delivery as well. *See*, Susan Zuckerman, Mediation

Program Helps Miss. and La. Rebuild After Katrina and Rita, Disp. Resol J, August-October 2006, at 12.

ii. Gaining and maintaining competence is a central concern for front line disaster relief lawyering.

iii. Be sure to partner with an attorney that is very familiar with the topic area, preferably one that practices that type of law on a regular basis:

a) Legal services organizations can benefit from *pro bono* partnerships with corporate law firms.

b) Make sure that *pro bono* attorneys check with their conflicts departments, particularly in cases involving the insurance and banking industries.

c) *See* NY Professional Conduct Rules, Rule 6.5 (a)(1).

iv. Consider what level of assistance you will be providing:

a) Be sure to outline the type of assistance that you will provide (i.e., negotiation, drafting, litigation, extended advocacy).

v. Set the parameters of service by explaining to the client what the work will entail.

a) Consider using a "limited scope" retainer which will explain the nature of the attorney-client relationship and what the attorney's responsibilities are with respect to the client's matter.

b) Be clear with the client about what kind of work will be covered to avoid any confusion or unmet legal needs in the future.

HYPOTHETICAL 1

You are a staff attorney with the MetroRights Legal Clinic. We begin our case at a disaster relief center. The center's director has handed you a case file titled "Park Properties". As you read the case file, you learn that Park Properties is a small apartment building and that all of the families living in the six family building, including the owner, have been displaced due to Super Storm Sandy. It is mid-November 2012 and the situation is quite serious. The home, an ocean front property, has sustained serious damage. There are various interests at stake here: the need to address the power outage, the need for emergency shelter and food, the property damage, home owner and renter's insurance claims and potential FEMA claims. In addition, some of the families have mixed immigration status, meaning that some members of the family have permanent residency, some are citizens and some have no immigration status in this country. Almost all of the tenants are here, eager to speak with you today.

This is your first day at the disaster relief center. You are approached by Ms. X and Mr. Y, neighbors in the same building owned by Park Properties. They report that their landlord is on his way to the center to obtain some help from FEMA. You are a tenants' rights attorney with some experience in public benefits. Once they are formally introduced to you by the center worker, they start to discuss their case. Before your laptop has powered up, they begin revealing details about their building and their

experiences since the storm. They start talking to you about the fact that they both have renters' insurance and that their property damage is considerable. Ms. X and Mr. Y believe that their damage was exacerbated by the landlord's failure to correct repairs in the ceilings of their third floor apartments. You are certain about some things but you have no experience with insurance matters. Before you can finish your intake form, they have started taking out several documents for your review.

QUESTION: You are the only attorney at the entire disaster relief center. What do you tell them?

> ***Practice Tip:*** *Disaster relief work usually requires the attorney to develop cross competencies in order to get to the nature of the problem.*

Disaster relief work escapes narrow pedagogical definition. Disaster relief legal work varies even from day to day as lawyers work to stabilize their clients. The client's needs on paper may say "housing" but may actually span from landlord tenant issues, insurance matters, foreclosure, consumer rights to even land use and zoning. Unlike most areas of practice, the disaster relief lawyer may have to become adept at handling various types of legal work that may be out of the scope of the work that the lawyer typically handles. As such, disaster relief lawyers should stay mindful of the competency requirement under the New York State Professional Code of Conduct of Lawyers 1.1.

Accordingly, disaster relief lawyers should look to expand their professional network to include diverse practice areas. *Pro bono* practice partnerships offer a simple solution. Many law firms with experience in certain areas of corporate law related to disaster relief could be helpful in these types of situations. For example, The Legal Aid Society of New York has been able to work with the insurance departments of various New York City area law firms who have been helpful with Hurricane Sandy insurance claim cases. By keeping *a pro bono* plan in mind, you can be confident that you can get some help to sort out some of the more unfamiliar issues. Likewise, attorneys that are new to legal services, or have been volunteered through their firm, should seek out trainings to familiarize themselves with some of the terminologies and issues that arise in legal service delivery. The key is to keep the lines of communication open with other attorneys that may be able to provide you with guidance or referrals for new issues.

This would also be a good opportunity for the attorney to put the scope of the offered services in writing. Sometimes called, "limited scope representation" this allows the attorney to set client expectations. Attorneys must ensure that they make diligent efforts to help the client to understand what the extent of their involvement would be, particularly when services may be brief or extended.

2. **Confidentiality**
    a. **<u>NY Rules of Professional Conduct Rule 1.6</u>**
        i. Duty to keep client's information confidential.
        ii. Disaster relief work/emergency legal service delivery does not reduce this obligation.

iii. Be sure that your client understands what, if any, privileges may be waived due to the involvement of third parties, even if they are there for "support".

b. The concern for confidentiality among people offering support is the same on both sides of the table.

i. Consider the abundant interaction with volunteer lawyers, law students and nonlawyers in many disaster relief projects. *See* ABCNY Formal Opinion 1995-11.

HYPOTHETICAL 2

The disaster relief center where you have been stationed is very crowded today. Many people have come in groups, mainly for the support, but also because many of them are neighbors. One of the families waiting in line behind Ms. Y and Mr. X are from a small island and speak a rare dialect of a very rare language. The family's head of household, Ms. R, is with her friend who happens to be fluent in both English and their language. Ms. R and her family live on the second floor and are coming to you for help with storm related unemployment issues. Her friend used to be her neighbor in this building as well. She also happens to work in the billing department a large complex in their neighborhood. The center is being run on a back-up generator and cell phone service in this particular area is very unreliable - precluding your opportunity to call up a remote translator. Ms. R has already started speaking to you through this translator.

QUESTION: How should attorneys navigate the confidentiality issues that arise when your client comes with "support"?

> ***Practice Tip:*** *The key provision here is the concept of "informed consent". Therefore, if you are concerned that the translator may not accurately relay the concept of confidentiality and the breach thereof, consider rescheduling the interview for a time when you have access to a translator.*

Attorneys have a duty to hold their client's information in strict confidence. Indeed, confidentiality permeates the entire lawyer-client relationship and is at the forefront of the lawyer's ethical obligations. This can be a particularly delicate issue, especially in disaster relief situations. Consider also that some of your client screenings may have to be conducted outdoors or in very crowded meeting areas.

However, in instances where the attorney deems that their privilege may be broken by the actual presence of a third party, the attorney should be sure to explain this concept to everyone present for the consultation. If the lawyer is not certain that their potential client understands this concept, the lawyer should refer to Rule 1.6 on confidentiality and consider halting the interview until this information can be properly relayed to their potential client.

3. **Representing Multiple Persons/Respect for the Rights of Third Persons**
    a. **NY Rules of Professional Conduct Rule 1. 7**
    b. Disaster relief work often involves providing counsel to families.
    c. Attorneys should be mindful that conflicts of interest may arise amongst clients.
        i. Priorities can and will shift during the course of your representation.
        ii. Attorneys should assess the goals of each party individually to ensure that group representation is possible.
    d. Attorneys should watch out for potential disagreements:
        i. "Lawyers have a duty to consider potential conflicts at the outset of an engagement and to decline proffered employment when such conflicts are likely". *See* DR 5-105 (A).
        ii. *See also,* ABCNY Formal Opinion 2005-05.
    e. Attorneys must be mindful of the rights of the unrepresented persons that may or may not be present. *See* ABCNY Formal Opinion 2009-2.

HYPOTHETICAL 3

From your conversations thus far with the tenants of Park Properties, you realize that you may be dealing with a unique situation. Not only are many of the apartments occupied by families, many of these families are related. After learning that Ms. Y and Mr. X, the siblings, have spouses who are not present, you decide to stop your conversation and meet with them separately to avoid any ethical conflicts between Ms. Y and Mr. X. They are both married and live with their spouses. However, the siblings want to sue the landlord in housing court. They insist on being co-petitioners and to be interviewed together.

As the conversation progress, Ms. Y briefly discloses that her husband used to be the official superintendent of the building about three years ago. Their current superintendent relocated to another state immediately before the storm. As a result, Ms. Y's husband has been assuming most of his previous job duties on the premises and is considering asking to be reappointed. As the complaints grow, Ms. X seems a little worried and mentions that perhaps they should call her husband. She changes her mind and says "I am sure that he will agree". Ms. Y still maintains that they should sue the landlord in a group action. Her brother, Mr. X, tells her that the group action would be the most powerful way to get all of their concerns addressed. Ms. Y agrees and asks if you would be able to represent their households jointly.

QUESTION: What are some of the ethical considerations for disaster relief attorneys when representing multiple clients?

Practice Tip: *In many disaster relief matters, the attorney may have to represent an entire household in the matter. In circumstances where the attorney needs to represent multiple persons, Rule 1.7 offers guidance. In addition, the attorney should remind all parties that in order to represent more than one person; she will need to meet with each person to ensure that all of their issues are clearly communicated and any conflicting interests are identified immediately.*

4. **Successor Counsel**
    a. **NY Rules of Professional Conduct Rule 4.2**
    b. The referral process may be within a community of lawyers that are familiar with one another, particularly when dealing with regional disasters.
        i. Even though the lawyers may work together on various other initiatives, they must remain mindful of maintaining the same level of confidentiality.
        ii. ABCNY Formal Opinion 2011-1, "[w]hen a lawyer contemplates any contact with her former client, a threshold question presented by the rule is whether the former client is represented by new counsel in connection with the subject matter of the contemplated communication".

HYPOTHETICAL 4

It is now January of 2013 and we meet Mr. X again. He is now being represented by The GreenStreet Community Law Clinic. He was previously represented by your law firm, The MetroRights Clinic. The lawyers at your firm determined that Mr. X's case did not meet their funding parameters because of some information that came to light after they had entered into a retainer agreement with him. As a result, they had to withdraw from his case and referred him to the lawyers at The GreenStreet Community Law Clinic. Indeed, MetroRights and GreenStreet have a long history of collaboration.

Mr. X is trying to challenge a storm related housing issue in small claims court. He wants to settle a claim against his landlord, Park Properties, for damage to his apartment after the storm. Notably, Mr. X kept extensive records of not only his interactions with the property owners but those of others. As tenant in the building for over twenty-five years, Mr. X's encyclopedic knowledge of the building makes him a great reference for all of the tenants.

You have a new client, Mr. Z. He happens to be a neighbor of Mr. X. Their adjacent apartments are on a side of the building that sustained storm damage. Mr. Z received a letter from the landlord about the repairs and possible rent abatements that were to commence shortly after the storm. Your new client has no documents from this post-storm period because he had to move several times with his family.

However, Mr. X, who is well known for his laminated letter collection, is bound to have a copy of the same "open letter" that was sent to your tenant as well. After all, the letters were meant for all of the inhabitants of the third floor and your client is Mr. X's neighbor on the third floor. In fact, your client told you that he showed his letter to Mr. X who then went to his binder and produced the same letter. Consider also that the lawyers at both organizations work very closely with one another and often serve on the same task forces on storm matters. This letter is essential to building the MetroRights clinic's client's case.

QUESTIONS: Can the MetroRights Clinic give Mr. X a quick call for a copy of the letter? Alternatively, what if Mr. X visits a community outreach event where the MetroRights Clinic has set up a table and he starts talking to you about commencing a group action against Park Properties due to the promises of the same letter? What if you ask Mr. Z to call Mr. X for a copy?

ANSWER(S):
No, the MetroRights Clinic cannot give Mr. X a call for a copy of the letter. According to Rule 4.2(a), "[i]n representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." Accordingly, the scenario with Mr. X at the community outreach event would also be considered prohibited communication.

With respect to the third question, Rule 4.2 also gives guidance on "client to client" contact. Rule 4.2(b) states that "[n]otwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." While it may be permissible under 4.2(b), the rule carefully qualifies this exception with various scenarios. The simplest way to avoid any ethical issues would be for the lawyers to communicate directly with one another.

5. **Clients With Diminished Capacity**
    a. **<u>NY Rules of Professional Conduct Rule 1.14</u>**
        i. Although the client may not exhibit the characteristics of someone with diminished capacity, it is very important for the disaster recovery lawyer to be mindful of what their clients have been through.
            a) Clients may have issues with depression, anxiety, and post-traumatic stress disorder as a result of their experiences with a natural disaster.
        ii. The District of Columbia's Bar offers comments to their corresponding rule on clients with diminished capacity: "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat

the client with attention and respect…." **Comments, Rule 1.14 (Full comment is available at** www.dcbar.org**).**

iii. Disaster relief lawyers should consider keeping a periodic check on the client's mental health to ensure that they are able to fully participate in their representation.

a) It is helpful to consider assembling referrals to counseling services in advance of working in a disaster relief capacity.

