Ethics Update for Trial Lawyers

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ETHICS UPDATE 2017

NYSBA TRIAL LAWYERS SECTION
AUGUST 6, 2017
HERSHEY, PENNSYLVANIA

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I. New York Statewide Attorney Discipline Rules – Effective October 1, 2016 (original effective date of July 2016 extended)

22 N.Y.C.R.R. Part 1240: Rules for Attorney Disciplinary Matters

According to a Memorandum released by the New York State Office of Court Administration on November 4, 2015:

> Th[e] proposed rules present a harmonized approach to the attorney disciplinary process within the four Departments of the Appellate Division on a broad range of issues in disciplinary practice, including: definitions of "professional misconduct" and other pertinent terms; standards of jurisdiction and venue; appointment of committees and quorum requirements; conflicts and disqualifications of current and former committee members and staff; procedures for filing complaints; investigatory authority of the Committee chief attorneys; disclosure of complaints to attorneys; disposition of matters by the Chief Attorney, and by the Committee; mandatory disclosure requirements prior to adverse Committee action; Admonitions and Letters of Advisement; review of Committee dispositions; review of dismissals or decisions not to investigate; commencement and conduct of proceedings before the Appellate Division; discipline by consent of the parties; interim suspensions; attorney resignations; diversion to monitoring programs; discipline based on criminal convictions or misconduct in another jurisdiction; suspension for incapacity; conduct of disbarred or suspended attorneys; reinstatement procedures; confidentiality provisions and applications to unseal confidential records; abatement of proceedings; restitution; appointments of attorneys, in appropriate cases, to protect the interest of clients or other attorneys; and indemnification of volunteers in disciplinary programs.
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> If ultimately approved, the uniform rules would replace the separate court rules on disciplinary practice currently in place in each of the four Departments. The proposed rules, drafted by a working group of senior staff of the Appellate Division and the Office of Court Administration at the direction of the Administrative Board of the Courts, address many of the issues raised by various commentators on New York's disciplinary practices over the last two decades, and should be read in conjunction with the recent report and recommendations of the Chief Judge's Commission on Statewide Attorney Discipline (available at: http://www.nycourts.gov/rules/comments/PDF/ AD-SWDiscCommittee.pdf).

In a press release dated December 29, 2015, the Office of Court Administration stated:

> **Chief Judge Announces New Rules to Ensure A More Efficient and Consistent Attorney Discipline Process in New York State**
>
> NEW YORK ─ Chief Judge Jonathan Lippman today announced the adoption by the four Departments of the New York State Supreme Court, Appellate Division, of new uniform statewide rules to govern New York's attorney disciplinary process. The new rules, which provide for a harmonized approach to the investigation, adjudication and post-proceeding administration of attorney disciplinary matters were approved following public comment and upon recommendation of the Administrative Board of the Courts. They will be promulgated as Part 1240 of the Rules of the Appellate Division (22 N.Y.C.R.R. Part 1240) and will take effect in July 2016.
>
> The rules announced today are comprehensive in scope, and set forth a uniform approach to the full panoply of issues in attorney discipline, including: standards of jurisdiction and venue; appointment of disciplinary committees and staff; screening and investigation of complaints; proceedings before the Appellate Division; rules of discovery; the name and nature of available disciplinary sanctions and procedural remedies for further review; expanded options for diversion to monitoring programs; reinstatement; and confidentiality.
>
> The adoption of uniform rules was among the foremost recommendations of the final report of the Commission on Statewide Attorney Discipline, formed by Judge Lippman in March 2015 to conduct a rigorous study of disciplinary practice in New York. That report, issued in September, called for statewide uniform rules and procedures "that strike the necessary balance between facilitating prompt resolution of complaints and affording the attorney an opportunity to fairly defend the allegations."
>
> Hailing the new rules as historic, Chief Judge Lippman said, "I could not be more pleased at the outstanding work of our four Appellate Division Departments, with their exceptional Presiding Justices, in enacting these unprecedented measures. I would also like to take this opportunity to thank Hon. A. Gail Prudenti and Hon. Barry Cozier for their stellar leadership of the Commission on Statewide Attorney Discipline, and all the commission members for their extraordinary efforts in helping lay the foundation for these important reforms. Working to eliminate regional variations and leading to a

more effective attorney discipline system over all, the new rules are a vital contribution to the fair administration of justice and the integrity of the legal profession throughout our state."

Chief Administrative Judge Lawrence Marks, praising the work of the organized bar in its review of the proposal, said, "This is an extremely important step in attorney discipline in our state, and the bar was terrific in its response to the proposal the court system put out for public comment. Various associations — the New York State Bar, the New York City Bar, a number of county bar associations and others — provided useful, detailed comments, and we are deeply grateful for that effort. Many of the comments were adopted. Others will be considered going forward, now that the Appellate Division speaks with a uniform voice on this vital topic."

The new rules are available at http://www.nycourts.gov/rules/comments/index.shtml.

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II. Crowdfunding

A. Philadelphia Bar Association Professional Guidance Committee Opinion 2015-6 (2015)

In Philadelphia Bar Association Professional Guidance Committee Opinion 2015-6 (December 2015), the inquirer proposed to solicit compensation for his work on a crowdfunding platform, "an internet site that enables users to post information about a project and solicit financial contributions from persons who believe the project to be a worthy cause." Furthermore, "[n]o contributors would be given a financial stake in the outcome of the litigation. They would merely make a contribution, and would receive nothing more than the satisfaction that they offered financial support to a legal cause in which they believe."

The fee agreement would state that "any contributed funds received from the crowdfunding appeal would be payments to counsel, not the party [client] and that these fees would remain counsel's property even in the event of a recovery of attorneys' fees under the fee shifting statute" that might apply in the litigation.

The Committee had "visited crowdfunding sites and noted that several do contain solicitations of support for a legal cause to pay legal fees, but in those cases, it appears that the contribution is to an entity that would hold the amounts contributed in trust to pay fees as earned in accordance with a separate fee agreement between the lawyer and the client that would specify how and when the lawyer would be paid."

The Committee cited to Comment 13 to Rule 1.7 of the Pennsylvania Rule of Professional Conduct, which provides:

> A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Rule 1.8(f) of the Pennsylvania Rules of Professional Conduct provides:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> > (1) the client gives informed consent;
> >
> > (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> >
> > (3) information relating to representation of a client is protected as required by Rule 1.6.

Rule 1.6 of the Pennsylvania Rule of Professional Conduct states that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation ..." Therefore, the lawyer must obtain the client's informed consent to reveal the litigation and publicize the case on the crowdsourcing site.

ABA Model Rule 1.0(e) defines "Informed consent" to mean:

> the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

See N.Y.Rule 1.0(j).

Comments 6 and 7 to Rule 1.0 elaborate:

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

It may be difficult to disclose facts on a crowdfunding site to attract contributions/investors, while not disclosing compromising information to opposing counsel.

Regarding fees, Rule 1.5 of the Pennsylvania Rules of Professional Conduct provides in pertinent part that:

> (a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. The factors to be considered in determining the propriety of the fee include the following:
>
> > (1) whether the fee is fixed or contingent;
> >
> > (2) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> >
> > (3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> >
> > (4) the fee customarily charged in the locality for similar legal services;
> >
> > (5) the amount involved and the results obtained;
> >
> > (6) the time limitations imposed by the client or by the circumstances;
> >
> > (7) the nature and length of the professional relationship with the client; and
> >
> > (8) the experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

In this regard, the Committee observed that:

> it seems the inquirer imagines that he or she will be paid as a fee whatever sum is raised by crowdfunding, regardless of its amount. We suspect that the inquirer anticipates that the amount raised will total far less than he would expect to be paid if the matter takes as long as he or she now anticipates, he or she spends the total number of hours now anticipated and if those hours were compensated at average rates of pay in the area. However, it may not turn out that way. It cannot be known how much may be raised; and the course of the

> representation is by no means certain. The litigation could end quickly, either favorably or not; before the litigation's end the inquirer may seek to withdraw or the client may wish to discharge him; or the inquirer may or may not succeed in seeking the payment of fees and expenses under an applicable fee shifting statute. Thus, just to give one example, if the matter ends quickly with relatively few hours of work expended, the retention of the entire amount raised on the crowdfunding site may produce an effective hourly rate that is extremely high. Without knowing how much was raised, it would therefore be difficult to determine whether or not the fee would be clearly excessive. Add the fact that the inquirer has asked the client to assign any award of attorney's fees to the inquirer, the possibility of a clearly excessive fee is truly an issue.

Furthermore, there was an issue as to whether the inquirer would "remain in the case through its termination, regardless of what the fee is, or may he withdraw in the event certain contingencies arise but still keep his fee."

The Committee raised two possible problems:

> For example, suppose the inquirer raises $20,000 under this arrangement and that the entire fund immediately is paid to him or her, and, then, the lawyer manages to get a result in the case by devoting only ten hours of work. That situation could produce a fee at the rate of $2,000 per hour. On the other end of the spectrum, suppose the funding site raises $20,000, and then the inquirer finds out the matter will go on for years and require thousands of hours of work, much more than anticipated, and more than the inquirer can possibly handle without a fee. Could he then keep the whole fee and withdraw?

The Committee also observed that if the inquirer "treats all amounts raised on the crowdsourcing site as earned immediately upon receipt, he has established a de facto non-refundable retainer, even though the actual amount is unknown. While there is no per se prohibition on non-refundable retainers in Pennsylvania (see Pennsylvania Bar Association ("PBA") Formal Opinion 95-100) great care should be taken in accepting such retainers."

In ABA Opinion 95-100, the Committee concluded that a nonrefundable fee arrangement:

> can be clearly excessive if it interferes with a client's ability to meaningfully discharge the lawyer with or without cause. That is, if there is a nonrefundable retainer paid in the amount of say, $100,000, and it is truly non-refundable, it may place a meaningful limitation on the client's ability to discharge the lawyer

> if he is in any way dissatisfied with the lawyer's performance or simply chooses to change counsel without cause at any point. Similarly, unless the arrangement also includes a promise to represent the client through to the conclusion of the matter, assuming the client wishes the lawyer to, it also could be a clearly excessive arrangement.

Philadelphia Bar Association Professional Guidance Committee Opinion 2015-6.

The Committee also pointed out that "[t]here has been strong criticism in adjoining states of non-refundable retainers. *See In Re Cooperman*, 83 N.Y. 2nd, 245 (1994) and Cohen v. Radio, 275 N.J. Super 241 (1994)." The New York Rules of Professional Conduct now prohibit "a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated." Rule 1.5(d)(4).

Comment 4 to Rule 1.5 of the New York Rules of Professional Conduct states:

> A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

The Philadelphia Bar Association Professional Guidance Committee concluded that "if the arrangement proposed is simply an arrangement whereby the fee consists of whatever is raised with no other undertakings, it is improper." Therefore, the arrangement must include the following attributes to satisfy the requirements of the Pennsylvania Rules:

> First, the fee arrangement should include terms which describe the lawyer's obligations including the lawyer's obligation to remain in the case, assuming the client wishes him to do so, until its conclusion or until some other point at which retention of the total fees paid would not constitute an excessive fee. For example, the fee arrangement with the client could state that the inquirer is

obligated to remain in the representation until the time expended reaches a total figure such that the total fee paid is reasonable in light of that time expended.

Second, the arrangement should require that the amount raised be placed in a trust account established under Rule 1.15 until those amounts are earned in accordance with the terms of the final fee agreement. Until such time that it is determined that the fee is actually earned, the monies raised constitute Rule 1.15 funds and should be held separate from the lawyer's own property.

Finally, the inquirer also should consider the duties owed to non-clients. The Rules refer in several places to the obligation of lawyers to be truthful in all respects to third parties. Rules 4.1 states that "[i]n the course of representing a client a lawyer shall not knowingly ... make a false statement of material fact or law to a third person.' Rule 7.1 requires that lawyers not make false or misleading communications about the lawyer or the lawyer's services, noting that a communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

B. New York State Bar Association Committee on Professional Ethics Opinion 1062 (2015)

In Formal Opinion 1062, the New York State Bar Association Committee on Professional Ethics also addressed crowdfunding. The inquiring lawyers were recent law school graduates who planned to start a small firm. They needed to raise capital to fund the start-up expenses of the new firm for the first few months of operations, such as rent, website development, professional liability insurance, and office supplies. The inquiring lawyers also accumulated substantial student loan debt and wanted to avoid further borrowing. They inquired whether they could ethically raise start-up funds via internet websites through "crowdfunding."

The opinion stated:

> "Crowdfunding" is defined generally as funding a project or venture by raising small amounts of money from a large number of people. It is often used in product development to test a market and refine a product. Philanthropic organizations also use crowdfunding to raise funds. We are aware of five basic approaches to crowdfunding: (1) Donation, (2) Reward, (3) Lending, (4) Equity, and (5) Royalty. In each of the models, the user uses the funding website of a crowdfunding "platform," which charges fees based on the amount of money raised. The platforms have varying focuses, models and fee

> structures. See generally Crowds Unite, What is Crowd Funding?, available at http://crowdsunite.com/what-is-crowdfunding.

The Committee noted that the "lending model" would only increase debt and, therefore, would not meet the law firm's goal.

As to the "donation model," the Committee noted that it:

> may be unattractive to potential donors (since they receive nothing in return and may not wish to support an enterprise designed to make a profit). The donation model might also be unattractive to the law firm, since friends and relatives of the lawyers might be inclined to donate directly to the law firm even if the lawyers were not using crowdfunding, whereas under the donation model their contributions will be diminished by the platform's fees. But we see no ethical issues with the donation model, as long as the lawyers make clear that donors will receive nothing in return and that the law firm is designed to be a profit-making enterprise.

The Committee opined that the "royalty model" and the "equity model":

> would clearly violate the Rules of Professional Conduct. The royalty model contemplates the investor receiving a percentage of revenues, and would therefore violate Rule 5.4(a) ("A lawyer shall not share legal fees with a nonlawyer"). Similarly, the equity model violates Rule 5.4(d) (lawyer shall not practice law in a for-profit entity if a non-lawyer owns any interest therein.).

As to the "reward model," the Committee observed that it "might fit the law firm's business needs, and the inquiring lawyers have suggested several examples of rewards, including (i) informational pamphlets, (ii) reports on the progress of the firm and (iii) the lawyers' performance of pro bono work for a third-party non-profit legal organization."

As to the ethical implications of the proposed rewards, the Committee observed:

> Informational pamphlets and progress reports. Informational pamphlets, whitepapers or reports on the firm's progress may be governed by Rule 7.1 ("Advertising"). Materials may not be considered advertising as defined in Rule 1.0(a) if they are "topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law…." Rule 7.1, Cmt. [7]; N.Y. State 967 (2013) (blog written by an attorney is not an "advertisement" if the primary purpose of the blog is not retention of the attorney). However, the lawyers should take care that their writings on legal topics do not give

individual legal advice. See Rule 7.1(r) (without affecting the right to accept employment, lawyer may write for publication on legal topics "so long as the lawyer does not undertake to give individual advice").