HYPOTHETICAL 5

You are also working with Ms. G, a tenant on the ground floor of the Park Properties building. Ms. G's apartment filled with water, although she evacuated, her apartment sustained serious water damage. You have been working with her on one of her renter's insurance claims with *pro bono* counsel. You receive a phone call from the *pro bono* counsel who states that she has been having difficulty reaching Ms. G and that Ms. G missed their last appointment. In fact, she has noticed what is becoming a pattern. Although the storm was now seven months ago, you are not sure how to categorize this behavior. During your last conversation, she mentioned feeling "a bit overwhelmed". Ms. G then states that is "not interested in any of this anymore" and abruptly ends the conversation. Up to this point, Ms. G had been one of your most helpful and involved clients. She calls back ten minutes later and apologizes, stating that "all this is getting to her" but that she is back on board. You know that Ms. G was treated for depression several years ago but you are not sure that the *pro bono* counsel is aware of this.

QUESTION: You have a settlement conference coming up in two weeks with the insurance company. Should you be concerned about Mrs. G's mental health?

> ***Practice Tip:*** *Oftentimes, clients in disaster relief situations have no warning and the effects of the situation can leave them traumatized. Long after the immediate threat has gone, it is not uncommon for the survivors to deal with a host of residual mental health problems, including but not limited to depression, anxiety, and post-traumatic stress disorder. While these conditions may not incapacitate your client's decision making faculty, it is a very important issue to take into consideration.*

Rule 1.14 offers guidance in these situations:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own

interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.

The disaster relief lawyer should definitely consider assembling referrals and discussing available options for every client in the beginning of their consultation. This would help the attorney to bring their concerns to their client's attention at a later date should their mental health or well-being become an issue. The goal is to try understand the client's challenges and to respond to them accordingly and promptly.

C. Practical Resources

1. There are several free resources available for attorneys facing ethical issues:
   a. The New York State Bar Association offers ethics opinions and various resources on their website: https://www.nysba.org/professionalconduct.
2. The materials on the website include a searchable database of ethics opinions.
   a. The Association of the Bar of the City of New York also posts a searchable database of ethics opinions on line. The City Bar also runs an ethics hotline.
   b. Phone: 1-212-382-6624.
   c. The Rules of Professional Conduct are also available on-line at: http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

V. CONCLUSION

A. Questions

B. Acknowledgements

Formal Opinion 1995-11

Formal Opinion 1995-11

July 6, 1995

ACTION: FORMAL OPINION

OPINION:

TOPIC: Non-lawyer employees; Supervision of Lay Personnel; Sharing Legal Fees with Non-lawyers; Confidentiality; Conflicts of Interest; Dissemination of False Public Communications.

DIGEST: A lawyer must effectively supervise non-lawyers in his or her employ, refrain from aiding or encouraging the unauthorized practice of law, ascertain that client confidences are maintained and that the public is not misled as to the status of non-lawyers. Lawyers may not share fees with non-lawyers.

CODE: DRs 1-104(A), 2-101(A), 3-101(A), 3-102(A), 3-103(A), 4-101(A), 4-101(D); ECs 3-5, 3-6, 4-4.

NOTE: Modifies N.Y. City 884 (1974).

QUESTION

What are the ethical responsibilities of attorneys with regard to legal assistants and other non-lawyer employees who interact with other lawyers, clients and the public?

OPINION

In the two decades since this committee issued its Formal Opinion on paralegals, see N.Y. City 884 (1974), much has happened with regard to non-lawyers' involvement in the provision of legal services. Non-lawyers have formed corporations or fashioned themselves "consultants" to provide legal services independent from attorneys and developed self-help books, kits and software. See ABA/BNA Lawyers' Manual on Professional Conduct, Prohibition on Practice by Nonlawyers, 21:8024, 21:8027 (1984). See also Alexandra M. Ashbrook, Note, The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation, 5 Geo. J. Legal Ethics 237, 257-59 (1991) (New York "immigration consultants"). Several groups currently are advocating a dramatically expanded role for the paraprofessional. See, e.g., Matthew Goldstein, Bar, Public Debate Role of Paralegals, N.Y.L.J., Aug. 20, 1993, at 1 (groups advocate easing restrictions on routine legal matters such as residential real estate closings and uncontested divorces). The National Federation of Paralegal Associations, Inc. ("NFPA") and the National Association of Legal Assistants ("NALA") which mostly represent paralegals in private law firms and corporations, HALT ("Help Abolish Legal Tyranny") also known as Americans for Legal Reform and Public Citizen are among those groups who last year testified before the American Bar Association's Commission on Nonlawyer Practice on the issue. While they differ as to the extent of the expansion, ranging from supervised service to the public to unsupervised but regulated service by licensed non-lawyers, they all advocate an expansive role for paralegals. This sentiment is shared by some in the profession. For example, both the Committee on the Profession of the Association of the Bar of the City of New York in its 1992 report, "Is Professionalism Declining?", and the ABA Commission on Professionalism in its 1986 report, advocated a greater role. Recently, the City Bar's Committee on Professional Responsibility gave its "preliminary endorsement to a deregulated licensing approach that permits greater nonlawyer practice in specified areas but [which] establishes minimal requirements. . . ." Prohibition on Nonlawyer Practice: An Overview and Preliminary Assessment, 50 Record 190, 209 (1995).

These developments exist in an environment where according to the United States Department of Labor, the paralegal field is one of the fastest growing occupations in America. The vast majority of these individuals are employed by private law firms, see Department of Labor, Occupational Outlook Handbook 231 (1994-95 ed.) (hereinafter "Handbook"), where it is widely recognized that the services of various lay personnel enable the lawyer to provide clients with legal services in the most economic and efficient manner. Lawyers customarily employ secretaries, investigators and paraprofessionals in delivering legal services to the client. Some firms however have branched out to maintain a nontraditional support staff. See Daniel Wise, Non-Lawyer Partners: Ethics Problems Seen; Experts Are Divided Over D.C. Court Rule, N.Y.L.J., Feb. 27, 1990, at 1 (discussing integration of architects, lobbyists and public relations specialists into law firms). The Labor Department also predicts that "[j]ob opportunities are expected to expand as more employers become aware that paralegals are able to do many legal tasks for lower salaries than lawyers." Handbook at 232.

Thus, a large and growing number of workers in the law firm are not subject to discipline under the Lawyer's Code of Professional Responsibility. See Preliminary Statement to The Lawyer's Code of Professional Responsibility ("[o]bviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers . . ."). To ensure that its objectives are nonetheless met, the Code requires lawyers to effectively supervise non-lawyers in their employ, to refrain from aiding or encouraging the unauthorized practice of law; to ascertain that client confidences are maintained and the public not misled as to the status of non-lawyers. The situation is therefore especially taxing upon the one individual in the workplace who is to be held responsible for the observance of the Ethics rules. This opinion addresses that immense responsibility. n1

n1 This opinion is intended to be limited to a discussion of the lawyer's responsibility toward non-lawyer personnel under his or her supervision. It is not intended to address the role of non-lawyers generally in the legal system.

Supervision of Support Staff

DR 1-104(A) provides:

A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if (1) [t]he lawyer orders the conduct; or (2) [t]he lawyer has supervisory authority over the other lawyer or the non-lawyer, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Code clearly contemplates that lawyers will delegate tasks to lay personnel. See EC 3-6. In delegating tasks, the lawyer should provide instruction regarding the ethical constraints under which those in the law office must work. While the non-lawyer may receive some guidance in this regard elsewhere, as for instance through the Code of Ethics and Professional Responsibility and Model Standards and Guidelines adopted by the NALA and NFPA, see also Mary A. DeVries, Legal Secretary's Complete Handbook 3-4 (4th ed. 1992) (instructing against solicitation of business for the firm and divulging client confidences), the lawyer should not rely on others to perform this important task.

Employers generally require formal paralegal training. However, the Department of Labor reports that while there are over 600 formal paralegal training programs, only 177 had been approved by the ABA in 1993. See Handbook at 232. Others prefer on-the-job training, often hiring persons with college

education but no legal training or promoting experienced legal secretaries. See id. Given the fact that paralegals do not have legal training and are not subject to discipline, the lawyer has a heightened standard of supervision from that generally owed toward a subordinate attorney pursuant to DR 1-104(A). See Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering § 5.3:100-03, at 784-85 (2d ed. 1990 & 1994 supp.). The standard of supervision is fairly strict. See In re Bonanno, 208 A.D.2d 1117, 617 N.Y.S.2d 584 (3d Dep't 1994) (attorney censured for lack of supervision of legal assistant who unbeknownst to attorney held himself out as attorney, represented clients and embezzled client funds). The lawyer must ensure that office procedures comport with the Code as well. See In re Kiley, 22 A.D.2d 527, 256 N.Y.S.2d 848 (1st Dep't 1965) (submission of false reports); In re Neimark, 13 A.D.2d 676, 214 N.Y.S.2d 12 (2d Dep't 1961) (failure to supervise office operations).

Appropriate tasks undertaken by paralegals

The law against the unauthorized practice of law, N.Y. Judiciary Law §§ 478 and 484, has been rationalized as required to protect the public from "the dangers of legal representation and advice given by persons not trained, examined and licensed for such work. . . ." Spivak v. Sachs, 16 N.Y.2d 163, 168, 263 N.Y.S.2d 953, 956, 211 N.E.2d 329, 331 (1965). Further, the state's power to license and sanction arguably ensures that attorneys will "practice ethically and with a certain minimum level of expertise." 18 Int'l Ltd. v. Interstate Express, Inc., 116 Misc. 2d 66, 67, 455 N.Y.S.2d 224, 225-26 (Sup. Ct. N.Y. Co. 1982) (and cases cited therein). That there are no similar safeguards applicable to the majority of lay personnel working in the legal field, is to some problematic. See Non-Lawyer Partners, supra ("'Only a professional who has his own license on the line' will pay sufficient attention to professional strictures. . . .").

Others argue conversely, that allowing non-lawyers to engage in many tasks currently reserved for attorneys would help provide much needed legal services to those who find the cost of hiring an attorney daunting, see Bar, Public Debate Role of Paralegals, supra (freelance paralegal charges $150 for mortgage refinancing, compared to $500 attorney's fee) and prove a boon to firms. See Neil T. Shayne, The Use of Paralegals, N.Y.L.J., Apr. 14, 1992, at 3 (arguing that as paralegals attend to lower billed matters, attorneys are freed to devote more hours to matters billed at more remunerative rate).

DR 3-101(A) provides that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." There continues to be much debate over the true impetus of this ethical rule. Compare Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 707-12 (1977) (fear of lower fees and increased public access lessening lawyers' monopoly) with Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 90 (1981) (protecting public from individuals not subject to the Bar's supervision and standards). Yet, whatever concerns are at the root of DR 3-101(A), it is the law in New York that a non-lawyer shall not practice law, and the law provides for punishment of the violator. See N.Y. Judiciary Law §§ 478, 484. Since the Code also counsels that lawyers should respect the law and refrain from illegal conduct, even minor violations of the law, debate over the underpinnings of DR 3-101(A) is engaging but inconsequential in evaluating a lawyer's responsibility.

The Code does not define what constitutes the "unauthorized practice of law". EC 3-5 merely provides:

Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client. . . .

Cf. N.Y. City 1994-9 (supervised unlimited discretion regarding sensitive matters of judgment nondelegable). Some jurisdictions have concluded that any work performed by a non-lawyer under the supervision of an attorney is by definition not the "unauthorized practice of law" violative of prohibitory provisions, see, e.g., In re Opinion 24 of Committee on Unauthorized Practice of Law, 128 N.J. 114, 123, 607 A.2d 962 (1992). This committee does not go so far. However, given that the Code holds the attorney accountable, the tasks a non-lawyer may undertake under the supervision of an attorney should be more expansive than those without either supervision or legislation. Supervision within the law firm thus is a key consideration. Cf. Yankopoulos v. State, 103 A.D.2d 95, 96-97, 478 N.Y.S.2d 633, 634 (1st Dep't 1984) (that paralegal communicated with bedridden attorney with respect to document she prepared and signed and for which she did not retain fee found "flimsy evidence" of unlawful practice).

The Department of Labor describes the duties of paralegals thusly:

Paralegals generally do background work for lawyers. To help prepare cases for trial, paralegals investigate the facts of cases to make sure that all relevant information is uncovered. Paralegals may conduct legal research to identify the appropriate laws, judicial decisions, legal articles, and other materials that may be relevant to clients' cases. After organizing and analyzing all the information, paralegals may prepare written reports that attorneys use to decide how cases should be handled. Should attorneys decide to file lawsuits on behalf of clients, paralegals may help prepare the legal arguments, draft pleadings to be filed with the court, obtain affidavits, and assist the attorneys during trials. Paralegals also keep files of all documents and correspondence important to cases. . . . They help draft documents such as contracts, mortgages, separation agreements, and trust instruments. They may help prepare tax returns and plan estates. Some paralegals coordinate the activities of the other law office employees and keep the financial records for the office.

Handbook at 231.