Pro bono hours. The proposal to offer pro bono hours to a third-party non-profit legal organization raises several issues. In N.Y. State 971 (2013), a lawyer proposed to donate legal services to a charitable organization for auction as a fund-raising device. We discussed the requirement of Rule 1.1(b) that a lawyer accept employment only if the lawyer is, or intends to become, competent to handle the matter. Opinion 971 also discussed the prohibition on undertaking a matter that would involve an impermissible conflict of interest under Rule 1.7 or Rule 1.9. We therefore concluded that the firm's offer of pro bono services must be conditioned on the firm's ability to comply with these ethical constraints. We stressed, however, that the fact these limitations apply does not mean that the lawyer cannot participate. See also N.Y. State 897 (2011) (lawyer may market legal services on a "deal" of the day" or "group coupon" website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and assess competence to provide the services). The same principles apply to the reward model that the inquiring lawyers are considering here.

III. Payment of Fees by Third Parties

New York Rule 1.8(f) provides:

> A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
>
> (3) the client's confidential information is protected as required by Rule 1.6.

Comments 11 and 12 to New York Rule 1.8(f) provide:

> **Person Paying for a Lawyer's Services**
>
> [11] Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third

person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client. See also Rule 5.4(c), prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest may exist if the lawyer will be involved in representing differing interests or if there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. See Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

New York State Bar Association Committee on Professional Ethics Opinion 1063 (2015)

The inquirer agreed to represent an 18-year old client ("Son") in a criminal defense matter. When the inquirer initially met the Son at the Town Court, the Son's divorced parents ("Mother" and "Father") were present. Although only Son signed a retainer agreement, each of the client's parents paid one-half of the retainer. The inquirer continues to represent Son.

Subsequently, the inquirer agreed to represent Mother in two matters against Father. One was a custody dispute against Father (not involving Son). The other was a support matter against Father in which Son was among the subjects of the support

sought. Opposing counsel protested that, having taken money from Father, it was a conflict of interest for the inquirer to represent Mother adverse to Father.

The Committee noted that:

> It is well-established that when a lawyer accepts payment from a third party to represent a client, the third-party payor is not a client merely by virtue of paying the lawyer's fee. See N.Y. State 716 (1999) (when an insurance company retains a lawyer to represent a policyholder, the client is the policyholder, not the insurance company). See generally American Law Institute, Restatement Third, The Law Governing Lawyers, §14, cmt. c (2000) (paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else).
>
> If a third-party payor is present at an intake interview, the lawyer may sometimes give the impression that the third party is also a client. Many factors might contribute to such an impression by the third party. A lawyer who accepts payment from third parties may therefore wish to inform such persons that the lawyer does not represent them and has no duties to them. The lawyer should also avoid giving legal advice to the third-party payor, and should make clear that the lawyer will not share confidential information with the third-party payor absent informed consent from the client. See Rule 1.8(f)(3) (lawyer shall not accept fees from third party unless "the client's confidential information is protected as required by Rule 1.6").

If the lawyer has not given the Father grounds to believe he is a client, the Committee noted that the three requirements in Rule 1.8(f) must be satisfied. Furthermore:

> If these three conditions are fulfilled, the Rules permit the third party payment. See N.Y. State 1000 (2014), in which compliance with Rule 1.8(f) operates to permit payment even by one whose interests are adverse or potentially adverse to those of the client. (Indeed, Opinion 1000 points out that, where legal fees are paid by an indemnitor such as an insurance company, the interests of the indemnitor are often contrary to those of the client.)
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> …
>
> Since we assume the Father is not a client, accepting a retainer from the Mother adverse to the Father does not involve "representing" differing interests. Thus, there is no conflict of interest under Rule 1.7(a)(1). However, a conflict could exist under Rule 1.7(a)(2) if a reasonable lawyer would conclude that the

inquirer's interest in continuing to receive fees from the Father for representing the Son would create a "significant risk" of adversely affecting the inquirer's professional judgment on behalf of the Mother. Even if such a personal interest conflict exists, which depends on questions of fact, the inquirer could still represent the Mother if he reasonably believes within the meaning of Rule 1.7(b)(1) that he could provide competent and diligent representation to the Mother, and if he obtains informed consent from the Mother, confirmed in writing, pursuant to Rule 1.7(b)(4). See Rule 1.7, Cmts. [18]-[20].

Part 1215, New York's Written Letter of Engagement Rule, requires that "where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney."

IV. Blind Copying Client on Email Correspondence

New York State Bar Association Committee on Professional Ethics Opinion 1076 (2015)

In Formal Opinion 1076, the New York State Bar Association Committee on Professional Ethics addressed whether a lawyer could blind copy a client on email correspondence with opposing counsel, despite the objection of opposing counsel.

The Committee noted that two opposing lawyers do not have a relationship of confidentiality. If a lawyer receives correspondence from an adverse party's counsel, the lawyer need not obtain consent to forward the communication to her client. The Committee began its analysis with Rule 1.4.

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New York Rule 1.4: Communication

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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The lawyer may have an obligation under Rule 1.4 to communicate correspondence from an adversary to a client. The Committee noted that doing so with a "bcc" to the client was not deceptive under Rule 8.4(c).

The Committee did note, however, that there are good reasons not to cc a client on correspondence to the adversary's lawyer. The client might not want her email address to be disclosed to others. The cc might also be deemed an invitation to opposing counsel to send correspondence to the client. That is, however, doubtful.

The client who was bcc'd might also mistakenly or carelessly hit "reply all" when responding to the email and thereby inadvertently disclose confidential information. *See Charm v. Kohn*, 27 Mass. L. Rep. 421 (Mass. Super. 2010)(bcc'ing client on lawyer's email to adversary "gave rise to foreseeable risk" that client would respond without taking careful note of the list of addressees).

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NY Rule 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes email and other electronically stored information subject to being read or put into readable form.

[3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the

situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer. See Rules 1.2, 1.4.

V. Communication with Person Receiving Limited-Scope Legal Services

ABA Formal Opinion 472 (November 30, 2015) "addresses the obligations of a lawyer under ABA Model Rule of Professional Conduct 4.2, Communication with Person Represented by Counsel, commonly called the "no contact" rule, and ABA Model Rule of Professional Conduct 4.3, Dealing with Unrepresented Person, when communicating with a person who is receiving or has received limited-scope representation under ABA Model Rule of Professional Conduct 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer." The Opinion also makes "recommendations for lawyers providing limited-scope representation."

A. Limited Scope Representation

The Committee observed:

> In a limited-scope representation, the Model Rules in general, and Model Rule 4.2 specifically, must be interpreted accordingly because limited-scope representations do not naturally fit into either the traditional full-matter representation contemplated by Model Rule 4.2 or the wholly pro se representation contemplated by Model Rule 4.3.

ABA Model Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The relevant comments to Rule 1.2(d) state:

> Agreements Limiting Scope of Representation
>
> [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

> [7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.
>
> [8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

The Committee gave an example of a limited-scope representation, which:

> may include assisting a litigant who is appearing before a tribunal pro se, by drafting or reviewing one or more documents to be submitted in the proceeding. "This is a form of 'unbundling' of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter." See ABA Formal Ethics Opinion 07-446 (2007)….
>
> ABA Formal Op. 07-447 (2007) addressed the scope of representation of a client in a collaborative law setting. In that Opinion, the Committee determined that "[A] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." The Committee rejected the argument that courts are deceived by lawyers who "ghostwrite" legal documents for pro se litigants or that such conduct is "dishonest," noting that the conduct does not mislead the court or any party.

The Committee addressed the informed consent required when a limited scope representation is undertaken:

> Informed consent is defined as: "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

> The Colorado Bar Association advised in Formal Ethics Opinion 101 that a lawyer providing limited-scope services to a client should "clearly explain the limitations of the representation, including the types of services which are not being provided and the probable effect of limited representation on the client's rights and interests." The D.C. Bar Legal Ethics Committee advised in its Opinion 330 (2005) that the "client's understanding of the scope of the services" is fundamental to a limited-scope representation. Opinion 330 recommended that lawyers reduce such agreements to writing:
>
> > Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement . . . Particularly in the context of limited-representation agreements, however, a writing clearly explaining what is and is not encompassed within the agreement to provide services will be helpful in ensuring the parties' mutual understanding.

Tracing the history of Rule 1.2(c), the Committee noted:

> the Ethics 2000 Commission recommended adding a formal Comment to Rule 1.2 that a "specification of the scope of representation will normally be a necessary part of the lawyer's written communication of the rate or basis of the lawyer's fee as required by Rule 1.5(b)." However, because the House of Delegates rejected the Commission's parallel proposal to amend Rule 1.5(b) — which would have required written fee agreements that included an explanation of the scope of the representation, the basis or rate of the fee, and the expenses for which the client will be responsible — this proposed Rule 1.2 Comment language was not advanced.
>
> …
>
> although not required by Rule 1.2(c), the Committee nevertheless recommends that when lawyers provide limited-scope representation to a client, they confirm with the client the scope of the representation — including the tasks the lawyer will perform and not perform — in writing that the client can read, understand, and refer to later. This guidance is in accord with Model Rule 1.5(b) which explains:
>
> > The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time

> after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The Committee also gave guidance to lawyers in individual states, noting:

> that some state rules of professional conduct require a written agreement when a lawyer provides limited-scope services. *See, e.g.*, Maryland Lawyers' Rules of Professional Conduct, Rule 1.2(c)(3); Missouri Rule of Professional Conduct 1.2(c); Montana Rule of Professional Conduct 1.2(c)(2); and New Hampshire Rule of Professional Conduct 1.2(c) and 1.2(g). Other states explain that a written agreement is preferred. See Ohio Rule of Professional Conduct 1.2(c) and Tennessee Rule of Professional Conduct 1.2(c). Additionally, some state rules of civil procedure require a limited-scope appearance filing with the court identifying each aspect of the proceeding to which the limited-scope appearance pertains. See, e.g., Illinois Supreme Court Rule 13(c)(6).

See also 22 N.Y.C.R.R. Part 1215 (requiring that New York lawyers reduce fee agreements to writing which includes, among other things, the scope of the representation); New York Rule 1.2(c)("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent *and where necessary notice is provided to the tribunal and/or opposing counsel*.") (emphasis added).

As to the important issue of communications with an adverse party's lawyer, the Committee observed:

> If a lawyer who is providing limited-scope services is contacted by opposing counsel in the matter, the lawyer should identify the issues on which the inquiring lawyer may not communicate directly with the person receiving limited-scope services. A lawyer providing limited-scope legal services to a client generally has no basis to object to communications between the opposing counsel and the client receiving those services on any matter outside the scope of the limited representation.
>
> These issues would best be resolved at the inception of the client-lawyer relationship by the client giving the lawyer providing limited-scope representation informed consent to reveal to opposing counsel what issues should be discussed with counsel and what issues can be discussed with the client directly.

B. Model Rule 4.2, Communication with Person Represented by Counsel: Is there a duty to ask about a limited scope representation?

The Committee noted that a lawyer directly communicating with an individual "will only violate Rule 4.2 if the lawyer knows that the person is represented by another lawyer in the matter to be discussed. 'Knows' is defined by the Model Rules as 'actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.'" ABA Model Rule 1.0(f); *see, e.g.*, *McHugh v. Fitzgerald*, 280 AD2d 771, 772-73 (3d Dep't 2001)("We are not unaware of the New York State Bar Association's opinion concluding that in order to prevent 'willful ignorance' of a party's representation by counsel, attorneys who communicate directly with an adverse party in situations where such party may be represented are advised to inform such party that, if represented by counsel, they should consult with their attorney (see, 1993 Opns NY State Bar Assn Comm on Professional Ethics 607)"); *Okla. Bar Ass'n v. Harper*, 995 P.2d 1143 (Okla. 2000) (lawyer did not violate Rule 4.2 without actual knowledge of the representation. "Ascribing actual knowledge to a lawyer based on the facts is not the same as applying the rule under circumstances where the lawyer should have known.").

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ABA Model Rule 4.3: Dealing With Unrepresented Person

In dealing 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 a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

***

The Committee acknowledged that "[l]awyers confronted with a person who appears to be managing a matter pro se but may be receiving or have received legal assistance, often are left in a quandary." In ABA Formal Ethics Opinion 95-396, the Committee opined:

> It would not, from such a practical point of view, be reasonable to require a lawyer in all circumstances where the lawyer wishes to speak to a third person in the course of his representation of a client first to inquire whether the person is represented by counsel: among other things, such a routine inquiry would unnecessarily complicate perfectly routine fact-finding, and might well unnecessarily obstruct such fact-finding by conveying a suggestion that there was a need for counsel in circumstances where there was none, thus discouraging witnesses from talking.

In Opinion 472, the Committee warned that "while the black letter of Model Rule 4.2 does not include a duty to ask whether a person is represented by counsel, this Committee reiterates the warning of Comment [8] to Rule 4.2 that a lawyer cannot evade the requirement of obtaining the consent of counsel before speaking with a represented person by 'closing eyes to the obvious.'"

A lawyer might be deemed to "know" that an adverse party is represented in a limited scope representation:

> when a lawyer representing a client faces what appears to be a pro se opposing party who has filed a pleading that appears to have been prepared by a lawyer or when a lawyer representing a client in a transaction is negotiating an agreement with what appears to be a pro se person who presents an agreement or a counteroffer that appears to have been prepared by a lawyer.

See generally State Bar of Arizona Op. 05-06 (2005) (filing of documents prepared by lawyer but signed by client receiving limited-scope representation is not misleading because ". . . a court or tribunal can generally determine whether that document was written with a lawyer's help.").

Where the circumstances indicate:

> that a person on the opposing side has received limited-scope legal services, the lawyer [should] begin the communication by asking whether the person is represented by counsel for any portion of the matter so that the lawyer knows whether to proceed under ABA Model Rule 4.2 or 4.3. This may assist a lawyer in avoiding potential disciplinary complaints, motions to disqualify, motions to exclude testimony, and monetary sanctions, all of which could impede a client's matter. It is not a violation of the Model Rules of Professional Conduct for the lawyer to make initial contact with a person to determine whether legal representation, limited or otherwise, exists.

See, e.g., Weeks v. Independent School Dist. No. I-89, 230 F.3d 1201 (10th Cir. 2000) (affirming district court's disqualification of lawyer who interviewed members of control group in violation of Rule 4.2); *see McHugh*, 280 A.D.2d at 773 (reversing order of preclusion).

If a person discloses representation under a limited-scope agreement and does not articulate either:

> 1) that the representation has concluded (as would be the case if the person indicates that yes, a lawyer drafted documents, but is not providing any other representation), or
>
> 2) that the issue to be discussed is clearly outside the scope of the limited-scope representation,

"then the lawyer should contact opposing counsel to determine the issues on which the inquiring lawyer may not communicate directly with the client receiving limited-scope services."

If communication is permitted, the Committee noted:

> When the communication concerns an issue, decision, or action for which the person is represented, the lawyer must comply with Rule 4.2 and communicate with the person's counsel.
>
> The lawyer may communicate directly with the person on aspects of the matter for which there is no representation. For these communications, the lawyer must comply with Rule 4.3. On aspects of the matter for which representation has been completed and the lawyer providing limited-scope services is not expected to reemerge to represent the client, a lawyer may communicate directly with the other person. We note that Rule 1.6 and the confidentiality of communications between a lawyer and the lawyer's client does not end when the limited representation concludes. Therefore, any communication with a person who received limited-scope legal services about an issue for which representation has concluded should not include inquiries about communications between the person and the lawyer providing limited-scope services.
>
> If at any point in the matter the person — or the lawyer providing the limited-scope representation to that person — notifies the communicating lawyer that the scope of the representation was expanded, the communicating lawyer must act in accordance with Rule 4.2 as to any issues, decisions, or actions implicated by the expansion of the scope of services.

See Muriel Siebert & Co., Inc. v. Intuit Inc., 8 N.Y.3d 506 (2007) ("so long as measures are taken to steer clear of privileged or confidential information, adversary counsel may conduct ex parte interviews of an opposing party's former employee").

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New York Rule 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) 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.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance

notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting pro se or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and un-counseled disclosure of information relating to the representation.

[2] Paragraph (a) applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.

[3] Paragraph (a) applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in

a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Reserved.]

[7] In the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former unrepresented constituent. If an individual constituent of the organization is represented in the matter by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rules 1.13, 4.4.

[8] The prohibition on communications with a represented party applies only in circumstances where the lawyer knows that the party is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See Rule 1.0(k) for the definition of "knowledge." Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] A lawyer may not make a communication prohibited by paragraph (a) through the acts of another. See Rule 8.4(a).

Client-to-Client Communications

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented

entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

[12] A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4.

[12A] When a lawyer is proceeding pro se in a matter, or is being represented by his or her own counsel with respect to a matter, the lawyer's direct communications with a counterparty are subject to the no-contact rule, Rule 4.2. Unless authorized by law, the lawyer must not engage in direct communications with a party the lawyer knows to be represented by counsel without either (i) securing the prior consent of the represented party's counsel under Rule 4.2(a), or (ii) providing opposing counsel with reasonable advance notice that such communications will be taking place.

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New York RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

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.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. As to misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(a), Comment [2A].

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

VI. New York State Adopts Rules Governing Multijurisdictional Practice

A. Background of Multijurisdictional Practice Issues

***Birbrower, Montalbano, Condon & Frank v. Superior Court of Santa Clara*, 949 P2d 1 (Cal. 1998)**

A New York law firm represented a California company in an arbitration. The arbitration required lawyers in the firm to travel to California to prepare for the arbitration. These lawyers were admitted in New York, but not California.

When the New York law firm sought to enforce its written fee agreement in California state court, the court held that the fee agreement violated public policy and that the firm had engaged in the unauthorized practice of law. In *Birbrower*, the California Supreme

Court "decline[d] ... to craft an arbitration exception to [the California] prohibition of the unlicensed practice of law in this state." *Birbrower*, 949 P2d at 9. The court held that the unauthorized practice of law in California "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state." A lawyer could be deemed to be engaged in the unauthorized practice of law in California "by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."

The ruling in *Birbrower* was promptly overruled by the California legislature. *See* Cal.Civ.Proc.Code § 1282.4 (providing an arbitration exception to unauthorized practice rules).

B. ABA Model Rule 5.5: Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

Law Firms And Associations

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a

jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that :

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

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Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals

and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rule on Temporary Practice by Foreign Lawyers*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rule for Registration of In-House Counsel*.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., *Model Rule on Practice Pending Admission*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5**.**

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13 states have adopted a MJP Rule virtually identical to ABA Model Rule 5.5. They are: Arkansas, Arizona, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Vermont, Washington, and West Virginia.

34 states have adopted a MJP Rule that is similar to ABA Model Rule 5.5. They are, with certain distinctions noted:

Alabama – Rule 5.5 (b) permits out-of-state lawyers to practice in Alabama on a temporary basis "including transactional, counseling, or other nonlitigation services" related to the lawyer's home-state practice.

Arizona – see below

California – California Court Rule 9.47, entitled "Attorneys practicing law temporarily in California as part of litigation," states that "[f]or an attorney to practice law under this rule, the attorney must:

> (1) Maintain an office in a United States jurisdiction other than California and in which the attorney is licensed to practice law;
>
> (2) Already be retained by a client in the matter for which the attorney is providing legal services in California, except that the attorney may provide legal advice to a potential client, at the potential client's request, to assist the client in deciding whether to retain the attorney;
>
> (3) Indicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed; and
>
> (4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

An attorney who satisfies these requirements may provide services that are part of:

> (1)A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;
>
> (2)A formal legal proceeding that is anticipated but is not yet pending in California and in which the attorney reasonably expects to be authorized to appear;
>
> (3)A formal legal proceeding that is anticipated but is not yet pending in another jurisdiction and in which the attorney reasonably expects to be authorized to appear; or

(4)A formal legal proceeding that is anticipated or pending and in which the attorney's supervisor is authorized to appear or reasonably expects to be authorized to appear.

The attorney whose anticipated authorization to appear in a formal legal proceeding serves as the basis for practice under this rule must seek that authorization promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule.

To engage in the above activities in California, the lawyer cannot be a California resident.

Colorado – Colorado Rule of Civil Procedure 220 does not state any specific exceptions to the general prohibition against unauthorized practice. The Rule provides that if a lawyer is licensed elsewhere and in good standing, she may perform nonlitigation services in Colorado so long as the lawyer is not domiciled in Colorado and does not keep an office in Colorado from which they hold themselves out as practicing Colorado law.

Connecticut – Rule 5.5(c) contains a reciprocity requirement. Rule 5.5 (f) provides:

(f) A lawyer desirous of obtaining the privileges set forth in subsections (c) (3) or (4): (1) shall notify the statewide bar counsel as to each separate matter prior to any such representation in Connecticut, (2) shall notify the statewide bar counsel upon termination of each such representation in Connecticut, and (3) shall pay such fees as may be prescribed by the Judicial Branch.

Delaware – Rule 5.5(d) states:

A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

District of Columbia – Rule 49 of the Rules of the District of Columbia Court of Appeals is a very detailed Rule which, among other things, allows lawyers licensed elsewhere to provide legal services in DC "on an incidental and temporary basis."

Florida

Georgia

Idaho

Kansas

Kentucky

Louisiana

Maine

Michigan

Minnesota

Missouri

Nevada

New Jersey

New Mexico

New York

North Carolina

North Dakota

Ohio

Oklahoma

Oregon

Pennsylvania

South Carolina

North Carolina

Tennessee

Utah

Virginia

Wisconsin

Wyoming

Texas has created a committee to study the adoption of MJP rules.

The ABA's Commission on Multijurisdictional Practice has a helpful website containing information on the adoption of MJP rules in various jurisdictions:

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

***

In ABA Formal Opinion 469 (2014), the Committee concluded that:

> A prosecutor who provides official letterhead of the prosecutor's office to a debt collection company for use by that company to create a letter purporting to come from the prosecutor's office that implicitly or explicitly threatens prosecution, when no lawyer from the prosecutor's office reviews the case file to determine whether a crime has been committed and prosecution is warranted or reviews the letter to ensure it complies with the Rules of Professional Conduct, violates Model Rules 8.4(c) and 5.5(a).

The opinion also observes:

> The participation by a prosecutor in the conduct described in this opinion, wherein the prosecutor supplies official letterhead to a debt collection company and allows the debt collection company to use it to send threatening letters to alleged debtors without any review by the prosecutor or staff lawyers to determine whether a crime was committed and prosecution is warranted, violates Rule 5.5(a) by aiding and abetting the unauthorized practice of law.

C. ABA Model Rule 8.5: Disciplinary Authority; Choice of Law

Maintaining The Integrity Of The Profession

Rule 8.5 Disciplinary Authority; Choice Of Law

a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

***

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct

as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

D. Temporary Practice of Law in New York-Part 523 of Court of Appeals Rules

The unauthorized practice of law is a crime in New York. *See* Judiciary Law §485-a (making certain violations of Judiciary Law §§ 478, 474, 486 and 495 a class E felony); Judiciary Law § 495 (No corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law § 478 (unlawful for any natural person (i) to practice or appear as an attorney-at-law

in a court of record in this state, (ii) to furnish attorneys or to render legal services, or (iii) to hold himself out in such manner as to convey the impression that he or she either alone or together with any other persons maintains a law office); § 484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

Effective December 30, 2015, 22 N.Y.C.R.R. section 523 (Section 523), permits temporary practice of law in New York by out-of-state and foreign attorneys for the first time. The Court of Appeals website states:

> The Court of Appeals has amended its rules to add a new Part 523 pertaining to the temporary practice of law in New York by out-of-state and foreign attorneys. The amendment sets forth the circumstances under which an attorney not admitted in New York may provide temporary legal services in the State. An attorney providing such temporary legal services may not establish an office or other systematic presence in the State or hold out to the public or otherwise represent that the attorney is admitted to practice here. Additionally, an attorney practicing pursuant to Part 523 is subject to the New York Rules of Professional Conduct and the disciplinary authority of this State.
>
> The Court also has amended its Rules for the Registration of In-house Counsel (Part 522). Under the newly amended rules, registration is now available to a foreign attorney who is a member in good standing of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority.
>
> The rule amendments are effective December 30, 2015. A copy of the Court's orders amending the rules is below.
>
> ***

Rules of the Court of Appeals for the Temporary Practice of Law in New York

§ 523.1 General regulation as to lawyers admitted in another jurisdiction

A lawyer who is not admitted to practice in this State shall not:

> (a) except as authorized by other rules or law, establish an office or other systematic and continuous presence in this State for the practice of law; or
>
> (b) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this State.

§ 523.2 Scope of temporary practice

(a) A lawyer who is not admitted to practice in this State may provide legal services on a temporary basis in this State provided the following requirements are met.

(1) The lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority; and

(2) the lawyer is in good standing in every jurisdiction where admitted or authorized to practice; and

(3) the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in this State, and such temporary legal services:

(i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or

(iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraph (3)(ii) or (3)(iii) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice.

***

Rule 1.5(g) of the New York Rules of Professional Conduct, which addresses a lawyers' fee split with a lawyer outside her firm, states:

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, *each lawyer assumes joint responsibility for the representation* (emphasis added);
>
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

In *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir. 1966), a California lawyer who came to New York to perform services in a federal lawsuit did not engage in the unauthorized practice of law even though the case settled before the lawyer could be admitted pro hac vice. The court noted that "it cannot seriously be doubted" that such admission would have been granted if requested. The Second Circuit stressed that the attorney would have been admitted pro hac vice had a proper motion been made, as the attorney was a member in good standing of the California bar and had never conducted himself in an "unlawyerlylike" fashion. *Id.* at 168. The Second Circuit found that where the client had exercised his right to counsel of his choice, he could not then escape payment of compensation for services rendered.

Can a lawyer not admitted in New York State participate in an arbitration venued in New York State?

In *Williamson v. John D. Quinn Construction Corp.* , 537 F.Supp. 613 (S.D.N.Y. 1982), the court held that a New Jersey attorney, who was not admitted in New York and participated in an arbitration in New York, did not commit unauthorized practice of law under New York law and could recover for the services rendered in the arbitration. The court noted that "[a]n arbitration tribunal is not a court of record; its rules of evidence and procedures differ from those of courts of record; its fact finding process is not equivalent to judicial fact finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys."

The *Williamson* court relied on *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966), where the Second Circuit held that an attorney not admitted to practice law in New York could recover fees for legal services even

though he had not been admitted pro hac vice because "there is not the slightest reason to suppose that if (a motion had been made it) would have been denied." The *Williamson* court concluded that "[t]his observation applies with even greater force with respect to an arbitration proceeding which is of such an informal nature." *See also, Prudential Equity Group, LLC v. Ajamie*, 538 F.Supp.2d 605 (S.D.N.Y. 2008) (in a fee dispute between attorneys, court concludes that Texas lawyer who was not admitted in New York did not engage in unauthorized practice of law by participating in New York arbitration).

In *Nisha, LLC v. TriBuilt Const. Group, LLC,* 2012 Ark. 130 (2012), the court distinquished *Williamson* and noted that "we are hard pressed to say that services of a legal nature are not being provided on behalf of the party in arbitration [and]… hold that a nonlawyer's representation of a corporation in arbitration proceedings constitutes the unauthorized practice of law."

Are Lawyers Providing Legal Services in New York Pursuant to Part 523 Required to Adhere to Letter of Engagement Rule (Part 1215) and Attorney-Client Fee Dispute Resolution Program (Part 137)?

22 N.Y.C.R.R. section 1215.2, entitled "Exceptions," provides that the Letter of Engagement Rule does not apply to "(d) *representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York,* or where no material portion of the services are to be rendered in New York." (emphasis added).

22 N.Y.C.R.R. section 137.1, entitled "Application," provides that "(a)[t]his Part shall apply where representation has commenced on or after January 1, 2002, *to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter*." (emphasis added). The section also provides that "(b) [t]his Part shall not apply to …(7) *disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York,* or where no material portion of the services was rendered in New York." (emphasis added).

Reciprocity

There is no reciprocity requirement in section 523.

Malpractice

What standard will apply to lawyers who practice here temporarily? *See* NY PJI 2:152, jury charge for legal malpractice.

***

(b) A person licensed as a legal consultant pursuant to 22 N.Y.C.R.R. Part 521, or registered as in-house counsel pursuant to 22 N.Y.C.R.R. Part 522, may not practice pursuant to this Part.

§ 523.3 Disciplinary authority

A lawyer who practices law temporarily in this State pursuant to this Part shall be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State in connection with such temporary practice to the same extent as if the lawyer were admitted or authorized to practice in the State. A grievance committee may report complaints and evidence of a disciplinary violation against a lawyer practicing temporarily pursuant to this Part to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law.

§ 523.4 Annual report

On or before the first of September of each year, the Office of Court Administration shall file an annual report with the Chief Judge reviewing the implementation of this rule and making such recommendations as it deems appropriate.

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In a March 10, 2016 piece titled Connors "No License Required: Temporary Practice in New York State," the new Part 523 is examined in further detail.