As the above indicates, the line between the work of an attorney and a paralegal defies clear demarcation and the courts have been only slightly more enlightening of these boundaries. Among those activities clearly prohibited are the appearance in court, holding oneself out to be a lawyer, and the rendering of legal advice to a particular client. See El Gemayel v. Seaman, 72 N.Y.2d 701, 536 N.Y.S.2d 406, 533 N.E.2d 245 (1988). In Matter of Stenstrom, 194 A.D.2d 277, 605 N.Y.S.2d 603 (4th Dep't 1993), an attorney was disbarred in part because he:

delegated to nonlawyer employees virtually all responsibility for client contact, the preparation of legal documents and the management of office finances. . . . Nonlawyer employees routinely misrepresented to clients the status of their cases and routinely advised clients on legal matters, on some occasions providing inaccurate advice that prejudiced or damaged the clients. . . . Nonlawyer employees were given signatory power with respect to the client trust account. . . .

194 A.D.2d at 278-79, 605 N.Y.S.2d at 604.

Suffice it to say that a lawyer should not permit a paralegal within his or her employ to give advice regarding legal relationships, rights or obligations which he or she has developed independent of or unbeknownst to a supervising attorney; nor counsel on the legal consequences of actions or the application of legal precepts to facts. Unless authorized by law in the circumstances, lawyers should not permit paralegals in their employ to appear alone in court with clients nor represent the legal position of the client in communications in the absence or without the knowledge of an attorney. Paralegals may communicate with clients and witnesses to obtain facts for purposes of legal representation and complete legal forms for attorney review and signature. A paralegal may engage in such activity as the organizing, indexing, reviewing, summarizing and proofreading of documents. He or she may draft correspondence, briefs and affidavits under the direction and supervision of an attorney. Besides these clearly acceptable activities, it remains with the legislature and courts to decide what activities are permissible.

Various forms of non-lawyer practice have either been authorized or recognized as not the practice of law. See In re Sharon B., 72 N.Y.2d 394, 534 N.Y.S.2d 124 (1988) (corporation may represent itself in child protection proceeding); Bennett ex re. Fed. Bar Ass'n v. Goldsmith, 254 A.D. 855, 6 N.Y.S.2d 748 (1st

Dep't 1938) (completing immigration forms alone not practice of law), aff'd, 280 N.Y. 529 (1939); New York Family Court Act § 838 (non-witness friend, relative counselor or social worker may be present in courtroom but not participate). Moreover, proposed legislation indicates this trend shows no signs of abatement in New York. See 1993 Senate Bill No. 4750 (unemployment insurance hearings); 1993 Assembly Bill No. 5446 (representation of tenants in housing court). Further, certain law students and law school graduates may, under lawyer supervision, engage in law-related activities in the work of a legal aid organization, in certain Family Court proceedings, in assisting District Attorneys, and other programs approved by the Appellate Division, see N.Y. Judiciary Law §§ 478, 484. See also N.Y. County 682 (1990). Yet, that specific lay personnel are authorized to perform certain tasks does not authorize all individuals -- including paralegals -- to perform those tasks. See Lefkowitz v. Lawrence Peska Assocs., 90 Misc. 2d 59, 393 N.Y.S.2d 650, 652 (Sup. Ct. N.Y. Co. 1977) (that patent agents are permitted by law to prepare applications does not make that nonlegal work).

Maintaining Client Confidences

The lawyer is responsible for maintaining the confidentiality of client information. DR 4-101(A), EC 4-4. DR 4-101(D) provides:

A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

A "secret" under DR 4-101(A) must be kept inviolate even if it does not reach the level of attorney-client privilege. See N.Y. State 503 (1979). It is especially important to supervise non-lawyers in this area since client conversations with lay personnel may not always be treated the same as communications with an attorney. Compare People v. Mitchell, 86 A.D.2d 976, 976, 448 N.Y.S.2d 332, 333 (4th Dep't 1982) (statements made in law office waiting room to paralegal and two secretaries in attorney's absence found not privileged), aff'd, 58 N.Y.2d 368, 461 N.Y.S.2d 267 (1983) with CPLR 4503(a) (confidential communication made between the attorney or his employee and the client in the course of professional employment protected).

Further, the transient nature of lay personnel is cause for heightened attention to the maintenance of confidentiality. See generally Kelly A. Randall, Note, Do Your Clients' Confidences Go Out the Window When Your Employees Go Out the Door?, 42 Hastings L.J. 1667 (1991) (proposing conflict of interest rule for non-lawyers). Similar to instances where a law firm has been disqualified due to the confidentiality imputed from a lawyer in the firm, so too may it be due to a non-lawyer employee. See Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc., 129 A.D.2d 678, 678, 514 N.Y.S.2d 440, 441 (2d Dep't 1987) (attorneys disqualified after hiring paralegal who had worked on subject litigation while previously employed by opponent). Lawyers should be attentive to these issues and should sensitize their non-lawyer staff to the pitfalls, developing mechanisms for prompt detection of potential conflict of interest or breach of confidentiality problems.

Letterhead, Correspondence, Briefs & Business Cards

DR 2-101(A) counsels that a lawyer cannot be involved in the dissemination of communications containing false, deceptive, or misleading statements. To this end, any communication generated out of the law firm that does not properly designate the non-lawyer status of any non-lawyer named therein is prohibited. See, e.g., Nassau County 87-14. To allow otherwise is to allow the public to be misled given the imprimatur of lawyer status and all it entails that a firm document automatically conveys. Therefore, a lawyer may not list paralegals on letterhead or business cards without clearly identifying their non-lawyer status. Cf. New York Criminal & Civil Courts Bar Ass'n v. Jacoby, 61 N.Y.2d 130, 136, 472 N.Y.S.2d 890, 894 (1984). Cf. N.Y. City 1987-1 (lawyer sharing an office with a non-lawyer must avoid misleading public into believing that the non-lawyer office-mate is a lawyer). Similarly, a legal assistant, designated as such, may be credited in a brief.

Further, in corresponding either orally or in writing with a client, another lawyer or member of the public, the legal assistant must make known his or her lay status. Ambiguous titles which do not make clear that the individual is a non-lawyer are prohibited. See N.Y. State 640 (1992); see also N.Y. County 673 (1989).

Compensation of Support Staff

DR 3-102(A)(3) prohibits lawyers or law firms from sharing fees with non-lawyers, except that "[a] lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." See also DR 3-103(A). The compensation of a non-lawyer employee may not be a commission or bonus that is directly linked to a percentage of profits or fees received from any client or the volume of business development, or be a reward for clients brought or referred by the non-lawyer to the firm. See, e.g., ABA 316 (1967); N.Y. State 633 (1992); Maryland 84-103. Non-lawyer compensation may, however, be tied to the net profits and business performance of a firm. See ABA Inf. 1440 (1979) (noting that the source of a law firm's funds to pay any non-lawyer employee is fees for legal services, and approving compensation of a non-lawyer administrator based in part on a percentage of net profits of the firm). Similarly, discretionary bonuses, which are almost always tied to the profitability of the firm, may properly be paid to non-lawyer employees without violating the rule against sharing legal fees. See Virginia 767 (1986) & 806 (1986).

CONCLUSION

Given the large and growing number of non-lawyers in the law firm coupled with the indecision over what is and what ought to be the proper role of non-lawyers in the provision of legal services, an attorney must take care to educate her non-lawyer employees regarding the rules of ethics and delegate and supervise the completion of appropriate tasks. He or she must ascertain that client confidences are maintained, that the public is not misled as to the status of non-lawyer employees and that non-lawyer compensation does not interfere with the lawyer's professional independence.

Formal Opinion 2005-05:
Unforeseeable Concurrent Client Conflicts

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2005-05: Unforeseeable Concurrent Client Conflicts

1. QUESTION

When unforeseeable conflicts develop between clients in the course of ongoing representation of both, without fault of the lawyer, and the clients refuse to consent to simultaneous representation, which, if any, client may the lawyer continue to represent? If the lawyer may continue to represent one but not both clients, how does the lawyer decide which client to continue representing?

2. INTRODUCTION

Conflicts that arise through no fault of the lawyer may develop in the course of representing two or more clients in unrelated matters as a result of corporate acquisitions or other unforeseeable circumstances. In those situations, lawyers typically seek conflict waivers from the affected clients, but in some instances a client may withhold consent to the multiple representation. This opinion examines the lawyer's ethical duties when confronted with such so-called "thrust upon" conflicts, which are illustrated by the following two scenarios.

Scenario 1 : A law firm represents Client A in a breach of contract suit against Company B. During the pendency of that suit, Client C, a longtime ongoing client of the law firm, acquires Company B in a stock sale, and Company B becomes a wholly owned subsidiary of Client C. The law firm (which does not represent Client C in the acquisition of B) informs Clients A and C that it wishes to continue to represent each of them in their respective matters. Client A consents to a conflict of interest waiver, but Client C does not. May the law firm continue to represent at least one client, and if so, may the law firm choose which client to represent?

Scenario 2 : A law firm has advised Client A for several years regarding various intellectual property licensing issues. The law firm has also advised Client B for several years on general corporate transactional matters not involving intellectual property licensing, including current negotiations with Company C to form a joint venture. During the course of those negotiations, Client A acquires Company C. Upon learning of the merger, the law firm seeks to obtain conflict of interest waivers from Clients A and B so that it may continue to represent both clients in their respective matters. Client A agrees to provide the necessary conflict of interest waiver, but Client B does not. May the law firm continue to represent at least one of the clients, and if so, may the law firm choose which client to represent?

As these scenarios suggest, "thrust upon" conflicts often, but do not always, arise as a result of changes in corporate ownership. Also, they may arise in both litigation and transactional practice. While in litigation a disqualification motion may as a practical matter resolve the question, in any case a lawyer's ethical duties exist independent of court disqualification jurisprudence and a lawyer will have to guide him or herself based on analysis of ethical obligations under the Code. A lawyer faced with an unforeseen conflict that arises through no fault of his or her own, the lawyer should be guided by the factors set forth in this opinion when deciding from which representation to withdraw.

3. DISCUSSION

Lawyers have a duty to consider potential conflicts at the outset of an engagement and to decline proffered employment when such conflicts are likely. DR 5-105(A). Even careful conflicting-checking, however, will not eliminate the risk of unforeseeable conflicts arising after the lawyer or firm has commenced multiple representations. Under the New York Code of Professional Responsibility (the "Code"), a lawyer may not *continue* the concurrent representation of multiple clients "if the exercise of independent professional judgment on behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests," DR 5-105(B), unless the conflict is capable of being, and is, consented to under DR 5-105(C). This opinion addresses the requirements of DR 5-105(B) in the case of "thrust upon" concurrent client conflicts. For purposes of this opinion "thrust upon" conflicts are defined as conflicts between two clients that (1) did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where (2) the conflict was not reasonably foreseeable at the outset of the representation, (3) the conflict arose through no fault of the lawyer, and (4) the conflict is of a type that is capable of being waived under DR 5-105(C),[1] but one of the clients will not consent to the dual representation. Although the "thrust upon" conflict may be unforeseeable and arise through no fault of the lawyer or law firm affected, when it gives rise to a concurrent conflict under DR 5-105, the lawyer must nevertheless take action to avoid violation of DR 5-105(B). The customary response to such conflicts is for the lawyer to withdraw as necessary to avoid the conflict. *See* DR 2-110(B)(2). The Code does not, however, expressly address the case of "thrust upon" conflicts, nor does it specify under DR 2-110 from *which* representation(s) the attorney should withdraw in order to cure the conflict.

Nor has this dilemma been addressed directly by New York ethics opinions construing the Code. A growing body of case law, however, has dealt with "thrust upon" conflicts in litigation, applying a flexible approach that is consistent with the Code and should be used as a guide to resolving such conflicts, within the limits set forth in this opinion.

A. A lawyer faced with an apparent "thrust upon" conflict should first determine whether a concurrent conflict under DR 5-105 exists

When client relationships change during the course of a representation, the lawyer should first determine whether the changed circumstances create an actual conflict. As Scenarios 1 and 2 above, as well as case law[2] suggest, corporate transactions are often sources of apparent "thrust upon" conflicts. In such cases, an apparent conflict may arise during the representation of two formerly unrelated clients when one becomes a member of the same corporate family (e.g., an affiliate, subsidiary, parent, or sister corporation) as another client's adversary. Representation of one member of a corporate family, however, does not automatically constitute representation of another member of the same corporate family. For the purposes of the ethics rules, a current client's adversary that, due to a merger or acquisition, has become the parent or subsidiary of another client, may not be considered a "client" at all. And if the apparent conflict does not actually involve two current clients, there is no conflict of interest under DR 5-105, and the attorney does not need to obtain consent from both clients in order to continue representing both.

Previous opinions have articulated the circumstances under which an apparent conflict involving a member of a current client's corporate family will be considered an actual conflict of interest requiring consent to continue representing both parties. This determination is based on several factors, including the relationship between the two corporate entities, and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member. *See**Eastman Kodak Co. v. Sony Corp.*, 2004 WL 2984297 at *3 (W.D.N.Y. Dec. 27, 2004) ("[t]he relevant inquiry centers on whether the corporate relationship between the two corporate family members is 'so close as to deem them a single entity for conflict of interest purposes'");*Discotrade Ltd v. Wyeth-Ayerst Int'l, Inc* ., 200 F.Supp.2d 355, 358-59 (S.D.N.Y. 2002)(concluding that a corporate affiliate was also a client for conflict purposes because, among other things, the affiliate was an operating unit or division of an entity that shared the

same board of directors and several senior officers and used the same computer network, e-mail system, travel department and health benefit plan as the client); *J.P. Morgan Chase Bank v. Liberty Mutual Insurance Co.*, 189 F.Supp.2d 20, 21 (S.D.N.Y. 2002) (concluding that a subsidiary of a corporate client is also a client for conflicts purposes because "the relationship [between the two] is extremely close and interdependent, both financially and in terms of direction;" among other things they operated from the same headquarters, shared the same board of directors, and the general counsel (and senior vice president) of the parent was also the general counsel (and senior vice president) of the subsidiary). See also N.Y. City Eth. Op. 2003-03 (whether a corporate affiliate is a client for conflicts purposes "will depend on many factors, including the relationship between the two corporations and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member"); See also ABA Formal Op. No. 95-390 (1995) (factors as to whether a corporate affiliate of a client is also considered a client include whether the subject matter of the representation involves the affiliate; whether affiliate reasonably believes that it is a client of the lawyer; whether the affiliate imparted confidential information to the lawyer in expectation of representation; and whether the lawyer may be required to regard the affiliate as a client due to the relationship between the client and affiliate); N.Y. County Eth. Op. 684 (1991) (factors as to whether representation of parent company extends to subsidiary include whether either the parent or subsidiary reasonably believes that an attorney-client relationship exists; whether counsel to the parent is privy to confidential information about subsidiary that could be detrimental to the subsidiary's interests; and whether the parent's interests would be materially adversely affected by an action against its subsidiary).

In "thrust upon" conflict situations, application of the factors articulated in the cited ethics opinions will often lead to the conclusion that no conflict exists. For example, in Scenario 1 above, Company B has become a subsidiary of a long-time firm Client C. If the firm has no pre-existing relationship with Company B, is not representing Company B at the time the purported conflict arises, was not involved in the transaction whereby Company B became a subsidiary of Client C, and the firm has not acquired confidences of Company B that are relevant to the litigation, then, absent other factors, it may be that the firm will be able to conclude that it does not have an attorney-client relationship with Company B. As a result, there is no concurrent conflict and it would be permitted to continue to represent Client A in litigation without the consent of Company B or Client C.

The remainder of this opinion assumes that the unforeseen change of circumstances does result in a concurrent conflict within the purview of DR 5-105.

B. General rule requiring withdrawal where a consentable conflict of interest exists between concurrent clients, and one or both clients will not consent to the conflict.

Under the Code, a lawyer may not take on or continue the concurrent representation of multiple clients if the representation would "involve the lawyer in representing differing interests" or if "the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected," unless the lawyer obtains the consent of each client affected by the conflict. DR 5-105. It is well settled that this means a lawyer may not oppose a current client in any matter, even if the matter is totally unrelated to the firm's representation of the client, without consent from both clients. See e.g. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) ("[w]here the relationship [with a client] is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of representation") (internal citation omitted); *IBM v. Levin*, 579 F.2d 271, 280 (3rd Cir. 1978) (it is "likely that some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter). *See also* N.Y. City Eth. Op. 2003-03. When faced with a thrust upon conflict under DR 5-105, therefore, a lawyer would be unable to continue representing both clients without violating the disciplinary rule, if the lawyer is unable to obtain consent. Pursuant to DR 2-110(B)(2), a lawyer must withdraw from representing a client where the representation would violate a disciplinary rule. Therefore, ordinarily, when two clients will not consent to a conflict of interest, and the conflict requires consent, the law firm must withdraw from representation of at least one of the clients.

The New York disciplinary rules do not, on their face, indicate whether an attorney must withdraw from both representations in conflict situations, or whether the attorney may withdraw from representing only one client, and if so, which one. The disciplinary rule that governs withdrawal, DR 2-110(B)(2), merely states that a lawyer shall withdraw from employment if ("[t]he lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule." It sheds no light on situations where the withdrawal to avoid violation of a disciplinary rule involves more than one client.

Previous ethics opinions that have addressed withdrawal have similarly shed little light on how an attorney should withdraw from representation when a conflict has arisen that involves two current clients in the contexts that we address. A few ethics opinions construing the New York Code have mandated withdrawal from representation of more than one client, but all are distinguishable. These situations generally involved joint representation of clients with divergent interests on the same side of a matter, or situations where attorney knowledge of confidential information affected the attorney's ability to continue representing both clients.*See, e.g.*, N.Y. City Eth. Op. 1990-1 (if a non-waivable conflict develops during the course of joint representation of two clients, the attorney may be forced to withdraw from both representations); N.Y.S. Eth. Op. 761 (2003) (if a lawyer receives relevant confidential information from one co-client that the lawyer is unable to share with the other co-client in joint representation, the lawyer must withdraw from representing both clients); N.Y. County Eth. Op. 707 (1995) (lawyer who represents two clients on the same side of a matter should withdraw from both representations if the lawyer learned confidential information of the dropped client that is material to the proposed remaining client's representation); N.Y.S. Eth. Op. 592 (1988) (lawyer must withdraw from representing two clients in separate criminal cases, where the lawyer obtained confidential information that materially affected both representations)

The New York disciplinary rules governing former client conflicts also do not directly state whether a lawyer may, in order to avoid a material conflict between two current clients, withdraw from representing one client (thereby creating a "former client") and continue to represent the other. Under DR 5-108(A), a lawyer may not represent a client adverse to a former client without consent in the same or substantially related matter, where the current client's interests are materially adverse to the interests of the former client. If the matters are not substantially related, however, the lawyer may continue to represent a client even if that client is directly adverse to a former client, as long as the representation does not violate the lawyer's duty of confidentiality to the former client.

C. Determining which matter to withdraw from

Since the ethics rules do not instruct lawyers how to determine from which client to withdraw when faced with a current client conflict that violates DR 5-105, lawyers confronting this situation must be guided by the duties of confidentiality and loyalty to the client. Under the Code, the duty of confidentiality extends to both current and former clients. DR 4-101(B); DR 5-108(A)(2). If the conflict of interest between two current clients arises because the lawyer possesses confidential information, and consent cannot be obtained, the lawyer normally must withdraw from the affected representation. *See generally* N.Y. City Eth. Op. 2005-02 (discussing duty of confidentiality). In circumstances where material confidential information is involved, or there is a substantial relationship between the two matters, a lawyer probably cannot solve the conflict merely by withdrawing from representing one client and continuing to represent the other, because the continuing representation would most likely still violate the rules regarding former client conflicts.

The duty of loyalty is also central to the ethical rules in Canon 5 prohibiting a lawyer from representing multiple clients with differing interests. "Maintaining the independence of professional judgment required of a lawyer precludes acceptance or continuation of employment that will adversely affect the lawyer's judgment on behalf of or dilute the lawyer's loyalty to the client." EC 5-14. And as explained by EC 5-1, "[t]he 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. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client." *See also* ABA Formal Op.

No. 92-367 (1992) (“[u]nderlying the ethical prohibition [of Model Rule 1.7(a)] is the precept that the lawyer’s duty of loyalty demands that a client not be concerned with whether the lawyer may subconsciously be influenced by the differing interests of another”); *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976) (EC 5-1 and EC 5-14 "provide that the professional judgment of a lawyer must be exercised solely for the benefit of his client, free of compromising influences and loyalties, and this precludes his acceptance of employment that will adversely affect his judgment or dilute his loyalty"). Concurrent representation in particular “presents the risk of divided loyalty to each client, portending constrained vigor and impeding independent judgment on the lawyer’s part.” ABA Annotated Model Rules of Professional Conduct

1.7 (5th ed. 2003) at 116.

While the Code may not expressly prevent a lawyer from dropping one client in order to represent another, it is well-settled that the duty of loyalty prevents an attorney from doing so opportunistically. For example, under the so-called "hot-potato" rule, a lawyer or law firm should not ordinarily be permitted to abandon one client in order to take on the representation of a more lucrative client, where representing both would create a conflict of interest. This approach has been followed in several court cases involving attorney disqualification motions, where courts have articulated the need to protect confidential client information, as well as to protect the disfavored client from being "cut adrift" simply because a more lucrative client comes along with a claim against it. *See, e.g., Hartford Accident and Indemnity Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534, 540 (S.D.N.Y. 1989) (finding against disqualification, but discussing rule: "Clearly, no court should condone such conduct [dropping the disfavored client in attempt to avoid disqualification motion]; it smacks of disloyalty where loyalty is owed, and notwithstanding the apparent elimination of the conflict, there remains the possibility that former client confidences will be abused"); *In re Wingspread Corp.*, 152 B.R. 861, 864 (S.D.N.Y. 1993) (ruling against disqualification, but discussing rule); *AmSouth Bank, N.A. v. Drummond Co.*, 589 So. 2d 715, 721-722 (Ala. 1991) (finding against disqualification, but discussing rule: “a law firm should not be allowed to abandon its absolute duty of loyalty to one of its clients so that it can benefit from a conflict of interest that it has created”).

The "hot potato" rule prohibiting the abandonment of a current client to take on a more lucrative representation is a salutary one, but it is not commanded by the text of the Code or the ABA Model Rules and should not apply to situations where its underlying rationale would not be served. The rule condemns affirmative self-interested acts of disloyalty by an attorney to an existing client in order to switch allegiance to a new one. In circumstances where an attorney is representing two clients, and an unforeseeable conflict between the two arises during the ongoing representation of both, concerns about opportunistic attorney activity are less evident: by definition, the problem was "thrust upon" the lawyer.

Many courts have also found that the duty of loyalty concerns underpinning the “hot potato” rule are not present in the “thrust upon” situation where the lawyer has not instigated the conflict or deliberately sought to abandon a client. In addition, in the current business climate, corporate mergers and acquisitions occur with sufficient regularity that conflicts of interests between two clients will often arise unexpectedly and through no fault of the lawyer, creating conflict situations that are not governed by the “hot potato” rule. Consequently, many courts have applied a flexible approach to “thrust upon” situations that focuses on balancing the interests of all affected parties rather than mechanically applying the “hot potato” rule to prevent a lawyer from withdrawing from one client in order to continue representing the other. *See, e.g., Installation Software Technologies, v. Wise Solutions*, 2004 WL 524829 at *4 (N.D. Ill. 2004) (applying a flexible approach to the resolution of a conflict arising out of a corporate acquisition, balancing several factors including (i) prejudice, (ii) cost, (iii) the complexity of the case, and (iv) the origin of the conflict); *Eastman Kodak Co. v. Sony Corp.*, 2004 WL 2984297 at *7 (W.D.N.Y. 2004) (holding that “the ‘flexible approach’ provides a far more practical framework to disqualification issues generated by mergers and acquisitions than the rigid ‘hot potato’ rule,” but balancing the interests in favor of disqualification); *Hartford Accident and Indemnity Co.*, 721 F. Supp. at 541 (where a conflict arose because the plaintiff’s law firm’s former partner represented the defendant, the court held that where there is no threat of actual prejudice, only a “wooden application” of the disciplinary canons would support disqualification); *AmSouth Bank* , 589 So. 2d at 722 (where the law firm did not play a role originally in creating the conflict, the court followed a “common sense” approach and found that the law firm may avoid disqualification by “moving swiftly to withdraw from its representation” to minimize prejudice to each client concerned); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990) (applying balanced approach in ruling against disqualification in situation where the conflict of interest was created by an acquisition of the client, and not by the law firm).

Nothing in the Code bars an attorney from employing similar reasoning in carrying out the obligations of Canons 2 and 5. When confronted with a "thrust upon" concurrent client conflict, lawyers should balance several factors in deciding whether they may withdraw from one representation and continue the other, and if so, which client to continue representing. Of course, absent consent, an attorney should not simply withdraw from a representation and continue an adverse one where doing so would compromise material confidences and secrets of what would become the former client. *See* DR 5-108. Because thrust upon conflicts typically involve totally unrelated matters, however, the requirement of protecting confidences of an ex-client will not always command a particular result. Where confidences will not be placed at risk, the overriding factor should be the prejudice the withdrawal or continued representation will cause the parties, including whether representation of one client over the other would give an unfair advantage to a client. The lawyer must also consider other factors, for example, the origin of the conflict (*i.e.*, which client's action caused the conflict to arise); whether one client has manipulated the conflict to try to force a lawyer off the matter and is using the conflict as leverage; the costs and inconvenience to the party being required to obtain new counsel, including the complexity of the representation; whether the choice would diminish the lawyer's vigor of representation toward the remaining client; and, the lawyer’s overall relationship to each client.