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E. Licensing of In-House Counsel in New York

22 N.Y.C.R.R. Part 522: Rules of the Court of Appeals for the Registration of In-House Counsel; effective December 30, 2015

22 N.Y.C.R.R. 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

(b) In its discretion, the Appellate Division may register as in-house counsel an applicant who:

> (1)(i) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (ii) is a member in good standing of a recognized legal profession in a foreign non-United States

jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority;

(2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction, within or outside the United States, which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; and

(3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

22 N.Y.C.R.R. 522.2 Proof required

An applicant under this Part shall file with the Clerk of the Appellate Division of the department in which the applicant resides, is employed or intends to be employed as in-house counsel:

(a) a certificate of good standing from each jurisdiction in which the applicant is licensed to practice law;

(b) a letter from each such jurisdiction's grievance committee, or other body entertaining complaints against attorneys, certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof;

(c) an affidavit certifying that the applicant:

(1) performs or will perform legal services in this State solely and exclusively as provided in section 522.4; and

(2) agrees to be subject to the disciplinary authority of this State and to comply with the New York Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration will be issued; and

(d) an affidavit or affirmation signed by an officer, director, or general counsel of the applicant's employer, on behalf of said employer, attesting that the applicant is or will be employed as an attorney for the employer and that the nature of the employment conforms to the requirements of this Part.

(e) Documents in languages other than English shall be submitted with a certified English translation.

22 N.Y.C.R.R. 522.3 Compliance

An attorney registered as in-house counsel under this Part shall:

(a) remain an active member in good standing in at least one state or territory of the United States or in the District of Columbia or a foreign jurisdiction as described in section 522.1(b)(1);

(b) promptly notify the appropriate Appellate Division department of a disposition made in a disciplinary proceeding in another jurisdiction;

(c) register with the Office of Court Administration and comply with the appropriate biennial registration requirements; and

(d) except as specifically limited herein, abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State.

22 N.Y.C.R.R. 522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (section 1200.0 Rule 1.0[w] of this Title) or engage in any activity for which pro hac vice admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

22 N.Y.C.R.R. 522.5 Termination of registration

(a) Registration as in-house counsel under this Part shall terminate when:

(1) the attorney ceases to be an active member in another jurisdiction, as required in section 522.1(b)(2) of this Part; or

(2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to

be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in this State solely and exclusively as permitted in section 522.4 of this Part. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) of this Part and shall file an amended statement within said 30-day period with the Office of Court Administration.

(b) In the event that the employment of an attorney registered under this Part ceases with no subsequent employment by a successor employer, the attorney, within 30 days thereof, shall file with the Appellate Division department where registered a statement to such effect, stating the date that employment ceased. Noncompliance with this provision shall result in the automatic termination of the attorney's registration under this Part.

(c) Noncompliance with the provisions of section 468-a of the Judiciary Law and the rules promulgated thereunder, insofar as pertinent, shall, 30 days following the date set forth therein for compliance, result in the termination of the attorney's rights under this Part.

22 N.Y.C.R.R. 522.6 Subsequent admission on motion

Where a person registered under this Part subsequently seeks to obtain admission without examination under section 520.10 of this Title, the provision of legal services under this Part shall not be deemed to be the practice of law for the purpose of meeting the requirements of section 520.10(a)(2)(i) of this Title.

22 N.Y.C.R.R. 522.7 Saving Clause and Noncompliance

(a) An attorney employed as in-house counsel, as that term is defined in section 522.1(a), shall file such an application in accordance with section 522.2 within 30 days of the commencement of such employment;

(b) Failure to comply with the provisions of this Part shall be deemed professional misconduct, provided, however, that the Appellate Division may upon application of the attorney grant an extension upon good cause shown.

22 N.Y.C.R.R. 522.8 Pro bono legal services

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 N.Y.C.R.R.

1200.0) rule 6.1(b) and other comparable definitions of pro bono legal services in New York under the following terms and conditions. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 N.Y.C.R.R. 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; and

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part.

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Part 522 of the Rules of the Court of Appeals for the Registration of in-House Counsel allows certain foreign in-house lawyers to register to practice in New York State.

Although 46 U.S. jurisdictions have adopted a form of Model Rule 5.5, the template for Part 523, only 11 have expanded it to lawyers from other countries.

Recent amendments to Part 522 allow registration as in-house counsel not just by lawyers admitted to practice in other states and the District of Columbia, but also to those who are "member[s] in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority." 22 N.Y.C.R.R. §522.1(b)(ii). This change was consistent with a recommendation by the Conference of Chief Justices, as well as with 15 other U.S. jurisdictions that have similarly expansive in-house counsel registration rules. See NYSBA Comments on Proposed Changes to the Rules of the Court

of Appeals, Nov. 9, 2015 (NYSBA Comments) at 15. The language used was the same as that used to define those who can apply to be foreign legal consultants in New York. *Id.*

Nevertheless, the change was controversial, because at least some commentators felt the new rule did not go far enough. As the NYSBA Comments noted [at 16], "in-house counsel in many foreign jurisdictions, particularly in Europe, are not admitted to the bar and would apparently not qualify under this definition." The NYSBA proposed giving the Appellate Divisions discretion to allow these in-house lawyers to register, but this suggestion was rejected. Id. The ABA is also considering whether to amend its model in-house registration rule to address this issue.

VII. Judiciary Law Section 470

Court of Appeals Holds That Judiciary Law Section 470 Requires Nonresident New York Attorneys to Maintain Physical Office in State and Second Circuit Declares Statute Constitutional

CPLR 2101(d) provides that "[e]ach paper served or filed shall be indorsed with the name, address and telephone number of the attorney for the party serving or filing the paper." In *Schoenefeld v. State*, 25 N.Y.3d 22, 6 N.Y.S.3d 221, 29 N.E.3d 230 (2015), an attorney residing in Princeton, New Jersey commenced an action in federal district court alleging, among other things, that Judiciary Law section 470 was unconstitutional on its face and as applied to nonresident attorneys. The federal district court declared the statute unconstitutional and, on appeal to the Second Circuit, that court determined that the constitutionality of section 470 was dependent upon the interpretation of its law office requirement. Therefore, it certified a question to the New York Court of Appeals requesting the Court to delineate the minimum requirements necessary to satisfy the statute.

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

The case then returned to the Second Circuit and on April 22, 2016, that court held that section 470 "does not violate the Privileges and Immunities Clause because it was not enacted for the protectionist purpose of favoring New York residents in their ability to practice law." *Schoenefeld v. State*, 821 F.3d 273 (2d Cir. 2016). Rather, the court concluded that the statute was passed "to ensure that nonresident members of the New York bar could practice in the state by providing a means, i.e., a New York office, for them to establish a physical presence in the state on a par with that of resident attorneys, thereby eliminating a service-of-process concern."

The case is discussed in further detail in Siegel, New York Practice § 202 (Connors ed., July 2016 Supplement) and in Connors, "The Office: Judiciary Law §470 Meets Temporary Practice Under Part 523," where we addressed the interplay between the new Part 523 and Judiciary Law section 470's requirement that nonresident lawyers admitted to practice in New York maintain an office within the State.

The United States Supreme Court denied certiorari on April 17, 2017. *Schoenefeld v. State*, --- S.Ct. ----, 2017 WL 1366736 (2017).

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing §470. The working group will be composed of state bar members who live in and outside New York.
>
> ***
>
> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
>
> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

In *Arrowhead Capital Finance, Ltd. v. Cheyne Specialty Finance Fund L.P.*, 2016 WL 3949875 (Sup. Ct., New York County 2016), the court noted that "[n]umerous case[s] in the First Department have held, before the recent *Schoenfeld* rulings, that a court should strike a pleading, without prejudice, where it is filed by an attorney who fails to maintain a local office, as required by § 470. *Salt Aire Trading LLC v Sidley Austin Brown & Wood, LLP*, 93 AD3d 452, 453 (1st Dept 2012); *Empire Healthchoice Assur., Inc. v Lester*, 81 AD3d 570, 571 (1st Dept 2011); *Kinder Morgan*, 51 AD3d 580 (1st Dept 2008); *Neal v Energy Transp. Group*, 296 AD2d 339 (2002); *cf Reem Contr. v Altschul & Altschul*, 117 AD3d 583, 584 (1st Dept 2014) (finding no § 470 violation where firm leased and used New York office with telephone)."

The *Arrowhead* court concluded that:

> Receiving mail and documents is insufficient to constitute maintenance of an office. *Schoenfeld*, supra. This court holds that hanging a sign coupled with receipt of deliveries would not satisfy the statute. Furthermore, there is evidence that [plaintiff's attorney] criticized defendant for serving documents at 240 Madison and directed [defendant's attorney] to use the PA Office address, an address he has consistently used in litigation.

The court dismissed the complaint without prejudice.

VIII. A LAWYER'S ETHICAL OBLIGATIONS TO RETURN EX-CLIENT'S PROPERTY

New York Rule 1.15: PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS

****

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

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New York RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

****

Comment

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, under paragraph (e) a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

***

A. ABA Informal Ethics Opinion 1376 (1977)

In ABA Informal Ethics Opinion 1376, the Committee addressed a lawyer's ethical duty to deliver files to a former client. The opinion interpreted Rule 9-102(B)(4) of the ABA Model Code of Professional Responsibility, which read:

> A lawyer shall: [P]romptly pay or deliver to the client as requested by the client the . . . properties in the possession of the lawyer which the client is entitled to receive.

The Committee concluded:

> The attorney clearly must return all of the materials supplied by the client to the attorney. . . . He must also deliver the 'end product' . . . On the other hand, in the Committee's view, the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purpose in working on the client's problem.

B. ABA Formal Opinion 471 (2015)

Ethical Obligations of Lawyer to Surrender Papers and Property to which Former Client is Entitled

In ABA Formal Opinion 471 the Committee addressed the ethical duties of a lawyer pursuant to the ABA Model Rules of Professional Conduct when responding to a former client's request for papers and property in the lawyer's possession that are related to the representation. The opinion did not, however, address a current client's property rights or other legal rights to these materials.

The inquiry noted that a lawyer represented a municipality for 10 years pursuant to a contract for legal services. The contract term expired. After publishing a request for proposals, the municipality chose a different lawyer to provide the municipality with future legal services. The municipality requested that the lawyer provide the municipality's new counsel with all files – open and closed. The lawyer has been paid in full for all of the work and inquired as to what materials must be provided to the former client.

Because the lawyer was paid in full, the opinion did not address retaining liens. *See Kaplan v. Reuss*, 113 A.D.2d 184, 495 N.Y.S.2d 404 (2d Dep't 1985)(discussing the distinction between a ''retaining'' lien, which attaches to any papers or property of the client in the lawyer's possession, and a ''charging'' lien, which applies to the proceeds of a given action); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 86-1520 (1986) (discussing lawyer retaining liens).

The opinion also cautioned that individual states might have their own particular rules governing the matter. For example, in *Matter of Sage Realty Corp.*, 91 NY2d 30 (1997), the Court held that a client has an expansive right to access the contents

of her file upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding. Barring a substantial showing by a lawyer of good cause to refuse client access, a former client should be entitled to copy and inspect work product materials, "for the creation of which they paid during the course of the firm's representation." The court did note several limited exceptions to the above rule, including documents which might violate a duty of nondisclosure owed to a third party, or otherwise imposed by law, and "firm documents intended for internal law office review and use." *See Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus*, 824 S.W.2d 92 (Mo. 1992) (client has a conditional right of access to a lawyer's notes, research, and drafts if the client needs the notes, research, and drafts to understand completed documents).

Wisconsin Professional Ethics Opinion E-00-3 concludes that hardware and software that a law firm uses to store documents is the property of the law firm, even though they may be used to store documents belonging to clients. When the client requests documents be provided on a computer disk which the lawyer has maintained electronically, the lawyer should provide those documents in the requested format, so long as it is reasonably practicable to do so. The lawyer providing the documents in electronic format must be careful to ensure that the confidences and secrets of other clients are not revealed. *See also* North Dakota Ethics Committee Op. No. 01-03 (client's file that is maintained in electronic format should be provided in same format if requested).

The opinion noted that the ABA Model Rules "do not directly address the length of time a lawyer must preserve client files after the close of the representation. Many jurisdictions provide guidance on this issue through court rule or ethics opinions." *See* Rule 1.15 in various jurisdictions.

The opinion notes that lawyers have been disciplined for failing to surrender papers and property to which the client is entitled. In *In re Brussow*, 286 P.3d 1246 (Utah 2012), the attorney was publicly sanctioned for refusing to turn over the file to a former client. He maintained that the client owed him money for the cost of deposition transcripts. The Utah Supreme Court noted that Utah's Rule 1.16 "differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses." *Id.* at 1252. Comment 9 to Utah Rule 1.16 states that "a lawyer shall provide ... the client's file to the client notwithstanding

any other law, including attorney lien laws." The attorney was also admonished for failing to account for fees paid in advance in violation of Rule 1.15(d).

In *In re Thai*, 987 A.2d 428 (D.C. Ct. of Appeals 2009), the attorney delayed returning a client's file and "actively obstructed the efforts of his former client and the successor attorney to obtain the file." *Id.* at 430. The court observed that:

> On its face, the comparatively short delay [five days] appears in stark contrast to some of our prior cases where sanctions followed delays of months or years in responding to a client request. *See, e.g.*, *In re Arneja*, 790 A.2d 552, 558 (D.C.2002) (imposing sanctions for attorney's year-and-a-half delay in delivering client's file. The sanction was a suspension from the practice of law for one year.); *In re Landesberg*, 518 A.2d 96, 97, 102 (D.C.1986) (imposing suspension on attorney for holding client file for two years after conceding he had no right to retain it. The sanction was a suspension from the practice of law for 60 days and restitution.); *In re Russell*, 424 A.2d 1087, 1088 (D.C.1980) (imposing suspension of six months for delay of several years following client's request for file). In this case though, the five-day delay represented a significant proportion of the thirty days respondent's client had to appeal his deportation order.
>
> The conclusion that the delay was insignificant also overlooks the fact that, during those five days, respondent repeatedly denied requests for the file and actively obstructed the efforts of his former client and the successor attorney to obtain the file. We have previously stated that "a client should not have to ask twice" for his file. *In re Landesberg*, 518 A.2d at 102. We have also said the client is owed an "immediate return" of his file "no matter how meager." *In re Russell*, 424 A.2d at 1088; *see also In re Hager*, 812 A.2d 904 (D.C.2002) (agreeing that Rule 1.16(d) "unambiguously requires an attorney to surrender a client's file upon termination of the representation" and quoting *In re Bernstein*, 707 A.2d 371, 375 (D.C.1998)). Under the circumstances here, it cannot be said that respondent took "timely steps" to do anything but further hinder his former client from securing alternative representation in this pressing matter.

Thai was suspended from practice for 60 days for violating Rule 1.16.