The commentary to the Model Rules supports this approach. As under the New York Code, the ABA Model Rules generally prohibit a lawyer from continuing to represent a client where that representation would be directly adverse to another client, or where a significant risk exists that the representation would be materially limited by the lawyer's responsibilities to the other client.**3** Model Rule 1.7(a). However, the commentary to Model Rule 1.7 suggests that in cases in which a conflict arises during the course of representation, and where the conflict was the result of "[u]nforeseeable developments, such as changes in corporate and other organizational affiliations," the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. Model Rule 1.7 Comment [5]. The District of Columbia ethics rules, which are based on the Model Rules, have taken this one step further and adopted an express "thrust upon" exception to the general prohibition against simultaneously representing two clients whose interests are directly adverse. DC Rule 1.7(d) provides that where certain concurrent conflicts are not reasonably foreseeable at the outset of representation, a lawyer should seek the opposing party’s consent to the conflict, but if such consent is not given by the opposing party, the lawyer need not withdraw despite the opposing party’s objection. See D.C. Eth. Op. 292 (1999) (interpreting Rule 1.7(d)).

The Restatement also supports a lawyer's ability to withdraw "in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients" so long as the situation causing the conflict was not “reasonably foreseeable” by the lawyer when the lawyer first undertook the representation of the client. Restatement (Third) of the Law Governing Lawyers § 132 cmt. j.

The application of this approach is illustrated by the court cases cited above. In *Installation Software Technologies*, 2004 WL 524829, for example, a conflict of interest arose when a current client of the law firm representing the plaintiff acquired the defendant and then refused to consent to the dual representation. The plaintiff’s law firm sought guidance from the court by moving for permission to withdraw or for “other relief.” The court denied the motion to withdraw after balancing (i) the prejudice to the non-consenting client, including whether its confidential information was at risk if the law firm stayed in the case; (ii) the financial costs to the plaintiff if it was forced to retain new counsel in the matter (iii) the complexity of the matter, and (iv) the origin of the conflict so as to ensure that the “‘conflict by acquisition’ . . . [did] not become a means for [the defendant] to strategically disadvantage [the plaintiff].” 2004 WL 524829 at

*6.

Another example is *Gould, Inc. v. Mitsui Mining & Smelting Co*. In *Gould* , a conflict of interest for plaintiff's counsel arose several years after litigation had commenced, when the defendant acquired a company, IGT, that plaintiff's counsel represented in unrelated matters. The defendant moved to disqualify plaintiff's counsel, but the court rejected the motion. In doing so, the court refused to mechanically apply the "hot potato" rule, and took a more flexible approach that balanced the various interests involved. First, the court found that the defendant had not been prejudiced because confidential information had not passed to the plaintiff as a result of plaintiff's firm's representation of IGT. Second, disqualifying plaintiff's firm would cost plaintiff a great deal of time and money in retaining new counsel and would significantly delay the progress of the case, which involved complex technological issues. Finally, the court found that the conflict was created by defendant's acquisition of IGT several years after the current litigation commenced, and not by any affirmative act of plaintiff's law firm. *Gould, Inc. v. Mitsui Mining & Smelting Co*., 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990); see also *University of Rochester v. G.D. Searle & Co*., 2000 WL 1922271 (W.D.N.Y. 2000) (ruling against disqualification); *Carlyle Towers Condominium Association, Inc. v. Crossland Savings, FSB*, 944 F. Supp. 341 (D.N.J. 1996) (ruling against disqualification);*AmSouth Bank, N.A. v. Drummond Co*., 589 So. 2d 715, 722 (Ala. 1991) (ruling against disqualification).

The scenarios set forth at the outset of this opinion illustrate how these factors may be applied in specific situations. Scenarios 1 and 2 involve situations where a current client has, through a merger or acquisition, become adverse to another client that is a member of the same corporate family. Depending on, among other things, the relationship between Company B and Client C in Scenario 1, and Company C and Client A in Scenario 2, the adversary may or may not be considered a "client" for conflicts purposes. See cases cited *supra*. on when a corporate affiliate becomes a client for conflicts purposes.

Assuming that a conflict does exist between the clients, however, the law firm would need to balance the factors outlined above in determining which client to represent. For example, in Scenario 1, the law firm would first need to determine who would be most prejudiced by the withdrawal. This would depend in part on the complexity of the breach of contract suit against B and how close to trial the suit is. The closer the suit is to trial, the more Client A would be prejudiced if the law firm withdrew from representation. In contrast, if the law firm had only recently been retained to represent Client A in the breach of contract suit and had yet to engage in extensive discovery, the prejudice to Client A from withdrawal would not be as great. Other factors that would determine which client would be most prejudiced involve, for example, the financial costs to each and whether the lawyer has acquired material confidential information that could be used against the client from whom the lawyer withdraws. In addition, because Client C created the conflict, the law firm should question whether Client C is seeking to use the conflict as leverage to force the law firm off the case involving Client A. As noted in*Installation Software*, a "conflict by acquisition" should not give the acquiring client a means to strategically disadvantage Client A, who is in effect an innocent bystander with respect to Client C's acquisition of Client A's adversary (Company B). More broadly, we believe that it will generally appear fairer and more understandable to a client whose lawyer withdraws because of a conflict if the client's action gave rise to the conflict in the first place.

At the same time, if Client C is a large, important client of the firm, the law firm must be wary in applying the balancing test that it is not motivated by purely economic factors to retain Client C. After weighing all of the factors, if the law firm decides that the balancing test favors Client C, it should inform Client A that due to a conflict of interest it must withdraw from representing that client in the law suit against Company B. If the law firm concludes that the factors weigh in favor of Client A, it should inform Client C that it will not withdraw from representing Client A in the breach of contract suit. At that point, it will be up to Client C to decide whether it wishes to consent to the conflict after all, or terminate its relationship with the law firm.

D. Limitations to Opinion

This opinion is not intended to apply other than in cases of a "thrust upon" conflict as defined above.

First, the conflict must truly be unforeseeable. This requirement will often be satisfied in the merger and acquisitions context, as in Scenarios 1 and 2, as long as the law firm represented both clients before the corporate transaction occurred or before the law firm knew it was under consideration. It could be satisfied in other contexts when, for example, a current client unexpectedly appears in an adverse capacity in a government investigation.

Second, the conflict must truly be no fault of the lawyer. So, for example, if the conflict arose because the lawyer did an inadequate conflicts check originally by, for example, failing to check necessary individuals or entities, failing to spell the names of the clients accurately when putting information into a database or by other conduct that is negligent, this opinion does not apply. *See, e.g*,. N.Y. City Eth. Op. 2003-03 (describing what records a law firm must keep and what policies and systems the firm must implement in order to do adequate conflicts checks).

Third, the conflict must be between concurrent clients. The rules governing when a current client becomes a former client for conflicts purposes are beyond the scope of this opinion but in determining whether this opinion applies the lawyer must consider whether even a client for whom the lawyer has done no work for a significant period of time is, in fact, a current client under the conflicts rules. This analysis involves a delicate fact-specific inquiry. *See, e.g. International Business Machines Corp. v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978) ("[a]lthough CBM had no specific assignment from IBM on hand on the day the antitrust complaint was filed . . . the pattern of repeated retainers, both before and after the filing of the complaint, supports the finding of a continuous relationship"); *Oxford Systems, inc. v. CellPro, Inc*. 45 F. Supp. 2d 1055, 1060 (W.D. Wash. 1999) (law firm that represented a client intermittently from 1985 to May 1997 deemed still to represent that client in April 1998 though no matters were then currently pending); *S.W.S. Financial Fund A v. Salomon Bros., Inc*., 790 F. Supp. 1392, 1398 (N.D. Ill. 1992) ("once established, a lawyer-client relationship does not terminate easily," quoting the comment to ABA M.R. 1.3); *Shearing v. Allergan, Inc*., 1994 WL 382450 (D. Nev. 1994) (client represented by law firm intermittently over 13 years but which had not given work to firm for more than a year was still a current client for conflict purposes); . *See also* D.C. Bar Ethics Opinion 292 (1999) (where a law firm represents a client on an ongoing basis on a discrete legal issue that may be raised in multiple proceedings and involves common facts, legal theories, parties, claims and defenses, the representation begins when the law firm first begins to provide these legal services, not when the particular matter that led to the conflict began).

Of course, attorneys must keep in mind that the continued representation of one client after withdrawing from the other must still satisfy DR 5-108, the rule governing former client conflicts. See DR 5-108; Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (continuing an adverse representation against a theretofore existing client "must be otherwise consistent with the former-client conflict rules"). In particular, the confidences and secrets of the former client must be protected, and no attorney may continue an adverse representation, without court approval, even in a "thrust upon" situation, in which material confidences and secrets of either client (or former client) will be placed at risk.

Finally, implementation of the balancing test for thrust upon conflicts must be performed in good faith. Where the attorney's decision regarding withdrawal appears opportunistic, for example the retained client generates significantly more fees than the dropped client and there are no other factors that weigh in favor of retaining that client, any insistence that the conflict was thrust upon the lawyer, or protestations of prejudice to the major client, may be viewed skeptically. On the other hand, a lawyer who does balance the relevant considerations in good faith should not be subject to discipline for getting it wrong in hindsight.

E. Prophylactic Measures

Lawyers may take several steps to anticipate and potentially avoid concurrent client conflicts. In particular, some conflicts may be avoided by obtaining

advance consents from clients to waive conflicts that may come up in the future. Of course, the fact that "thrust upon" conflicts by definition are not reasonably foreseeable may make it particularly difficult in some cases to obtain enforceable advance waivers. Nonetheless, in appropriate instances clients can give informed and therefore effective waivers in advance to a sufficiently described set of circumstances without necessarily knowing all details or the identity of the other client. *See*N.Y. City Eth. Op. 2004-02 (the lawyer seeking an advance waiver should be as specific as possible regarding the types of possible future adverse representations, the types of matters that might present conflicts, and at least the class of potentially conflicted clients); *see also*N.Y. County Eth. Op. 724 (1998); ABA Formal Op. No. 93-372 (1993).

In addition, attorneys may be able to draft the letter of engagement to avoid uncertainty as to whether the representation is ongoing or not, and who is the client. For example, the lawyer could clarify that he or she only represents the client in a particular area or for a particular matter, and representation in any other matter would necessitate a separate agreement.[4]Similarly, the lawyer could clarify that he or she represents only specified entities within the corporate family, and not current or future affiliates.

4. CONCLUSION

When, in the course of continuing representation of multiple clients, a conflict arises through no fault of the lawyer that was not reasonably foreseeable at the outset of the representation, does not involve the exposure of material confidential information, and that cannot be resolved by the consent of the clients, a lawyer is not invariably required to withdraw from representing a client in the matter in which the conflict has arisen. The lawyer should be guided by the factors identified in this opinion in deciding from which representation to withdraw. In reaching this decision, the overarching factor should be which client will suffer the most prejudice as a consequence of withdrawal. In addition, the attorney should consider the origin of the conflict, including the extent of opportunistic maneuvering by one of the clients, the effect of withdrawal on the lawyer's vigor of representation for the remaining client, and other factors mentioned in this opinion.

Dated: Jun

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1. For a more in-depth discussion of when conflicts are consentable, see, for example, N.Y. City Eth. Op. 2001-2 (addressing the circumstances in which it is permissible for a lawyer to represent a client in a corporate transaction whose interests are adverse to a client the lawyer represents in another matter, and both clients consent); N.Y. County Eth. Op. 671 (1989) (addressing the circumstances under which a lawyer who represents a corporate client may represent a second client whose interests are adverse to the first client, and both clients have consented).

2 . See e.g., *University of Rochester v. G.D. Searle & Co.*, 2000 U.S. Dist. LEXIS 19030 (W.D.N.Y. 2000); *In re Wingspread Corp.*, 152 B.R. 861, 864 (S.D.N.Y. 1993); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990).

3 .Model Rule 1.7 states: "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: … (4) each affected client gives informed consent, confirmed in writing."

4 . For a more in-depth discussion of the circumstances in which a conflict of interest may be avoided by limiting the scope of a lawyer's representation of a client, see N.Y. City Eth. Op. 2001-3 (the scope of a lawyer's representation of a client may be limited in order to avoid a potential future conflict, provided that the client consents to a limited engagement after full disclosure, and the limitation does not render the lawyer's counsel inadequate or diminish the zeal of representation).

Formal Opinion 2009-2:

Ethical Duties Concerning Self-represented Persons

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

Formal Opinion 2009-2: Ethical Duties Concerning Self-represented Persons

TOPIC: Ethical duties concerning self-represented persons.

DIGEST: DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

CODE/RULE: DR 1-102; 4-101; 7-104; 7-106; EC 2-7; 7-13; 7-14; 7-18; 7-23; 9-4; Canons 4-7; Rule 4.3

QUESTIONS: What are a lawyer's ethical duties when another party to a litigation or transaction is self-represented? Does the Code of Professional Responsibility limit what a lawyer may say to a self-represented person?

OPINION

I. Introduction

Among the many changes to courts in the State of New York in the past two decades has been a sharp increase in the number of self-represented litigants. [1]There are nearly 1.8 million self-represented litigants in the New York State Unified Court System, according to a recent estimate. *See* Hon. Judith S. Kaye, The State of the Judiciary 2007 at 18. [2] Undoubtedly, the widespread foreclosure and credit crises will further increase that number as more people, unable to afford legal representation, must nonetheless come to court to protect and assert their rights. *Cf.* Margery A. Gibbs, *More Americans serving as their own lawyers*, Associated Press News Wire, Nov. 11/25/08 (discussing the increasing numbers of self-represented litigants in domestic disputes).

Self-represented litigants provide many and varied challenges for tribunals. Some self-represented persons may have difficulty comprehending the rules and procedures of a tribunal. Others may not be able to adequately articulate facts, causes of action, or the relief they seek. Some may even misapprehend the respective roles of judicial officers, court personnel, or opposing counsel. The inexperience of self-represented persons can lead to additional litigation or motion practice, resulting in cost and delay for all parties, and sometimes an order setting aside an executed agreement. *See, e.g., Cabbad v. Melendez*, 81 A.D.2d 626, 626 (2d Dep't 1981) (vacating consent judgment "'inadvertently, unadvisably or improvidently entered into'" by self-represented, non-English-speaking tenant (citation omitted)); *600 Hylan Assocs. v. Polshak*, 17 Misc.3d 134(A) (2d Dep't 2007) (table decision),*text available at* 2007 WL 4165282; *see also Schaffer Holding LLC v. Fleming*, 1 Misc.3d 131(A) (2d Dep't 2003) (table decision), *text available at* 2003 WL 23169883 (affirming order vacating stipulation).

Judicial response to the increase in self-represented litigants is ongoing and evolving. For example, state and federal courts in New York have opened offices to aid self-represented individuals appearing in their courtrooms. [3] Courses relating to self-represented litigants are now included in judicial training seminars. [4]

There has, however, been little discussion of a lawyer's role when communicating with self-represented persons in the litigation and transactional contexts. This opinion considers whether the lawyer's duties to the court (*e.g.*, DR 7-106, EC 7-13, EC 7-23, EC 9-4), the administration of justice (*e.g.*, DR 1-102(A)(4)-(5), EC 2-7), and the lawyer's own client (Canons 4-7), require the lawyer to take proactive measures when dealing with an unrepresented person. We first address what communications between lawyers and their self-represented adversaries are permitted, and then articulate, consistent with the New York Code of Professional Responsibility (the "Code"), the newly-approved New York Rules of Professional Conduct and past precedent, a duty to warn self-represented persons who have objectively manifested their confusion about the opposing lawyer's role in a matter.

II. Discussion

A. What Communications Are Permissible Under DR 7-104(A)(2)

The Code explicitly recognizes that lawyers' encounters with self-represented litigants are inevitable. Indeed, Ethical Consideration 7-18 recognizes that attorneys acting on behalf of a client "may have to deal directly with" self-represented persons in a wide variety of transactional and litigation contexts.

The primary guidance the Code offers for managing these interactions is found in DR 7-104(A)(2) which provides in pertinent part:

> During the course of representation of a client a lawyer shall not . . . . [g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

See also EC 7-18 (extending this obligation to an unrepresented "person"). [5]

Even when the interests of a self-represented person "conflict with the interests of the lawyer's client," ethics opinions have construed this Code provision to permit more than a simple statement that the self-represented person should obtain counsel. For example, the New York State Bar Association Committee on Professional Ethics concluded that an executor of a will could, but was not required to, advise an unrepresented surviving spouse of the need to obtain a lawyer to address a legal issue, and also could identify the relevant issue (the spouse's potential right to take an election against the estate) to be addressed by the lawyer.*See* N.Y. State 477 (1977). Even though the executor might take a contrary position on that issue, the opinion concluded that "to remain silent in the face of the surviving spouse's expressed dissatisfaction with his testamentary share might seem somewhat unfair and could, under certain circumstances, tend to mislead." The opinion further stated that it would be permissible for a lawyer to freely provide to a self-represented non-client information that is "purely a matter of fact and non-privileged," so long as it otherwise would be ethically permissible to do so (*e.g.*, no confidences or secrets would be revealed in violation of DR 4-101).

The New York County Lawyers' Association addressed a lawyer's ability to negotiate a settlement with an adverse party who had discharged her attorney. *See* N.Y. Cty 708 (1995). The opinion concluded that once an attorney had verified that the adverse party was no longer represented, she could communicate with the adverse party directly about the lawsuit and continue the negotiations -- but could not render any advice other than to secure counsel. The opinion cautioned, however, that under the circumstances presented, the attorney had an affirmative duty to advise the self-represented party to seek counsel while

flagging a particular legal issue:

> At the outset of their dealings, . . . inquirer should advise [the unrepre sented] plaintiff that there may be legal issues, such as the possible [discharged] attorney's charging lien, affecting plaintiff's right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because inquirer is barred from doing so.

The inquiring attorney had expressed her concern that any settlement she reached with the unrepresented person might be affected by the charging lien of the former lawyer. Thus, it appeared that the *inquirer's client* could have been adversely affected had the unrepresented person failed to consider the impact of a potential charging lien before agreeing to a settlement.

More recently, the New York State Bar Association Committee on Professional Ethics recognized that in a governmental investigation, a government lawyer speaking to a self-represented person may, but is not required to, inform her of the need to retain counsel and alert her to the right against self-incrimination. *See* N.Y. State 728 (2000). The opinion reasoned that "the rule [DR 7-104(A)(2)] has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel." *Id*. (citing N.Y. State 477 (1977) and N.Y. State 708 (1998); *s ee also* ABCNY Formal Op. 2004-3 (government lawyer "may advise" an unrepresented agency constituent of the "non-controvertible" legal proposition that "under no circumstances may the constituent testify falsely"). Concluding that the right against self-incrimination was such "non-controvertible information," and recognizing that a government attorney has a duty to "seek justice" even in civil matters (EC 7-14), the opinion stated that a government attorney "might reasonably conclude" that the government's "interest in dealing fairly with the public" warrants advising the unrepresented person to retain a lawyer even if a private attorney would be "disinclined" to do so.

Finally, the New York State Bar Association Committee on Professional Ethics examined the duties of a government lawyer when the other party to pending negotiations, although represented, was unaccompanied by its lawyers at a meeting. *See* N.Y. State 768 (2003). The opinion also considered the related issue of what a lawyer may do when she does not know that the other party is represented by counsel. Addressing a situation analogous to the lawyer who negotiates with a self-represented party, the opinion concluded that it would be permissible for the lawyer to describe her client's own position in negotiations. It further found that the lawyer would not violate DR 7-104(A)(2) by providing certain indisputable information to the unrepresented party, such as the filing requirements of the lawyer's agency client. *See id*.

The teachings of these opinions are, essentially, three-fold. First, a lawyer may, but need not, advise a self-represented party to retain counsel and identify the legal issues that could be usefully addressed by counsel. Second, the lawyer may be obligated to render this advice when it would advance the interests of her own client to do so. Third, the lawyer may, but need not, provide certain incontrovertible factual or legal information to the self-represented party, such as her client's own position in negotiations, non-negotiable procedural requirements for doing business, or the existence of a legal right such as the right against self-incrimination. We concur with each of these conclusions.

We also identify an additional option for matters pending before a court or other tribunal. In light of the efforts of a growing number of courts to provide support for self-represented litigants, we conclude that it is also appropriate for a lawyer to direct a self-represented adversary to any available court facilities designed to aid those litigants, such as an Office of the Self-Represented, or to a clerk or other court employee designated to orient the self-represented person through the litigation process. 7

B. Duty To Clarify the Lawyer's Role

A lawyer engaging in any of these permissible communications, or choosing not to make them, should remain mindful of the need to avoid misleading the self-represented party. *See* DR 1-102(A)(4) (forbidding "conduct involving dishonesty, fraud, deceit, or misrepresentation"); DR 7-102(A)(5) (forbidding a lawyer from "[k]nowingly mak[ing] a false statement of law or fact" in representing a client); Restatement (Third) of the Law Governing Lawyers (hereafter, "Restatement") § 103(1) (2000) (in dealing with a constituent of the lawyer's organizational client who is not represented by counsel, a lawyer "may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents"); *cf.Niesig v. Team I*, 76 N.Y.2d 363, 376 (1990) (stating, in the context of permissible interviews with self-represented employees of a lawyer's corporate client who could not bind the corporation, that "it is of course assumed that attorneys would make their identity and interest known to interviewees" and otherwise comport themselves ethically).

Refraining from misleading or deceptive conduct, however, may not be sufficient to satisfy the requirements of the Code in all dealings with self-represented persons. For some self-represented persons, further action may be necessary. In that regard, we conclude that a lawyer should be ready, when dealing with a self-represented person, to clarify when needed that the lawyer (a) does not and cannot represent the self-represented person; (b) represents another party in the matter who may have (or does have) interests adverse to the self-represented person; and (c) cannot give the self-represented person any advice, other than to secure counsel, or, as described above, to consult an available court facility designed to assist self-represented persons.

The lawyer may provide this clarification at any time without violating DR 7-104(A)(2), but we conclude that she *must* do so whenever she knows or has reason to know that the self-represented person misapprehends the lawyer's role in the matter. This may require the lawyer to repeat the clarification more than once. If the represented side of a case or transaction involves multiple individual attorneys, each attorney may have to explain her role in the matter. If the lawyer believes it necessary under the circumstances, the lawyer should also ask the self-represented person to confirm that she understands what the lawyer has told her.

Although research has not revealed any New York authority previously recognizing this duty to a self-represented person, we believe it is supported by existing ethics principles. The Restatement, for example, specifically recognizes the need to correct misunderstandings between lawyers and self-represented individuals when an organization's attorney deals with an unrepresented constituent of the organization. Restatement, § 103(2) ("[W]hen the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient."); *s ee also*ABCNY Formal Op. 2004-3 ("When a lawyer . . . retained by an organization is dealing with the organization's . . . constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents") (citing DR 5-109(A). The nuances of client identity and the lawyer's role are easily misunderstood when the lawyer is representing an organizational client. However, we believe the same logic compels clarification whenever a self-represented person objectively manifests her misunderstanding of a lawyer's role. We therefore believe the duty should be extended as discussed in this opinion.

We depart from the Restatement's "material prejudice" standard, however, and conclude that a stronger approach is appropriate under the Code (and the newly-approved Rules). When a self-represented nonclient objectively manifests a belief that an attorney for an adverse or potentially adverse party is also acting as her own counsel, or attempts to solicit or accept guidance from that attorney on legal issues, there is an *inherent* risk of material prejudice to the nonclient and an element of unfairness that warrants a clear affirmative statement by the lawyer that she is not the nonclient's attorney. Moreover, we note, as the Restatement itself does, that failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the lawyer's client. For example, there could be prejudicial delay or additional expense if, as the result of a failure to correct a material misimpression, issues need

to be re-litigated, agreements set aside, or attorneys disqualified. *Cf.* Restatement § 103 cmt. e ("Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the [client] if the lawyer, even if unwittingly, thereby undertakes concurrent representation . . . .").

In reaching this conclusion, we are mindful that not all self-represented persons are alike. Some may be highly sophisticated and experienced business people, capable of handling delicate negotiations or maneuvering through the court system unaided. Others may be relatively uneducated and intimidated by the procedures of our legal system. The lawyer should consider where a specific self-represented person falls along that continuum in evaluating whether she has a duty to explain or clarify her role.

A lawyer also should determine, based on the facts and circumstances presented, whether the explanation to be provided to the self-represented person should be in writing. Relevant factors include, but are not limited to, the extent to which self-represented person has demonstrated her misunderstanding of the lawyer's role, and the existence or threat of litigation, where failure to make a clear record of communications could be prejudicial to the lawyer's client.

III. Conclusion

DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time, explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. [8] The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

February 2009

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[1] Persons proceeding in legal matters without an attorney are often interchangeably referred to as "pro se," "self-represented," or "unrepresented." This opinion uses the term "self-represented person/party" to refer to non-attorneys who are representing themselves in a litigation or transaction in which one or more other persons are represented by counsel. Corporations may not appear self-represented in court in New York.