Rule 1.15(a) states that "[o]ther property" that comes into a lawyer's hands "shall be identified as such and appropriately safeguarded." The Committee observed that:

> Although not specifically defined in the Rule, "other property" may be fairly understood to include, for example, (a) tangible personal property, (b) items with intrinsic value or that affect valuable rights, such as securities, negotiable instruments, wills, or deeds and (c) any documents provided to a lawyer by a client.

In a footnote, the Committee concluded that the obligation to safeguard property of the client "exists with respect to all materials whether in paper or electronic form. *See* ABAMODEL RULE 1.0(n) defining writing as 'a tangible or electronic record of a communication . . . including audio or video recording, and electronic communications.' *See also* N.H. Bar Ass'n Advisory Op. 2005-06/3 (2005)."

"As an initial matter," the Committee opined that "in the absence of other law or a valid dispute under Rule 1.15(e), the lawyer must return all property of the municipality that the municipality provided in connection with the representation. *See* ABA Informal Ethics Opinion 1376 (1977). This would necessarily include original documents provided by the client."

Entire File Approach

The Committee acknowledged that:

> The Model Rules do not define the "papers and property to which the client is entitled," that the lawyer must surrender pursuant to Rule 1.16(d). Jurisdictions vary in their interpretation of this obligation. A majority of jurisdictions follow what is referred to as the "entire file" approach. In those jurisdictions, at the termination of a representation, a lawyer must surrender papers and property related to the representation in the lawyer's possession unless the lawyer establishes that a specific exception applies and that certain papers or property may be properly withheld. Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person; materials containing a lawyer's assessment of the client; materials containing information, which, if released, could endanger the health, safety, or welfare of the client or others; and documents reflecting only internal firm communications and assignments. The entire file approach assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.

See, e.g., Iowa Sup. Ct. Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812 (2007) (failure to return entire file to client violates disciplinary rules); *Matter of Sage Realty Corp.*, 91 NY2d 30 (1997); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); Ariz. Formal Op. 04-01 (2004); Colo. Bar Ass'n. Formal Op. 104 (1999); D.C. Bar Op. 333 (2005); Or. Bar Ass'n Formal Op. 2005-125 (2005); Va. State Bar Op. 1399 (1990).

End-Product Approach

The Committee also noted that:

> Other jurisdictions follow variations of an end-product approach. These variations distinguish between documents that are the "end-product" of a lawyer's services, which must be surrendered and other material that may have led to the creation of that "end-product," which need not be automatically surrendered. Under these variations of the end-product approach, the lawyer must surrender: correspondence by the lawyer for the benefit of the client; investigative reports and other discovery for which the client has paid; and pleadings and other papers filed with a tribunal. The client is also entitled to copies of contracts, wills, corporate records, and other similar documents prepared by the lawyer for the client. These items are generally considered the lawyer's "end product."

See, e.g., Ala. Ethics Comm. Advisory Op. 1986-02 (1986); Ill. State Bar Ass'n Advisory Op. 94-13 (1995); Kan. Bar Ass'n Op. 92-5 (1992); Miss. Bar Formal Op. 144 (1988); Neb. Lawyer's Advisory Comm. Advisory Op. 12-09 (2012); Utah State Bar Ass'n Advisory Op. 06-02 (2006).

Discussing materials that the client is not entitled to, the Committee stated:

> Administrative materials related to the representation, such as memoranda concerning potential conflicts of interest, the client's creditworthiness, time and expense records, or personnel matters, are not considered materials to which the client is entitled under the end-product approach. Additionally, the lawyer's personal notes, drafts of legal instruments or documents to be filed with a tribunal, other internal memoranda, and legal research are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client under the end product approach.

See Ohio Bd. Comm'rs on Grievances and Discipline Advisory Op. 2010-2 (2010); Colo. Bar Ass'n Formal Op. 104 (1999); *Saroff v. Cohen*, No. E2008-00612-COA-R3-CV, 2009 WL 482498 , 2009 BL 39364 (Tenn. Ct. App. Feb. 25, 2009) (Invoices for legal work performed are a law firm's business records, not prepared for the client's benefit, and need not be turned over upon client request. Proper procedure for securing this information when client is suing firm is to make a discovery request.); Colo. Bar Ass'n Formal Op. 104 (1999); Alaska Bar Ass'n Ethics Comm. Op. 2003-3 (2003); D.C. Bar Op. 333 (2005); *Womack Newspapers Inc. v. Town of Kitty Hawk*, 639 S.E.2d 96, 104 (N.C. 2007); Miss. Bar Formal Op. 144 (1988); Utah State Bar Ass'n Advisory Op. 06-02 (2006); Ill. State Bar Ass'n Advisory Op. 94-13 (1995); San Diego Cnty. Bar Ass'n Op. 1984-3 (1984).

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Association of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-1 (2010)

"Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions."

The opinion breaks documents into three categories:

> Category 1: documents with intrinsic value or those that directly affect property rights such as wills, deeds, or negotiable instruments. *See* D.C. Bar Op. 283 (1998).
>
> Category 2: documents that a lawyer knows or should know may still be necessary or useful to the client, perhaps in the assertion of a defense in a matter for which the applicable limitations period has not expired. *See* N.Y. State 460 (1977).
>
> Category 3: documents that need not be returned to the client because they "would furnish no useful purpose in serving the client's present needs for legal advice," *Sage Realty*, 91 N.Y.2d at 36, or are "intended for internal law office review and use." *Id.* at 37.

The opinion contains a helpful sample engagement letter that addresses the disposal of files at the end of the matter.

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In ABA Formal Opinion 471 the Committee affirmed the position taken in Informal Ethics Opinion 1376 "as it states the minimum required by the Rules." The Committee acknowledged, however:

> there may be circumstances in individual representations that require the lawyer to provide additional materials related to the representation. For example, when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose.

The Committee concluded that, "on the facts presented, at a minimum, Rule 1.16(d) requires that the lawyer must surrender to the municipality:

- any materials provided to the lawyer by the municipality;
- legal documents filed with a tribunal - or those completed, ready to be filed, but not yet filed;
- executed instruments like contracts;
- orders or other records of a tribunal;
- correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy;
- discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits;
- legal opinions issued at the request of the municipality; and
- third party assessments, evaluations, or records paid for by the municipality

The following papers generally need not be returned:

- drafts or mark-ups of documents to be filed with a tribunal;
- drafts of legal instruments;
- internal legal memoranda and research materials;

- internal conflict checks;
- personal notes;
- hourly billing statements;
- firm assignments;
- notes regarding an ethics consultation;
- a general assessment of the municipality or the municipality's matter; and
- documents that might reveal the confidences of other clients.

IX. Attorney-Client Privilege; Sign Language Interpreters

In Opinion 1053 (2015) of the New York State Bar Association's Committee on Professional Ethics, the Committee opined that:

> The scope and application of the attorney-client privilege is a question of law beyond the jurisdiction of this Committee, but we note that courts have repeatedly held that the privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. If use of a sign-language interpreter does not waive the privilege, and use of such an interpreter is necessary for effective communication between the lawyer and client, it is ethically required.

The Committee noted:

> courts have repeatedly held that the attorney-client privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. *See United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) ("the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client"); *People v. Osorio*, 75 N.Y.2d 80 (1989) (communications made to counsel through an agent of either attorney or client to facilitate communication generally held privileged); *Stroh v. General Motors Corp.*, 213 A.D.2d 267 (1st Dept. 1995) (presence of daughter of elderly client during conversations with attorney does not vitiate privilege); see generally American Law Institute, Restatement of the Law Governing Lawyers § 70; see also N.Y. Judiciary Law, art. 12 (providing for the hiring of court interpreters and the appointment of interpreters for deaf

parties or witnesses). Nor does the use of a sign language interpreter necessarily violate Rule 1.6's general requirement that a lawyer safeguard a client's confidential information. See Rule 5.3 Comment [2] ("[nonlawyer] assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.")

In order to maintain the privilege, the lawyer or law firm should ensure that the interpreter understands the requirement to maintain confidentiality. See Rule 5.3 (A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate) and Comment [2] thereto ("A law firm must ensure that such assistants [both employees and independent contractors that act for the lawyer in rendition of professional services] are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client . . . ."). Rule 5.3 notes that the lawyer may take into account factors such as the experience of the person whose work is being supervised. For example, the lawyer may need to take fewer precautions with a professional interpreter who is subject to a code of conduct than with a family member or friend of the client, who may not understand the requirements for retaining the privilege.

Finally, the Committee stressed that:

> if a lawyer needs a sign language interpreter to communicate effectively with a client, then, unless the lawyer utilizes such an interpreter, the lawyer would be unable to provide "competent representation" to the client, as required by Rule 1.1. As noted by Comment [5] to Rule 1.1, competent handling of a particular matter includes, inter alia, "inquiry into and analysis of the factual . . . elements of a problem." With many hearing-impaired clients, a lawyer could not effectively engage in the required inquiry if he failed to avail himself of a sign language interpreter. N.Y. City 1995-12. Accord, Utah Opinion 96-06; California Opinion 1984-77.

X. Attorney-Client Privilege; Common Interest Doctrine; Protecting Confidential Information

A. New York Rules of Professional Conduct: RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

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

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B. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc..*, ___ N.Y.3d ____, 2016 WL 3188989 (N.Y. June 9, 2016)

Court of Appeals Refuses to Expand Common Interest Doctrine of Attorney-Client Privilege

One of the more important tasks for lawyers conducting disclosure is asserting the attorney client privilege in response to a CPLR 3120 document demand. CPLR 3101(b) provides absolute immunity from disclosure for any information protected by the privilege. This objection, and any other relevant one, must be timely asserted in what is generally referred to as a privilege log. *See* CPLR 3122(b); Siegel, New York Practice §362. The privilege log provides bare bones

information regarding the document that is withheld so the party seeking it can at least mount an argument that the privilege does not apply.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc..*, ___ N.Y.3d ____, 2016 WL 3188989 (N.Y. June 9, 2016), the discovery dispute centered on whether defendant Bank of America was required to produce approximately 400 documents that were withheld on attorney-client privilege grounds. The documents contained communications between Bank of America and codefendant Countrywide that transpired while they were contemplating a merger. The privilege log claimed that the documents were immune from disclosure by the attorney-client privilege because they pertained to various legal issues the two companies needed to resolve together to successfully complete the merger closing. Plaintiff made a motion to compel production of the documents under CPLR 3124, arguing that Bank of America waived the privilege by sharing the information with Countrywide before the merger.

The Court of Appeals noted that the social utility of the attorney client privilege "is in '[o]bvious tension' with the policy of this State favoring liberal discovery" and, therefore, "must be narrowly construed." *Id.* The Court quoted from its prior opinion in *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 593–594 (1989), which provides a procedural blueprint for attorneys asserting the privilege in litigation. The Court again held:

> The party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,' that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived.

In response to plaintiff's argument of waiver, Bank of America contended that it communicated with counsel for Countrywide under the common interest doctrine of the attorney-client privilege. That doctrine generally allows two or more clients who have retained separate counsel to represent them "to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." The common interest doctrine has

been applied by New York courts for over twenty years, but only in situations when the attorney-client communications took place while the clients faced "pending or reasonably anticipated litigation."

In *Ambac*, the documents withheld from disclosure contained communications shared in anticipation of a merger. While Bank of America and Countrywide certainly had a common legal interest in successfully completing the merger, they did not reasonably anticipate litigation at the time of the communications. The Court rejected Bank of America's argument that the common interest doctrine should be expanded to include communications made in furtherance of "any common legal interest" and adhered to the litigation requirement. Therefore, the documents will need to be disclosed.

The Court's decision in *Ambac* highlights the importance of preserving privileged information at every step of the representation. This obligation requires intimate knowledge of both the elements of the privilege and the disclosure rules in Article 31 of the CPLR.

C. Amendments to Rule 1.6 Effective January 1, 2017

Rule 1.6(c): "A lawyer *make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).*"(amendment in italics).

Comments 16 and 17 to Rule 1.6 now provide:

> **Duty to Preserve Confidentiality**
>
> [16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure

of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

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XI. Attorney-Client Privilege; In House Ethics Counsel

Consultations with In-House Ethics Counsel

1) ABA Formal Ethics Opinion 08-453-IN-HOUSE CONSULTING ON ETHICAL ISSUES

In American Bar Association Formal Ethics Opinion 08-453 (2008), the ABA examines several ethical issues that may/will arise when a lawyer consults with another lawyer in the same firm, commonly designated "in-house ethics counsel," about the ethical implications of the consulting lawyer's conduct pertaining to his or her counseling of a client of the law firm.

Establishing an in-house ethics counsel is one alternative to conform with the Model Rules general contemplation that some structure or process exist within a law firm for resolution of questions about legal ethics, so as to comply with Rule 5.1(a), which makes law firm partners responsible for reasonably ensuring that "all lawyers in the firm conform to the Rules of Professional Conduct." *See* Comment 3 to Rule 5.1("[s]ome firms ... have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee."). "The precise nature of the measures a firm must implement under Rule 5.1 necessarily will depend on the size of the firm, the experience of its members, and the nature and frequency of the ethical problems it encounters." ABA Op.08-543.

A) The Duty of Confidentiality

As a threshold matter, Rule 1.6(a) generally prohibits disclosure of "information relating to the representation of a client," except where impliedly authorized or expressly permitted by the client. The opinion notes that the consent of the client is not required before a lawyer consults with in-house ethics counsel because disclosure of a client's confidential information within a firm is impliedly authorized by a client who comes to a law firm for legal assistance. In short, the client normally hires the entire firm and expects that the firm will utilize all available resources to benefit him or her. Comment 5 to Rule 1.6 also provides that lawyers in a firm may disclose to each other information relating to a client of the firm, unless otherwise instructed by the client. "Accordingly, unless a client has expressly instructed that information be confined to specific lawyers within the firm, the lawyer handling the matter does not violate the duty of confidentiality by consulting within the firm about the client's matter." ABA Op.08-543.

Moreover, Rule 1.6(b)(4) expressly permits a lawyer to disclose confidential client information to a lawyer who is not a partner or other employee of the firm, if the purpose is to obtain advice about the lawyer's compliance with the Rules of Professional Conduct. The Ethics Opinion notes that "Rule 1.6(b)(4) also facilitates the compliance by a firm's partners, managers, and supervising lawyers with their Rule 5.1 obligation to ensure that all lawyers in the firm conform to the rules of professional conduct."