[2] Informal surveys of court managers in the New York City Housing Court and New York City Family Court in 2003 revealed that "most litigants (Family Court, approximately 75%; Housing Court, approximately 90%) appear without a lawyer for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity." Office of the Deputy Chief Administrative Judge for Justice Initiatives, New York State Unified Court System,*Self-Represented Litigants in the New York City Family Court and New York City Housing Court* at 1, *inSelf-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys* (Dec. 2005), *available at* http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf. Similarly, survey respondents at the Town and Village Courts estimated in 2003 that 78% of litigants appeared without a lawyer "*almost all or most of the time* in small claims matters, 77% in vehicle and traffic cases, 47% in housing cases, 38% in civil cases, and 15% in criminal cases." *Id.*, *Services for the Self-Represented in the Town and Village Courts* at 3 (emphasis in original).

[3] Contact information for the Office of Self-Represented or Pro Se Office is available online for New York State courts (http://www.nycourts.gov/courthelp /nolawyer-text.htm#add) as well as federal district courts (http://www.nynd.uscourts.gov/prose.cfm; http://www1.nysd.uscourts.gov /courtrules_prose.php?prose=contact; http://www.nywd.uscourts.gov/mambo/index.php?option=com_content&task=section&id=8&Itemid=43; http://www.nyed.uscourts.gov/probono/Locations/locations.html) and federal appellate court (http://www.ca2.uscourts.gov/Docs/COAManual /everything%20manual.pdf) .

[4] *See, e.g.* , Office of Justice Initiatives website http://www.nycourts.gov/ip/justiceinitiatives/srl2.shtml#6 (discussing the "Dealing Effectively with Self-Represented Litigants" program); New York State Unified Court System, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for New York Judges* (Summer 2008) (working draft distributed in judicial training seminars); *see also* Cynthia Grey, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (American Judicature Society 2005) (discussion guide (pp. 59 ff.) containing "materials that can be used to plan and present a session on judicial ethics and self-represented litigants" (p. 59) including a self-test, hypotheticals, role plays, and small group exercises), *available at*http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf; Best Practice Institute, National Center for State Courts, *Judicial Management of Cases Involving Self-Represented Litigants, available at* http://www.ncsconline.org/Projects_Initiatives/BPI/ProSeCases.htm.

[5] The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. Rule 4.3 provides: "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." Although the term "legal advice" in Rule 4.3 suggests a narrower scope than the term "advice" in DR 7-104(A)(2), we see no need to discuss or resolve a possible distinction for the purposes of this opinion.

[7] Although we believe that interactions between lawyers and self-represented persons typically will be far different than the relationship between a corporation's lawyer and the corporation's unrepresented employees that we addressed in ABCNY Formal Op. 2004-2, we acknowledge that there may be situations where a lawyer should not advise a nonclient to seek counsel. Indeed, we conclude that a lawyer is obligated to render such advice only where it is in the interest of the lawyer's client to do so, or the self-represented person has demonstrated confusion about the lawyer's role.

[8] Nothing in this opinion alters a lawyer's duties under DR 7-106(B)(1) and EC 7-23, generally requiring a lawyer to advise the tribunal of controlling legal authority not cited by any other party, regardless of whether it is adverse to her client's position.

TOPIC: Ethical duties concerning self-represented persons.

DIGEST: DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

CODE/RULE : DR 1-102; 4-101; 7-104; 7-106; EC 2-7; 7-13; 7-14; 7-18; 7-23; 9-4; Canons 4-7; Rule 4.3

QUESTIONS: What are a lawyer's ethical duties when another party to a litigation or transaction is self-represented? Does the Code of Professional Responsibility limit what a lawyer may say to a self-represented person?

OPINION

I. Introduction

Among the many changes to courts in the State of New York in the past two decades has been a sharp increase in the number of self-represented litigants. [1]There are nearly 1.8 million self-represented litigants in the New York State Unified Court System, according to a recent estimate. *See* Hon. Judith S. Kaye, The State of the Judiciary 2007 at 18. [2] Undoubtedly, the widespread foreclosure and credit crises will further increase that number as more people, unable to afford legal representation, must nonetheless come to court to protect and assert their rights. *Cf.* Margery A. Gibbs, *More Americans serving as their own lawyers*, Associated Press News Wire, Nov. 11/25/08 (discussing the increasing numbers of self-represented litigants in domestic disputes).

Self-represented litigants provide many and varied challenges for tribunals. Some self-represented persons may have difficulty comprehending the rules and procedures of a tribunal. Others may not be able to adequately articulate facts, causes of action, or the relief they seek. Some may even misapprehend the respective roles of judicial officers, court personnel, or opposing counsel. The inexperience of self-represented persons can lead to additional litigation or motion practice, resulting in cost and delay for all parties, and sometimes an order setting aside an executed agreement. *See, e.g.*, *Cabbad v. Melendez*, 81 A.D.2d 626, 626 (2d Dep't 1981) (vacating consent judgment "'inadvertently, unadvisably or improvidently entered into'" by self-represented, non-English-speaking tenant (citation omitted)); *600 Hylan Assocs. v. Polshak*, 17 Misc.3d 134(A) (2d Dep't 2007) (table decision),*text available at* 2007 WL 4165282; *see also Schaffer Holding LLC v. Fleming*, 1 Misc.3d 131(A) (2d Dep't 2003) (table decision), *text available at* 2003 WL 23169883 (affirming order vacating stipulation).

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There has, however, been little discussion of a lawyer's role when communicating with self-represented persons in the litigation and transactional contexts. This opinion considers whether the lawyer's duties to the court (*e.g.*, DR 7-106, EC 7-13, EC 7-23, EC 9-4), the administration of justice (*e.g.*, DR 1-102(A)(4)-(5), EC 2-7), and the lawyer's own client (Canons 4-7), require the lawyer to take proactive measures when dealing with an unrepresented person. We first address what communications between lawyers and their self-represented adversaries are permitted, and then articulate, consistent with the New York Code of Professional Responsibility (the "Code"), the newly-approved New York Rules of Professional Conduct and past precedent, a duty to warn self-represented persons who have objectively manifested their confusion about the opposing lawyer's role in a matter.

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See also EC 7-18 (extending this obligation to an unrepresented "person"). [5]

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> At the outset of their dealings, . . . inquirer should advise [the unrepre sented] plaintiff that there may be legal issues, such as the possible [discharged] attorney's charging lien, affecting plaintiff's right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because inquirer is barred from doing so.

The inquiring attorney had expressed her concern that any settlement she reached with the unrepresented person might be affected by the charging lien of the former lawyer. Thus, it appeared that the *inquirer's client* could have been adversely affected had the unrepresented person failed to consider the impact of a potential charging lien before agreeing to a settlement.

More recently, the New York State Bar Association Committee on Professional Ethics recognized that in a governmental investigation, a government lawyer speaking to a self-represented person may, but is not required to, inform her of the need to retain counsel and alert her to the right against self-incrimination. *See* N.Y. State 728 (2000). The opinion reasoned that "the rule [DR 7-104(A)(2)] has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel." *Id.* (citing N.Y. State 477 (1977) and N.Y. State 708 (1998); *s ee also* ABCNY Formal Op. 2004-3 (government lawyer "may advise" an unrepresented agency constituent of the

"non-controvertible" legal proposition that "under no circumstances may the constituent testify falsely"). Concluding that the right against self-incrimination was such "non-controvertible information," and recognizing that a government attorney has a duty to "seek justice" even in civil matters (EC 7-14), the opinion stated that a government attorney "might reasonably conclude" that the government's "interest in dealing fairly with the public" warrants advising the unrepresented person to retain a lawyer even if a private attorney would be "disinclined" to do so.

Finally, the New York State Bar Association Committee on Professional Ethics examined the duties of a government lawyer when the other party to pending negotiations, although represented, was unaccompanied by its lawyers at a meeting. *See* N.Y. State 768 (2003). The opinion also considered the related issue of what a lawyer may do when she does not know that the other party is represented by counsel. Addressing a situation analogous to the lawyer who negotiates with a self-represented party, the opinion concluded that it would be permissible for the lawyer to describe her client's own position in negotiations. It further found that the lawyer would not violate DR 7-104(A)(2) by providing certain indisputable information to the unrepresented party, such as the filing requirements of the lawyer's agency client. *See id*.

The teachings of these opinions are, essentially, three-fold. First, a lawyer may, but need not, advise a self-represented party to retain counsel and identify the legal issues that could be usefully addressed by counsel. Second, the lawyer may be obligated to render this advice when it would advance the interests of her own client to do so. Third, the lawyer may, but need not, provide certain incontrovertible factual or legal information to the self-represented party, such as her client's own position in negotiations, non-negotiable procedural requirements for doing business, or the existence of a legal right such as the right against self-incrimination. We concur with each of these conclusions.

We also identify an additional option for matters pending before a court or other tribunal. In light of the efforts of a growing number of courts to provide support for self-represented litigants, we conclude that it is also appropriate for a lawyer to direct a self-represented adversary to any available court facilities designed to aid those litigants, such as an Office of the Self-Represented, or to a clerk or other court employee designated to orient the self-represented person through the litigation process. 7

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The lawyer may provide this clarification at any time without violating DR 7-104(A)(2), but we conclude that she *must* do so whenever she knows or has reason to know that the self-represented person misapprehends the lawyer's role in the matter. This may require the lawyer to repeat the clarification more than once. If the represented side of a case or transaction involves multiple individual attorneys, each attorney may have to explain her role in the matter. If the lawyer believes it necessary under the circumstances, the lawyer should also ask the self-represented person to confirm that she understands what the lawyer has told her.

Although research has not revealed any New York authority previously recognizing this duty to a self-represented person, we believe it is supported by existing ethics principles. The Restatement, for example, specifically recognizes the need to correct misunderstandings between lawyers and self-represented individuals when an organization's attorney deals with an unrepresented constituent of the organization. Restatement, § 103(2) ("[W]hen the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient."); *s ee also*ABCNY Formal Op. 2004-3 ("When a lawyer . . . retained by an organization is dealing with the organization's . . . constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents") (citing DR 5-109(A). The nuances of client identity and the lawyer's role are easily misunderstood when the lawyer is representing an organizational client. However, we believe the same logic compels clarification whenever a self-represented person objectively manifests her misunderstanding of a lawyer's role. We therefore believe the duty should be extended as discussed in this opinion.

We depart from the Restatement's "material prejudice" standard, however, and conclude that a stronger approach is appropriate under the Code (and the newly-approved Rules). When a self-represented nonclient objectively manifests a belief that an attorney for an adverse or potentially adverse party is also acting as her own counsel, or attempts to solicit or accept guidance from that attorney on legal issues, there is an *inherent* risk of material prejudice to the nonclient and an element of unfairness that warrants a clear affirmative statement by the lawyer that she is not the nonclient's attorney. Moreover, we note, as the Restatement itself does, that failure to intercede when the self-represented person is acting under a misapprehension may adversely affect the interests of the lawyer's client. For example, there could be prejudicial delay or additional expense if, as the result of a failure to correct a material misimpression, issues need to be re-litigated, agreements set aside, or attorneys disqualified. *Cf.* Restatement § 103 cmt. e ("Failing to clarify the lawyer's role and the client's interests may redound to the disadvantage of the [client] if the lawyer, even if unwittingly, thereby undertakes concurrent representation . . . .").

In reaching this conclusion, we are mindful that not all self-represented persons are alike. Some may be highly sophisticated and experienced business people, capable of handling delicate negotiations or maneuvering through the court system unaided. Others may be relatively uneducated and intimidated by the procedures of our legal system. The lawyer should consider where a specific self-represented person falls along that continuum in evaluating whether she has a duty to explain or clarify her role.

A lawyer also should determine, based on the facts and circumstances presented, whether the explanation to be provided to the self-represented person should be in writing. Relevant factors include, but are not limited to, the extent to which self-represented person has demonstrated her misunderstanding of the lawyer's role, and the existence or threat of litigation, where failure to make a clear record of communications could be prejudicial to the lawyer's client.

III. Conclusion

DR 7-104(A)(2) permits a lawyer to advise a self-represented person adverse to the lawyer's client to seek her own counsel and to make certain other related

statements. These statements may include, where appropriate, identification of general legal issues that the self-represented person should address with a lawyer; undisputed statements of fact or law such as the position of the lawyer's client on a contested issue; and references to court-sponsored programs designed to assist a self-represented litigant. A lawyer may at any time, explain or clarify the lawyer's role to the self-represented litigant and advise that person to obtain counsel. [8] The lawyer must volunteer this information if she knows or should know that a self-represented person misunderstands the lawyer's role in the matter.

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[1] Persons proceeding in legal matters without an attorney are often interchangeably referred to as "pro se," "self-represented," or "unrepresented." This opinion uses the term "self-represented person/party" to refer to non-attorneys who are representing themselves in a litigation or transaction in which one or more other persons are represented by counsel. Corporations may not appear self-represented in court in New York.