B) Disclosure To Client

Just as consent of the client is not required before a lawyer consults with in-house ethics counsel, the client normally need not be informed of the consultation after the fact. Rule 1.4 generally requires consultation with the client only about the means by which the client's objectives should be accomplished. Thus, there is normally no need to explain that, after consultation with an in-house ethics counsel, a certain course of conduct was chosen over other possible courses, unless the ethics counsel concludes, for example, that the firm lawyer's assistance in the client's proposed course of action will constitute a violation of the Rules of Professional Conduct. In that situation (or one akin to it), Rule 1.4 would require that the client be consulted. "For example, if the conclusion of the ethics counsel is that the firm lawyer's assistance in a client's proposed course of action will constitute a violation of the rules of professional responsibility, Rule 1.4(a)(5) requires the firm to consult with the client about the legal limits of the firm's assistance, and Rule 1.4(b) requires an explanation to the client of the possible consequences of the proposed action, including the need of the firm to withdraw so as not to violate its own obligations." ABA Op.08-543; *see also* Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

C) Conflict of Interest

In examining whether in-house ethics consultations will give rise to a per se conflict between the firm and its client, the ABA found that the consultation does not normally give rise to such a per se conflict of interest because "[a] lawyer's effort to conform her conduct to applicable ethical standards is not an interest that will materially limit the lawyer's ability to represent the client" in contravention of

Rule 1.7(a)(2); "rather[, it] is an inherent part of that judgment." *See* New York State Bar Ass'n. Comm. on Prof'l Eth. Op. 789 (2005). As an example, the opinion notes:

> A lawyer's effort to conform her conduct to applicable ethical standards is not an interest that will materially limit the lawyer's ability to represent the client. On the contrary, "it is inherent in that representation and a required part of the work of carrying out the representation. It is, in other words, not an interest that 'affects' the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment." For example, a lawyer who is asked by a client to undertake a course of action that the lawyer fears might be criminal or fraudulent would be well-advised to consult with in-house ethics counsel on the propriety of following the client's direction. Although the lawyer has an interest in avoiding conduct that will violate her own ethical duties, the consultation also serves the legitimate purpose of enabling the lawyer to advise a firm client about the legality and wisdom of the proposed course of action and about other available options. In situations such as this, where the lawyer is seeking prophylactic advice to assist in her representation of the client, there is no significant risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's interest in avoiding ethical misconduct.

It should be noted that where the principal goal of the ethics consultation is to protect the interest of the consulting lawyer or law firm from the consequences of a firm lawyer's misconduct, however, a personal interest conflict may arise under Rule 1.7(a)(2). Under such circumstances, the representation may continue only if the client gives informed consent. *See* Rule 1.7(b) (allowing certain conflicts to be waived after "each affected client gives informed consent, confirmed in writing"); ABA Op.08-543 ("In the absence of the client's informed consent confirmed in writing, a lawyer may not represent the client if there is significant risk that the representation will be materially limited by a conflicting interest of the lawyer. The Rule ensures that the lawyer's pursuit or protection of her own interests will not materially interfere with the representation of the client."). As an example, the opinion notes:

> if the consulting lawyer has engaged in misconduct in the course of the representation, it may be difficult or impossible for that lawyer (or

anyone in the lawyer's firm) to give the client sufficiently detached advice as the matter progresses. In that circumstance, there is a significant risk that the representation of that client will be materially limited by the interests of the consulting lawyer and every lawyer in the firm. Unless the client waives disqualification of the individual lawyer, all the lawyers in the firm are disqualified from continuing the representation, pursuant to Rule 1.10(a). Moreover, that consent may be sought only when the firm reasonably believes that one or more lawyers in the firm can provide competent and diligent representation to the client notwithstanding the consulting lawyer's conflict.

The Opinion noted that "misconduct" includes a violation of the applicable rules of professional conduct, but that the above analysis may also apply to negligence or other breaches of duty to a client. However, "they are outside the scope of this opinion."

D) Who Is Ethics Counsel's Client?

An interesting and important issue arises as to the identification of the in-house ethics counsel's client. Because a lawyer employed or retained by an organization represents the organization rather than one of its constituents, *see* Rule 1.13(a), an ethics counsel ordinarily represents the law firm and not any of the individual attorney's in the firm. *See also* Rule 1.13(g) (recognizing that an entity's lawyer also may represent constituents of the entity, provided the dual role does not present a concurrent conflict of interest in violation of Rule 1.7).

To avoid the consequences that usually accompany conflicts of interest (i.e., disqualification, etc.), it would be prudent for the law firm to make clear to its lawyers that the ethics counsel represents the firm and not any individual attorney, as the reasonable expectations of the consulting attorney would surely be considered in any determination as to the existence of an attorney-client relationship between the ethics counsel and a consulting attorney. *See* Rule 1.13(f) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); Rule 4.3 ("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.").

As to dual representation, the Opinion notes that:

> Under certain circumstances, the ethics counsel may agree (or may lead the consulting lawyer reasonably to believe) that the ethics counsel will represent the consulting lawyer individually. Such dual representation may be appropriate where the interests of the consulting lawyer and the firm are reasonably believed not to be in conflict. For instance, if the ethics counsel concludes that the consulting lawyer has not engaged in any misconduct, joint representation usually would be appropriate. To the extent that the ethics counsel's representation is limited to the firm, ethics counsel must be careful to explain to any individual firm member with whom she is dealing that only the firm is a client, particularly if she reasonably believes the interests of the firm and the individual member are or may be adverse. These explanations are even more important when the ethics counsel believes the consulting lawyer may have engaged in misconduct and may, nevertheless, expect assistance from the firm.

E) Disclosing Information

Once a lawyer consults with the in-house ethics counsel, the ethics counsel *may* be obligated to disclose the misconduct of the consulting lawyer to a higher authority within the firm, unless he or she reasonably believes the situation can be corrected without harm to the firm through counseling or other means. Under Rule 1.13(b), an ethics counsel must take appropriate action to protect the firm when he or she has knowledge that the consulting attorney is "engaged in action . . . that is a violation of a legal obligation to the organization, or any violation of law that might be imputed to the organization, and that is likely to result in substantial injury to the organization." The Opinion also notes that:

> Unless the lawyer believes it is not necessary in the best interest of the organization to do so, she must refer the matter to higher authority in the organization, 'including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization.' If that referral is not effective to prevent a violation of law that the lawyer reasonably believes will result in substantial injury to the organization, [under Rule 1.13(c)] the lawyer may reveal the information outside the organization, whether or not Rule 1.6 otherwise permits such disclosure."

ABA Op.08-543(quoting Rule 1.13(b)). The opinion notes, therefore, that a "law firm's ethics counsel thus could choose to reveal information to disciplinary

authorities or to others if the firm management fails or refuses to correct clearly illegal conduct that reasonably might be attributed to others in the firm and would cause substantial injury to the firm."

Although each ethical violation will present a sui generis inquiry, any measure taken by an ethics counsel should, "'to the extent practicable,' minimize the risk of revealing information relating to the representation to persons outside the firm." *See* Rule 1.13, Comment 4.

F) Reporting the Consulting Lawyer's Misconduct to Disciplinary Authorities

Rule 8.3(a) mandates disclosure to the appropriate disciplinary authority when a lawyer knows that another lawyer has committed a violation of the rules "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The ABA has noted that "reporting under this rule is required only when the conduct in question is egregious and 'of a type that a self-regulating profession must vigorously endeavor to prevent.'" ABA Op.08-543(quoting Rule 8.3, cmt. 3).

Reporting misconduct in this context to disciplinary counsel will not be required if the ethics counsel's information is "information relating to the representation of her client" or clients. *See* Rules 1.6(a), 8.3(c). Ethics counsel should, however, seek appropriate client (law firm) consent to report where disclosure is not likely to harm the law firm. *See* Rule 8.3, Comment 2 ("a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests."). Note that such knowledge might also be based upon the confidential information of the firm's client, which is also protected by Rule 1.6(a).

Importantly, "[t]he reporting exception for the ethics counsel does not apply to lawyers involved in the law firm's management or to other lawyers in the firm[,]" as there is no attorney-client relationship between them and the consulting lawyer. Lawyers involved in the law firm's management and the other lawyers in the firm are not excused from reporting known ethical misconduct to the disciplinary authority unless their knowledge is based on confidential information of a firm client.

G) Are Communications with In House Ethics Counsel Privileged Against the Client?

The New York State Bar Association's Committee on Professional Ethics noted in Opinion 789 (2005) that:

> Three recent cases - VersusLaw, Inc. v. Stoel Rives, LLP, 111 P.3d 866, 878, 127 Wash. App. 309, 332 (2005), Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002), and Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002) - suggest that an in-house legal counsel's advice to law firms may not be subject to claims of attorney-client privilege as against their then-clients based on the courts' view that the firm's consultation with its in-house lawyers introduced a conflict between the law firm and its clients. The question of the applicability of the privilege is an evidentiary issue for the courts.

In *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 2013 WL 3389006 (Mass. 2013), the court concluded that confidential communications between law firm attorneys and a law firm's in-house counsel concerning a malpractice claim asserted by a current client of the firm are protected from disclosure to the client by the attorney-client privilege provided:

> (1) the law firm has designated an attorney or attorneys within the firm to represent the firm as in-house counsel,
>
> (2) the in-house counsel has not performed any work on the client matter at issue or a substantially related matter,
>
> (3) the time spent by the attorneys in these communications with in-house counsel is not billed to a client, and
>
> (4) the communications are made in confidence and kept confidential.

The next day, July 11, 2013, the Supreme Court of Georgia reached a similar conclusion in *St. Simon's Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 2013 WL 3475328 (Ga. 2013). The court ruled that the attorney client privilege attaches where:

> (1) there is an attorney-client relationship between the firm and its in house ethics counsel ("so long as an actual attorney-client relationship has been formed, with the firm clearly established as the client of the in-house counsel, the privilege may attach to their communications so long as the other requisites of the privilege are met);

(2) the communications in question relate to the matters on which legal advice was sought ("In the law firm in-house counsel context, these principles require that the communications be made between the in-house counsel in its capacity as firm counsel and the firm's attorneys in their capacity as representatives of the client, the law firm, regarding matters within the scope of the attorneys' employment with the firm");

(3) the communications have been maintained in confidence ("As applied within law firms, this principle means that, in order to maintain privileged status, intra-firm communications regarding the client's claims against the firm should generally involve only in-house counsel, firm management, firm attorneys, and other firm personnel with knowledge about the representation that is the basis for the client's claims against the firm"); and

(4) no exceptions to privilege are applicable ("Thus, to the extent there is an allegation that in-house counsel has been employed by firm attorneys in an effort to defraud rather than merely defend against a client, the privilege may be waived").

In Stock v. Schnader Harrison Segal & Lewis LLP, _ A.D.3d _, 2016 WL 3556655 (1st Dep't 2016) the First Department was faced with a similar issue:

> The primary issue on this appeal is whether attorneys who have sought the advice of their law firm's in-house general counsel on their ethical obligations in representing a firm client may successfully invoke attorney-client privilege to resist the client's demand for the disclosure of communications seeking or giving such advice. We hold that such communications are not subject to disclosure to the client under the fiduciary exception to the attorney-client privilege (recognized in *Hoopes v. Carota*, 142 A.D.2d 906 [3d Dept 1988], *affd* 74 N.Y.2d 716 [1989]) because, for purposes of the in-firm consultation on the ethical issue, the attorneys seeking the general counsel's advice, as well as the firm itself, were the general counsel's " 'real clients'."…. Further, we decline to adopt the "current client exception," under which a number of courts of other jurisdictions (*see e.g. Bank Brussels Lambert v. Credit Lyonnais [Suisse] S.A.*, 220 F Supp 2d 283 [SD N.Y.2002]) have held a former client entitled to disclosure by a law firm of any in-firm communications relating to the client that took place while the firm was representing that client. Because we also find unavailing the former client's remaining arguments for compelling

the law firm and one of its attorneys to disclose the in-firm attorney-client communications in question, we reverse the order appealed from and deny the motion to compel.

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XII. Advocate-Witness Rule

New York Rule 3.7: Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

****

In *People v. Berroa*, 99 N.Y.2d 134, 140 (2002), the Court observed that an attorney "should not continue to serve as an advocate when it is obvious that the lawyer will be called as a witness on behalf of the client." In *Berroa*, the Court held that a stipulation by defense counsel, which was read to the jury, violated the advocate-witness rule and deprived defendant of his right to conflict-free counsel where the stipulation transformed the defendant's lawyer into an adverse witness and pitted the lawyer's credibility against other witnesses.

In *People v. Ortiz*, 26 N.Y.3d 430 (2015), defendant testified on his own behalf. On cross-examination, the People attempted to impeach defendant's testimony that Valenzuela came after him with a kitchen knife with the following statement made by his counsel at arraignment:

> "Your Honor, my understanding of the events for [defendant] is vastly different [from the prosecution's]. I believe [defendant] was at this apartment looking to possibly rent a room there. An argument began between him and the landlord, and at which point the complaining witness came after him with *a razor blade*, which explains why it was recovered, and that it belongs to the people who lived there" (emphasis added).

The People sought to introduce this statement to show that defendant previously told his attorney that Valenzuela came after him with a razor blade, not a kitchen knife, as he testified. Defense counsel vigorously objected, arguing that she misspoke at arraignment and that introducing the statement would force her to become a witness against her own client.

The court denied counsel's requests but offered to have another attorney question her about the statement or to introduce a stipulation as to what counsel would say if asked about the statement. After renewing her objection and being overruled a second time, defense counsel agreed to the stipulation, which the court read aloud to the jury. It provided that if counsel were to testify, she would state that her remarks at arraignment were incorrect and that defendant did not tell her Valenzuela had come after him with a razor blade, but rather, defendant told her Valenzuela came after him with a kitchen knife. Following deliberations, the jury convicted defendant of burglary in the second degree.

The Court of Appeals, noting the similarities with *Berroa*, observed:

> Defendant's counsel was placed in a similarly untenable position in this case when the People introduced counsel's statement from arraignment. Anyone familiar with arraignment practices in New York City criminal courts understands the hurried nature of those proceedings and the likelihood, as occurred here, that defense counsel may appear on behalf of 30 defendants in one night. It is no surprise then that she mistakenly stated that defendant told her Valenzuela came after him with a razor blade instead of a knife. The prosecutor sought to use this statement to attack defendant's credibility, and in doing so, caused defendant's advocate to become his adversary. Indeed, defendant's credibility was attacked by the one person in the courtroom whose job was to advocate for it.

> The situation went from bad to worse when it became clear that the only way for defense counsel to rehabilitate her client's credibility was to impugn her own, moments before she would argue for her client's innocence in summation. Any way you look at it, defense counsel had no choice but to withdraw. In these unusual circumstances, we hold that the trial court should have granted counsel's request to withdraw or declared a mistrial.

The Court distinguished its prior holdings in *People v. Brown*, 98 N.Y.2d 226, 746 N.Y.S.2d 422, 774 N.E.2d 186 (2002) and *People v. Rivera*, 58 A.D.2d 147, 396 N.Y.S.2d 26 (1st Dept.1977), *aff'd* 45 N.Y.2d 989, 413 N.Y.S.2d 146, 385 N.E.2d 1073 (1978) because:

> The statements admitted in those cases were made by defendants' former attorneys and therefore did not involve the issue of whether a defendant's current counsel must withdraw when her statements are inconsistent with the defendants' testimony at trial. Unlike defense counsel in this case, the defendants' trial attorneys in Brown and Rivera were not set up to attack their clients' credibility or, by stipulation, their own.

XIII. *Arons* Authorizations: Communications with an Adverse Party's Treating Physician

A. *Muzio v. Anthony R. Napolitano, M.D., P.C.*, 82 A.D.3d 947, 919 N.Y.S.2d 64 (2d Dep't 2011).

In this medical malpractice action, the court noted that the defendants conducted an interview of the plaintiff's treating physician, a nonparty, without obtaining a valid authorization pursuant to the Health Insurance Portability and Accountability Act of 1996. Although plaintiff placed her medical condition in controversy, "the defendants were required to obtain an authorization expressly permitting an interview with her treating physician prior to conducting the interview."

The Second Department concluded that "[s]ince any information obtained by the defendants from the interview was 'improperly ... obtained' (CPLR 3103[c]), the Supreme Court should have granted that branch of the plaintiff's pretrial motion which was pursuant to CPLR 3103(c) for a protective order precluding the defendants from calling her treating physician to testify at trial as an expert witness for the defense, and from introducing, at trial, the information obtained from the interview."

A lawyer who conducts an ex parte interview of a treating physician and does not adhere to the guidelines outlined by the Court of Appeals in *Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007) risks being disqualified from the matter. See, e.g., *Campolongo v. Campolongo*, 2 A.D.3d 476, 768 N.Y.S.2d 498 (2d Dep't 2003) (holding that supreme court, finding a violation of DR 7-104 [currently Rule 4.2], providently exercised its discretion in disqualifying the defendant's attorney and precluding the use of the psychiatrist's report and testimony obtained in violation of the rule). The matter is discussed in futher detail in the 2009 McKinney's Supplementary Practice Commentaries to CPLR 3121.

B. In *Miller v. Kingston Diagnostic Center*, 33 Misc.3d 496, 929 N.Y.S.2d 668 (Sup. Ct., Ulster Co. 2011)

Plaintiff's counsel sent all defendants *Arons* authorizations, but also sent a letter to a treating physician which stated, in pertinent part, as follows:

> Enclosed please find copy of the "Aron's" authorization, executed by Harold G. Miller, on behalf of the Estate of Dorothy Miller which the court has directed we provide to defense counsel. This authorization permits the defense attorney an opportunity to speak with you regarding the care and treatment you rendered to Ms. Miller, relative to the incident in question.
>
> The Courts are clear that it is up to the treating physician to make a decision as to if, when and where to meet. The Court also clearly permits a doctor to charge whatever is reasonable and necessary for such meeting to compensate the doctor for his lost time.
>
> As the attorney representing the plaintiff, I am requesting the right to be present when you speak with defense counsel.
>
> I assure you and defense counsel that I will not speak, comment or in any way interfere with your conversation.
>
> Ultimately, the decision to meet with a defendant's attorney, with or without the presence of the plaintiff's counsel, is completely up to you. You are not under any obligation to meet with the defense attorney or to allow me to be present if you decide to meet with the defense attorney.
>
> By copy of this letter to defense counsel, I am putting them on notice of my request that I will await notification, if any, from your office should you determine to permit me to be present if you decide to speak with defense counsel."

The court concluded that "the letter from plaintiff's counsel is not threatening or intimidating. Such letter notes that the treating physician's participation in such interview is voluntary and requests the right to be present, noting, however, that such presence by plaintiff's counsel is not required." The court emphasized that the letter "was made on notice to defendants' counsel and such letter requested no further communication unless such physician was willing to permit plaintiff's counsel to be present at the interview." Therefore, distinguishing prior caselaw in the area, the court concluded that the letter did not interfere with defense counsel's right to ask for an ex parte interview with plaintiff's treating physician.

C. *Charlap v Khan*, 41 Misc. 3d 1070 (Sup. Ct., Erie County 2013).

Plaintiff commenced a medical malpractice action based on treatment rendered to plaintiff's decedent. Defendants requested HIPAA-compliant *Arons* "speaking authorizations" permitting their attorneys to speak with decedent's non-party health care providers. Defendants uncovered correspondence from the plaintiff addressed to one of decedent's treating physicians stating:

> I am writing to you regarding a lawsuit that has been commenced on behalf of my late wife, Lisa Charlap, which is listed above. The attorneys for the defendants in this lawsuit have indicated that they intend to contact you, and will attempt to meet with you to discuss the medical treatment you have provided, and perhaps other issues that relate to this lawsuit.
>
> Although I am required to provide these defense lawyers with a written authorization permitting them to contact you, the law does not obligate you in any way to meet with them or talk with them. That decision is entirely yours. If you decide to meet with their lawyers, I would ask that you let me know, because I would like the opportunity to be present or to have my attorneys present.

Defendants argued that they had a right to conduct private interviews with decedent's treating physicians and that the letter from plaintiff interfered with that right. Therefore, defendants requested that the court "fashion a remedy by ordering plaintiff to send correspondence to decedent's non-party health care providers retracting his request to be present during defense counsel's private interviews of those health care providers."

The *Charlap* court noted that:

> The only limitation placed upon private interviews of an adverse party's treating physicians was rooted by the *Arons* court in the ethical constraints

> placed upon attorneys under the then Code of Professional Responsibility ("Code"). According to *Arons*, an attorney who approaches a non-party physician must reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited to the medical condition at issue in the litigation (9 N.Y.3d at 410, 850 N.Y.S.2d 345, 880 N.E.2d 831).

The *Charlap* court also discussed *Kleeschulte v. Blair*, 2008 WL 2636952 (Sup. Ct., Ulster Co. 2008), where defendants demanded and received HIPAA-compliant medical authorizations to interview plaintiff's nonparty treating physicians. After defense counsel scheduled the interview, plaintiff's counsel arrived at the proposed time and informed defense counsel of her intention to sit in on the interview. The defendants' interview did not go forward. Defendants subsequently learned that plaintiff's counsel forwarded a letter to the treating physicians, reading in pertinent part as follows:

> As if physicians are not busy enough, New York State's highest Court has recently determined that physicians should take time out of their day and speak with attorneys who are defending cases. My office is obligated to supply them with an authorization permitting them an opportunity to speak with you about the care and treatment that you gave to your patient and my client. Please be advised that you are not required by law to have this conversation or meeting. Simply, I must supply the defense counsel with authorizations permitting them the opportunity. The choice is yours. However, as an advocate for my client and your patient, I am respectfully requesting that if you do decide to have a conversation or interview with defense counsel, that you please notify me of the date and time and I will make myself available to sit in as well. My office is obligated to supply them with an authorization permitting them an opportunity to speak with you about the care and treatment that you gave to your patient and my client. Please be advised that you are not required by law to have this conversation or meeting. Simply, I must supply the defense counsel with authorizations permitting them the opportunity. The choice is yours. However, as an advocate for my client and your patient, I am respectfully requesting that if you do decide to have a conversation or interview with defense counsel, that you please notify me of the date and time and I will make myself available to sit in as well.
>
> If this causes undue hardship, kindly advise.

In *Kleeschulte*, the Ulster County supreme court agreed with defendants, who argued "that they are entitled to privately interview plaintiff's treating physicians, without interference from plaintiff's counsel." *Id.* at *2. The court concluded that through her "letter to the treating physicians and her appearance at the appointment, plaintiff's counsel ... unduly interfered with defendants' rights under *Arons*." *Id.* The court also allowed the defendants "a further opportunity to conduct private interviews with the treating physicians free of any interference from plaintiff's counsel." *Id.* The *Kleeschulte* court refused defendants' request to impose sanctions, but did award "reimbursement in the amount of $350.00 for the disrupted... appointment, together with attorney fees on the motion in the amount of $1,000.00 payable by plaintiff's counsel." *Id.*

The *Charlap* court noted that it:

> respectfully disagrees with the language of the[] decisions which suggests that *Arons* created a "right" to private interviews with treating physicians. The Arons decision does not hold that there is a "right" to the interviews, but only to the execution and delivery of the HIPAA-compliant "speaking authorizations."… Because the non-party witness controls whether the informal interview will occur and under what circumstances it will be conducted, any "right" to the interview would be unenforceable and therefore non-existent under law….
>
> The question is not whether *Arons* created a "right" to private interviews but whether attorneys "may" ethically do so and under what constraints. The Court of Appeals' answer is that an attorney "may" conduct such interviews, just as they "may" conduct many other forms of "informal discovery," provided the attorney complies with the Rules with respect to treating physicians (at a minimum). An attorney must reveal the attorney's identity and interest, make clear the interview is voluntary, and limit the interview to the medical condition at issue. The court's direction in this regard is consistent with DR7–104, which has been essentially carried over into Rule 4.3….
>
> The specific portions of the Rules which may serve as boundaries restricting the conduct of attorneys when communicating with plaintiffs' treating physicians include Rules 3.3 (Conduct Before a Tribunal), 3.4 (Fairness to Opposing Party and *1082 Counsel), 4.1 (Truthfulness in Statements to Others), 4.3 (Communicating with Unrepresented Persons) and 8.4 (Misconduct). Rule 3.3 requires a lawyer representing a client before a tribunal to remediate fraudulent conduct related to the proceedings. Comment (12) to

> Rule 3.3(b) defines such conduct as including "bribery, intimidating or otherwise unlawfully communicating with a witness ...." Rule 3.4 prohibits lawyers from suppressing evidence which the lawyer or client has a legal obligation to reveal, and prohibits a lawyer from advising or causing a person "to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein." Rule 4.1 mandates that a lawyer not "knowingly make a false statement of fact or law to a third person." Rule 8.4(d) precludes a lawyer from engaging in conduct "that is prejudicial to the administration of justice."
>
> Rule 4.3 is the most relevant to the pending motions because the letter from plaintiff was sent to a presumably unrepresented non-party treating physician. It provides that a lawyer shall not state or imply to an unrepresented person that the lawyer is disinterested, and the lawyer must act to correct any misunderstanding in this regard. Rule 8.4(a) also is directly applicable here because, at oral argument, plaintiff's counsel admitted that his law firm wrote the letter for plaintiff. Rule 8.4(a) prohibits a lawyer from engaging in unprofessional conduct through the acts of another or by knowingly inducing another to do so.

The *Charlap* court concluded that the letter sent by plaintiff's counsel did "not cross the boundaries set by the Rules." The letter did not advise the nonparty doctor to do anything improper, and did not express a preference that the witness not meet with the adversary. Nonetheless, the court concluded that this would be permissible under New York City Bar Association Opinion 2009–5, which it deemed "highly persuasive." The court viewed the letter as, "at most, …a request to be present during an interview, a request which may or may not be honored by the witness."

The Court denied the defendants' motions, but declined to opine "as to whether the letter may be used for credibility purposes during cross examination of the plaintiff."

XIV. Ethics Issues in Social Media and Electronic Disclosure

A. NYCLA Ethics Opinion 745 (2013)

In Formal Opinion 745, the New York County Lawyers Ethics Committee concluded that attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas

including Rule 3.1("Non-Meritorious Claims and Contentions"), 3.3 ("Conduct Before a Tribunal"), and 3.4 ("Fairness to Opposing Party and Counsel").

The opinion noted that:

> The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them.

The opinion observes that "[i]t is now common for attorneys and their investigators to seek to scour litigants' social media pages for information and photographs" and that "[d]emands for authorizations for access to password-protected portions of an opposing litigant's social media sites are becoming routine."

The Committee opined that:

> There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client's social media pages, requiring adverse counsel to request access through formal discovery channels.

Furthermore, an attorney "may advise clients as to what should or should not be posted on public and/or private pages." Finally, "[p]rovided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed."

There are issues of substantive law in this realm, also noted in the opinion, but these are beyond the jurisdiction of an ethics committee. For example, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015) (Court of Appeals essentially adopted the standards set forth by the First Department in its *VOOM* decision); *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012); 2012-13 Supplementary Practice Commentaries, CPLR 3126, C3126:8A ("Sanction for Spoliation of Evidence"). The ethics opinion also notes that "a client must answer truthfully (subject to the rules of privilege or other

evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject." *See* Rule 3.3(a) (3); 22 N.Y.C.R.R. Part 130 ("Costs and Sanctions").

Formal Opinion 745 states "we note that an attorney's obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients' position emanating from the clients' use of social media."

Comment 8 to New York Rule 1.1 ("Competence") now states:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

See North Carolina Bar Association: Advising A Civil Litigation Client About Social Media (July, 2015)(agreeing with New Hampshire Bar Association, N. H. Bar Ass'n Op. 2012-13/05, which concluded that "counsel has a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation.").

B. Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (June 9, 2015).

These Guidelines are available at: http://www.nysba.org/socialmediaguidelines/ (see pp. 15–22, citing NYCLA Op. 745). Guideline No. 5.A, entitled "Removing Existing Social Media Information," states:

> A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal

> hold obligations. Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

Guideline No. 5.B, entitled "Adding New Social Media Content," states:

> A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not "direct or facilitate the client's publishing of false or misleading information that may be relevant to a claim."

Guideline No. 5.C, entitled "False Social Media Statements," provides:

> A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.

C. The Ethical Implications of Attorney Profiles on LinkedIn

1) New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 (2015)

In Formal Opinion 748 (2015), the New York County Lawyers Association Professional Ethics Committee observed that "LinkedIn, the business-oriented social networking service, has grown in popularity in recent years, and is now commonly used by lawyers… Lawyers may use the site in several ways, including to communicate with acquaintances, to locate someone with a particular skill or background—such as a law school classmate who practices in a certain jurisdiction for assistance on a matter—or to keep up-to-date on colleagues' professional activities and job changes."

The current version of LinkedIn allows:

> users and their connections to list certain skills, interests, and accomplishments, creating a profile similar to a resume or law firm biography. Users can list their own experience, education, skills, and interests, including descriptions of their practice areas and prior matters. Other users may also "endorse" a lawyer for certain skills—such as litigation

> or matrimonial law—as well as write a recommendation as to the user's professional skills.

The opinion addressed three ethical issues arising from an attorney's use of LinkedIn profiles:

> 1) whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct;
>
> 2) whether an attorney may accept endorsements and recommendations from others on LinkedIn;
>
> 3) what information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct

1) Whether a LinkedIn Profile is considered "Attorney Advertising" under the New York Rules of Professional Conduct?