[2] Informal surveys of court managers in the New York City Housing Court and New York City Family Court in 2003 revealed that "most litigants (Family Court, approximately 75%; Housing Court, approximately 90%) appear without a lawyer for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity." Office of the Deputy Chief Administrative Judge for Justice Initiatives, New York State Unified Court System,*Self-Represented Litigants in the New York City Family Court and New York City Housing Court* at 1, *inSelf-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys* (Dec. 2005), *available at* http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf. Similarly, survey respondents at the Town and Village Courts estimated in 2003 that 78% of litigants appeared without a lawyer "*almost all or most of the time* in small claims matters, 77% in vehicle and traffic cases, 47% in housing cases, 38% in civil cases, and 15% in criminal cases." *Id.*, *Services for the Self-Represented in the Town and Village Courts* at 3 (emphasis in original).

[3] Contact information for the Office of Self-Represented or Pro Se Office is available online for New York State courts (http://www.nycourts.gov/courthelp /nolawyer-text.htm#add) as well as federal district courts (http://www.nynd.uscourts.gov/prose.cfm; http://www1.nysd.uscourts.gov /courtrules_prose.php?prose=contact; http://www.nywd.uscourts.gov/mambo/index.php?option=com_content&task=section&id=8&Itemid=43; http://www.nyed.uscourts.gov/probono/Locations/locations.html) and federal appellate court (http://www.ca2.uscourts.gov/Docs/COAManual /everything%20manual.pdf) .

[4] *See, e.g.* , Office of Justice Initiatives website http://www.nycourts.gov/ip/justiceinitiatives/srl2.shtml#6 (discussing the "Dealing Effectively with Self-Represented Litigants" program); New York State Unified Court System, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for New York Judges* (Summer 2008) (working draft distributed in judicial training seminars); *see also* Cynthia Grey, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (American Judicature Society 2005) (discussion guide (pp. 59 ff.) containing "materials that can be used to plan and present a session on judicial ethics and self-represented litigants" (p. 59) including a self-test, hypotheticals, role plays, and small group exercises), *available at*http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf; Best Practice Institute, National Center for State Courts, *Judicial Management of Cases Involving Self-Represented Litigants*, *available at* http://www.ncsconline.org/Projects_Initiatives/BPI/ProSeCases.htm.

[5] The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. Rule 4.3 provides: "In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." Although the term "legal advice" in Rule 4.3 suggests a narrower scope than the term "advice" in DR 7-104(A)(2), we see no need to discuss or resolve a possible distinction for the purposes of this opinion.

[7] Although we believe that interactions between lawyers and self-represented persons typically will be far different than the relationship between a corporation's lawyer and the corporation's unrepresented employees that we addressed in ABCNY Formal Op. 2004-2, we acknowledge that there may be situations where a lawyer should not advise a nonclient to seek counsel. Indeed, we conclude that a lawyer is obligated to render such advice only where it is in the interest of the lawyer's client to do so, or the self-represented person has demonstrated confusion about the lawyer's role.

[8] Nothing in this opinion alters a lawyer's duties under DR 7-106(B)(1) and EC 7-23, generally requiring a lawyer to advise the tribunal of controlling legal authority not cited by any other party, regardless of whether it is adverse to her client's position.

Formal Opinion 2011-1:

Contacting Former Clients Represented by Successor Counsel

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics

FORMAL OPINION 2011–1: CONTACTING FORMER CLIENTS REPRESENTED BY SUCCESSOR COUNSEL

TOPIC: Contact with former clients.

DIGEST: Absent consent of successor counsel, a lawyer may not contact a former client known to be represented by counsel to discuss matters within the scope of the successor counsel's representation.

RULE: 4.2

QUESTION: May a lawyer contact a former client to discuss matters concerning the prior representation without obtaining the prior consent of successor counsel?

OPINION

We address the question of whether a lawyer may contact, on her own behalf, a former client to discuss matters relating to the prior representation without the prior consent of successor counsel. This issue arises in a number of contexts including, for example, where a lawyer seeks to collect a fee or permission to return or destroy client files after she has been discharged by the client and replaced by new counsel. We conclude that a lawyer may not contact her former client regarding matters as to which the lawyer knows the client is represented by successor counsel.

Rule 4.2(a) of the New York Rules of Professional Conduct (the "Rules") governs this issue. That Rule provides as follows:

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

N.Y. Rules of Prof'l Conduct R. 4.2(a)(2010).

When a lawyer contemplates any contact with her former client, a threshold question presented by the rule is whether the former client is represented by new counsel in connection with the subject matter of the contemplated communication. If the client is not so represented, direct contact is not prohibited by the rule. If the client is so represented, the former client would be deemed under the rule to be a "party" whom the former lawyer knows is "represented by another lawyer in the matter." In that case, new counsel must give "prior consent" to direct communication. *Id*.

Rule 4.2(a) begins with phrase "[i]n representing a client," which appears to limit the scope of the rule. The weight of authority, however, is that a lawyer may not contact a represented person even when the lawyer is acting pro se and thus not "representing a client" at the time of contact. As explained by the court in *In re Discipline of Schaefer*, 25 P.3d 191, 199 (Nev. 2001), "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se." *Accord In re Disciplinary Proceeding Against Haley*, 126 P.3d 1262, 1269 (Wash. 2006); *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1119-20 (Idaho 1996); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994); *In re Conduct of Smith*, 861 P.2d 1013, 1016-17 (Or. 1993); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894, 898 (W. Va. 1990); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App. 1999); District of Columbia Op. 258 (1995); Hawaii Op. 44 (2003). *But seePinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990) (lawyer, in his role as a tenant of an office building, may contact the landlord directly about the landlord's attempt to evict the lawyer, even though the landlord is represented by counsel in that proceeding).

Ethics committees in two states have reached the same conclusion specifically with respect to contacts with former clients represented by new counsel, opining that Rule 4.2 prohibits such contacts when the intended communication falls within the scope of the representation. We believe this to be the correct result and reach the same conclusion. *See* Illinois Op. 96-09 (1997) (discharged lawyer seeking fees from former client is restricted in doing so by Rule 4.2); *see also* Rhode Island Op. 2002-04 (2002) (when successor counsel writes to original lawyer asking for file and encloses signed request from client, original lawyer may not contact former client without successor's permission).

In each of the foregoing ethics opinions, successor counsel had been retained to represent the client in connection with the same matter handled by the prior lawyer. In the Illinois opinion, the new lawyer (B) asked the prior lawyer (A) to provide a breakdown of A's time spent on the files, together with a list of his expenses, and promised to protect those fees and expenses in the event of any settlement or judgment obtained on behalf of the client. Several days later, A, without authority from B, called the client and attempted to convince him, through lies, to fire B and re-hire A. Although the opinion concluded that the communication violated Rule 4.2, it nevertheless declined to adopt a *per se* rule prohibiting a lawyer's contact with a former client, acknowledging that there may be valid reasons to contact a former client following discharge. But as to the communication at issue, the opinion did find that it had been initiated by the discharged lawyer with knowledge of B's representation and "appear[ed] motivated by a desire on his part to either protect his claim for fees and expenses and/or to convince the client to allow him to resume handling the files." The communication, therefore, violated Rule 4.2. In the Rhode Island opinion, successor counsel sent a letter to prior counsel requesting the client's files and stating that the client no longer wished to be contacted by his prior attorney. Successor counsel enclosed with the letter a "file transfer authorization" signed by the client, authorizing the prior attorney to release the file to successor counsel, discharging the prior attorney, and stating that successor counsel is "my attorney for all purposes."The opinion concluded that under those circumstances, Rule 4.2 prohibited the prior attorney from communicating directly with the client regarding the file transfer.

Rule 4.2, of course, does not flatly prohibit all contact with former clients and there appears to be no reason to adopt any such blanket prohibition. Indeed, we believe that such a *per se* rule would unduly restrict an attorney's ability to communicate with a former client regarding matters as to which the client is not represented by counsel. In our view, therefore, an inquiry from an attorney to a former client, including, but not limited to, a request for unpaid fees and expenses, would not run afoul of Rule 4.2 in the absence of any reason to believe that successor counsel is representing the client with respect to payment of those fees.

In contrast, when a lawyer knows that the former client has secured new counsel, Rule 4.2 prohibits direct contact regarding any matter within the scope of the representation -- even where the lawyer is acting pro se -- unless the lawyer obtains the prior consent of successor counsel. To be sure, this conclusion may not be fully supported by the language of the first clause of Rule 4.2, which lawyers might justifiably interpret as permitting contact whenever the attorney initiating the communication is acting pro se and thus not "representing a client." Nevertheless, we believe that our construction, and that of most courts and ethics committees that have considered the question, comports with and furthers one of the salutary policy objectives of the rule, namely, to protect "a represented nonlawyer party from 'possible overreaching by other lawyers who are participating in the matter.'" *In re Disciplinary Proceeding Against Haley*, 126 P.3d at 1269 (citation omitted). But given the ambiguity of the rule and its potential for creating a trap for the unwary, we believe the Courts should consider amending the rule to clarify its intended scope and purpose.

Biographies

Christine N. Appah is a 2008 graduate of Duke University School of Law. She is a *magna cum laude* graduate of The City College of New York (CUNY). At City College, Ms. Appah double majored in International Studies and Urban Legal Studies and minored in public policy. She also earned honors in Liberal Arts and History.

Ms. Appah joined The Legal Aid Society of New York in the Queens Neighborhood Office in 2008. Ms. Appah's work has focused on the areas of housing and homelessness prevention. As a staff attorney, Ms. Appah makes regular court appearances and counsel's clients on a variety of housing related matters. Christine has also been involved in outreach and disaster relief related legal work and currently serves as an attorney in Legal Aid's disaster relief unit.

Ms. Appah is also very committed to the study of legal ethics in the context of public interest law. Most recently, she served on the ethics training panel of The Legal Aid Society of New York's Civil Division. Christine is involved in various community outreach activities geared towards improving the quality of life for Queens residents.

Sunny Noh, prior to Superstorm Sandy, was Staff Attorney in NYLAG's Housing Project for 3.5 years, providing direct services to tenants in litigation and administrative advocacy. However, shortly after Superstorm Sandy, in January 2013, Ms. Noh was named a Supervising Attorney in the newly created Storm Response Unit, which provided outreach to impacted communities, trainings to disaster case managers, attorneys and other advocates and dedicated direct services to Sandy survivors. Currently, Ms. Noh primarily supervises the housing practice and insurance practice within the unit. Ms. Noh is a *cum laude* graduate of the University at Buffalo Law School, SUNY.

Fazeela Siddiqui is a Staff Attorney at the Legal Aid Society in NYC, where her primary focus is disaster-relief law. She has represented numerous clients affected by Hurricane Sandy with widespread issues that range from advocating for hotel shelter clients facing eviction, FEMA appeals, representing clients against unscrupulous debt-collectors, to mediating homeowner's insurance claims on behalf of low-income homeowners. Fazeela has provided testimony to the New York City Council on critical issues such as accountability and oversight in disaster fund tracking to the oversight of the City's "Build it Back" program, which is funded by the U.S. Department of Housing & Urban Development (HUD).

Fazeela holds a law degree from the Northeastern University School of Law, a Master's in Social Policy & Evaluation from the University of Michigan School of Social Work and a Bachelor's Degree in Organizational Behavior and Spanish from the University of Michigan.

Anne Stephenson is a staff attorney in the Homeowner and Consumer Rights Project at Queens Legal Services. Her practice centers on foreclosure defense and Superstorm Sandy-related policy advocacy and direct services in such areas as insurance disputes, contractor fraud, and FEMA

disaster assistance appeals. Anne graduated from the University of Virginia School of Law in 2012 and has been working at Queens Legal Services since April 2013.

Moderator

Jennifer Ching is the Director of Queens Legal Services. At QLS, she manages the borough-wide legal services and advocacy program, which includes fourteen practices, including disaster aid. Jennifer has coordinated advocacy responses post-Sandy on issues ranging from federal, state and city agency responsiveness to long-term community rebuilding issues. She has presented and lectured on disaster issues in numerous settings, including CLE programs. Prior to joining QLS, Jennifer was Director of New York Appleseed, a citywide public interest advocacy center. From 2004-2008, Jennifer was a litigator with Paul, Weiss, Rifkind, Wharton & Garrison LLP, where her pro bono representation included litigation on behalf of 13 Saudi nationals held in Guantanamo. Jennifer was a 2002 Gibbons Fellow in Public Interest Law and Constitutional Litigation, where she litigated national security, employment, civil rights and death penalty matters. She taught as an adjunct professor at Rutgers School of Law-Newark and, as a Skadden Fellow at the American Civil Liberties Union of New Jersey, Jennifer founded New Jersey's first legal advocacy project for low-wage immigrant workers.