Under New York's ethics rules, an "advertisement" is defined in Rule 1.0(a) as:

> [A]ny public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

The comments to the rules make clear that "[n]ot all communications made by lawyers about the lawyer or the law firm's services are advertising" and the advertising rules do not encompass communications with current clients or former clients germane to the client's earlier representation. Rule 7.1, Comment 6. Similarly, communications to "other lawyers . . . are excluded from the special rules governing lawyer advertising even if their purpose is the retention of the lawyer or law firm." *Id.*, Comment 7.

Applying the above Rules, the Committee concluded that:

> a LinkedIn profile that contains only biographical information, such as a lawyer's education and work history, does not constitute an attorney advertisement. An attorney with certain experience such as a Supreme Court clerkship or government service may attract clients simply because the experience is impressive, or knowledge gained during that position may be useful for a particular matter. As the comments to the New York Rules of

> Professional Conduct make clear, however, not all communications, including communications that may have the ultimate purpose of attracting clients, constitute attorney advertising. Thus, the Committee concludes that a LinkedIn profile containing only one's education and a list of one's current and past employment falls within this exclusion and does not constitute attorney advertising.

2) Whether an attorney may accept endorsements and recommendations from others on LinkedIn?

The Committee noted that:

> additional information that LinkedIn allows users to provide beyond one's education and work history, however, implicates more complicated ethical considerations. First, do LinkedIn fields such as "Skills" and "Endorsements" constitute a claim that the attorney is a specialist, which is ethically permissible only where the attorney has certain certifications set forth in RPC 7.4? Second, even if certain statements do not constitute a claim that the attorney is a specialist, do such statements nonetheless constitute attorney advertising, which may require the disclaimers set forth in RPC 7.1?

In Formal Opinion 972 (2013) of the New York State Bar Association, the question before the Committee was whether an individual lawyer or law firm could describe the kinds of services they provide under the LinkedIn section labeled "Specialties."

New York's Rule 7.4(a) allows lawyers and law firms to make general statements about their areas of practice, but a "lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law." Rule 7.4(c) provides an exception and "allows a lawyer to state the fact of certification as a specialist, along with a mandated disclaimer, if the lawyer is certified as a specialist in a particular area" approved by the ABA or appropriate authority. *See* ABA Model Rule 7.4(d) ("A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless: (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and (2) the name of the certifying organization is clearly identified in the communication.").

The Committee opined that by listing areas of practice under a heading of "Specialties," a lawyer or law firm makes a claim that the lawyer or law firm "is a specialist or specializes in a particular field of law." Thus, proper certification would be required as provided in Rule 7.4(c). *See also Hayes v. Grievance Comm. of the Eighth Jud. Dist.*, 672 F. 3d 158 (2d Cir. 2012) (striking down as unconstitutional portions of New York Rule 7.4(c)'s disclaimers including the language that "certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law"). If, however, "a lawyer has been certified as a specialist in a particular area of law or law practice by an organization or authority as provided in Rule 7.4(c), then the lawyer may so state if the lawyer complies with that Rule's disclaimer provisions."

The NYSBA opinion did not address whether the lawyer or law firm could, consistent with Rule 7.4(a), list practice areas under other headings in LinkedIn, such as "Products & Services" or "Skills and Expertise." In Formal Opinion 748, the New York County Lawyers Association Professional Ethics Committee concluded that:

> With respect to skills or practice areas on lawyers' profiles under a heading, such as "Experience" or "Skills," this Committee is of the opinion that such information does not constitute a claim to be a specialist under Rule 7.4. The rule contemplates advertising regarding an attorney's practice areas, noting that an attorney may "publicly identify one or more areas of law in which the lawyer or law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c)." RPC 7.4(a). This provision contemplates the distinction between claims that an attorney has certain experience or skills and an attorney's claim to be a "specialist" under Rule 7.4. Categorizing one's practice areas or experience under a heading such as "Skills" or "Experience" therefore, does not run afoul of RPC 7.4, provided that the word "specialist" is not used or endorsed by the attorney, directly or indirectly. Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists.

LinkedIn allows others to include endorsements and recommendations on an attorney's profile, which raises additional ethical considerations. "While these endorsements and recommendations originate from other users, they nonetheless appear on the attorney's LinkedIn profile." The Committee concluded that

> because LinkedIn gives users control over the entire content of their profiles, including 'Endorsements' and 'Recommendations' by other users (by allowing an attorney to accept or reject an endorsement or recommendation), we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals. To that end, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to Rule 7.1.

The Committee provided certain examples:

> if a distant acquaintance endorses a matrimonial lawyer for international transactional law, and the attorney has no actual experience in that area, the attorney should remove the endorsement from his or her profile within a reasonable period of time, once the attorney becomes aware of the inaccurate posting. If a colleague or former client, however, endorses that attorney for matrimonial law, a field in which the attorney has actual experience, the endorsement would not be considered misleading.

3) What information attorneys should include (and exclude) from their LinkedIn profiles to ensure compliance with the New York Rules of Professional Conduct?

If an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the Opinion concludes that the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1. While not opining on the requirements for all potential content on LinkedIn, the Committee concluded that:

> If an attorney's LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words "AttorneyAdvertising" on the lawyer's LinkedIn profile. See RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer's services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the attorney

should also include the disclaimer "Prior results do not guarantee a similar outcome." See RPC 7.1(d) and (e). Because the rules contemplate "testimonials or endorsements," attorneys who allow "Endorsements" from other users and "Recommendations" to appear on one's profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one's skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement "characterizing the quality of the lawyer's [] services" under Rule 7.1(d).

2) New York City Bar Association Formal Opinion Number 2015-7 (2015)

In Opinion 2017-7, the New York City Bar Association Opined that:

> An attorney's individual LinkedIn profile or other content constitutes attorney advertising only if it meets all five of the following criteria: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. Given the numerous reasons that lawyers use LinkedIn, it should not be presumed that an attorney who posts information about herself on LinkedIn necessarily does so for the primary purpose of attracting paying clients. For example, including a list of "Skills," a description of one's practice areas, or displaying ""Endorsements" or "Recommendations," without more, does not constitute attorney advertising.If an attorney's individual LinkedIn profile or other content meets the definition of attorney advertising, the attorney must comply with the requirements of Rules 7.1, 7.4 and 7.5, including, but not limited to: (1) labeling the LinkedIn content "Attorney Advertising"; (2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and (5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising. Before disseminating any advertisements, whether on social media or otherwise, the attorney should ensure that those advertisements comply with all requirements set forth in Article 7 of the New York Rules.

The New York City Bar expressed significant disagreement with NYCLA Opinion 748:

> Given LinkedIn's many possible uses, there should be clear evidence that a lawyer's primary purpose is to attract paying clients before concluding that her LinkedIn profile constitutes an "advertisement." In this regard, we differ sharply from Opinion 748 issued by the Professional Ethics Committee of the New York County Lawyer's Association ("NYCLA"), which concluded that "if an attorney chooses to include information such as practice areas, skills, endorsements, or recommendations, the attorney must treat his or her LinkedIn profile as attorney advertising and include appropriate disclaimers pursuant to Rule 7.1." NYCLA Ethics Op. 748 (2015) (emphasis added). This conclusion focuses exclusively on the content of a LinkedIn profile, and ignores the other factors that must be considered in determining whether a communication is an ""advertisement," such as the primary purpose of the communication and the intended audience. Including a list of "Skills" or a description of one's practice areas, without more, is not an advertisement. Likewise, displaying Endorsements and Recommendations can have several purposes, beyond the goal of attracting paying clients. Accordingly, the inclusion of Endorsements or Recommendations does not, without more, make the lawyer's LinkedIn profile an ""advertisement."

The City Bar did, however, "concur with the conclusion in NYCLA Ethics Op. 748 that attorneys are responsible for periodically monitoring third party Endorsements and Recommendations on LinkedIn "at reasonable intervals" to ensure that they are "truthful, not misleading, and based on actual knowledge." *See also* NYSBA 2015 Social Media Guidelines, at 9 ("A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer's social media profile" and "must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.")."

Furthermore, the City Bar also:

> agree[d] with the conclusion in NYCLA Ethics Op. 748 that listing practice areas under the heading "Skills" or "Experience" does not "constitute a claim to be a specialist under Rule 7.4." We also agree with guidance in the NYSBA 2015 Social Media Guidelines, which states that "a lawyer may include information about the lawyer's experience elsewhere, such as under another

heading or in an untitled field that permits biographical information to be included." NYSBA 2015 Social Media Guidelines, at 7-8.

XV. Fee Agreements

A. New York Rule 1.5: FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

***

New York State Bar Association Committee on Professional Ethics Formal Opinion 1112 (2017), the inquirer sought to add this provision to its fee agreement:

> In the event of your failure to pay any bill for legal fees, costs and/or disbursements in excess of 20-days from the date of the bill, you hereby authorize the undersigned attorney to bill your credit card for the full amount of the unpaid balance of the bill, without further notice to you. Your credit card information is as follows: X*%###

The opinion concludes that a lawyer's retainer agreement may provide that (i) the client secures payment of the lawyer's fees by credit card, and (ii) the lawyer will bill the client's credit card the amount of any legal fees, costs or disbursements that the client has failed to pay after 20 days from the date of the lawyer's bill for such amount.

The opinion noted that the client must be expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration under Part 137 of the Uniform Rules) before the lawyer charges the credit card. Furthermore, the lawyer may not charge the client's credit card account for any disputed portion of the lawyer's bill. Cf. Rule 1.15(b)(4)(if the client disputes the lawyer's right to funds, the lawyer may not withdraw the disputed funds from the lawyer's special account until the dispute is finally resolved).

Previously, the Committee had approved the client's payment of a lawyers fee using a credit card as long as:

> (i) the amount of the fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv) the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137.

***

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not

foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

****

Lawyer Who Refers Matter to Another Lawyer Undertakes Representation of Client

ABA Formal Opinion 474 (2016) concludes that "[a] lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, has undertaken representation of the client." Therefore, "[f]ee arrangements arrangements under Model Rule 1.5(e) [New York Rule 1.5(g)] are subject to Rule 1.7" and its conflict of interest provisions. "Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter. The opinion also cautions that "[w]hen one lawyer refers a matter to a second lawyer outside of the firm and the first lawyer either performs legal services in connection with or assumes joint responsibility for the matter and accepts a referral fee, the agreement regarding the division of fees, including client consent confirmed

in writing, must be completed be-fore or within a reasonable time after the commencement of the representation."

Court of Appeals Resolves Disputes Over Fee Splitting Agreements

In *Marin v. Constitution Realty*, LLC, 28 N.Y.3d 666, 49 N.Y.S.3d 39, 71 N.E.3d 530 (2017), the Court of Appeals resolved a fee dispute between the plaintiffs' attorney of record in a Labor Law action (L-1), and two attorneys L-1 engaged to assist her in the litigation: L-2 and L-3.

L-1 initially engaged L-2 to act as co-counsel and provide advice in the action. Their written agreement provided that L-2 would receive 20% of net attorneys' fees if the case settled before trial, and 25% once jury selection commenced. Neither L-1 nor L-2 informed the clients of L-2's involvement in the action, although L-2 believed L-1 had informed the client. The Court noted that the failure to inform the clients of L-2's involvement in the matter violated both the former Code of Professional Responsibility, DR 2–107(a), and the current Rules of Professional Conduct, Rule 1.5(g)(if lawyer is sharing fees with a lawyer outside her firm, the client must "agree[] to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing").

Six months later, L-1 wrote to L-2 "unilaterally discharging him and advising him that his portion of the fees would be determined on a quantum meruit basis." L-2 did not respond to L-1 and did no further work on the case.

L-1 ultimately obtained partial summary judgment on liability under Labor Law § 240(1) on plaintiffs' behalf and then sought the assistance of L-3 for a mediation of the matter. Under L-1's agreement with L-3, L-3 was entitled to 12% percent of all attorneys' fees whenever the case was resolved. The agreement provided that "[a]fter … mediation," L-3 "will be entitled to forty (40%) percent of all attorneys' fees whenever the case is resolved."

After the one-day mediation session concluded, L-3 continued to have discussions with the mediator and, ten days after the session, accepted a settlement offer of $8 million on behalf of plaintiff, which was tendered by the mediator.

L-1 moved for an order establishing L-3's attorneys' fees at 12% of net attorneys' fees and, after L-2 intervened, L-1 also moved for an order setting his fees on a quantum meruit basis. L-2 and L-3 each cross-moved: L-2 to fix his fee at 20% of net attorneys' fees and L-3 to fix his fee at 40% of net attorneys' fees.

The Court of Appeals concluded that L-1's agreements with L-2 were enforceable, despite the failure to comply with Rule 1.5(g)'s fee splitting provisions, and entitled L-2 to 20% of net attorneys' fees. While the Court classified L-1's "failure to inform her clients of [L-2]'s retention" as "a serious ethical violation," it did "not allow her to avoid otherwise enforceable contracts under the circumstances of this case (see Samuel v. Druckman & Sinel, LLP, 12 N.Y.3d 205, 210, 879 N.Y.S.2d 10, 906 N.E.2d 1042 [2009])." The Court stressed that "it ill becomes defendants, who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits." The Court found this to be "particularly true here, where [L-1] and [L-2] both failed to inform the clients about [L-2]'s retention, [L-1] led [L-2] to believe that the clients were so informed, and the clients themselves were not adversely affected by the ethical breach."

Applying "general principles of contract interpretation," the Court concluded that L-3 was only entitled to 12% of the net attorneys' fees because the matter was essentially resolved through mediation.

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(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client

has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. See Rule 1.15(j).

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. See 22 N.Y.C.R.R. Part 1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement

meets the requirements of paragraph (d)(4). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. See Rule 1.16(d). It is proper, however, to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." See 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or visitation. This provision also precludes a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. See Rule 1.0(g) (defining "domestic relations matter" to include an action to enforce such a judgment).

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. See Rule 5.1. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

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B. 22 N.Y.C.R.R. Part 1215 Written Letter of Engagement

Section 1215.1. Requirements

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

(1) if otherwise impractible; or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b) of this section.

Section 1215.2. Exceptions

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

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C. Appellate Division Rules

Appellate Division Rules 22 N.Y.C.R.R. §§ 603.7, 691.20, 806.13, 1022.31 also contain provisions governing contingent fees in personal injury and wrongful death actions. The Third Department's rule is included below:

Section 806.13. Contingent fees in claims and actions for personal injury and wrongful death

(a) In any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice, whether determined by judgment or settlement, in which the compensation of claimant's or plaintiff's attorney is contingent, that is, dependent in whole or in part upon the amount of the recovery, the receipt, retention or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than that contained in the schedule of fees in subdivision (b) of this section is deemed to be fair and reasonable. The receipt, retention or sharing of compensation which is in excess of such schedule of fees shall constitute the exaction of unreasonable and unconscionable compensation, unless authorized by a written order of the court as provided in this section. Compensation of claimant's or plaintiff's attorney for services rendered in claims or actions for personal injury alleging medical, dental or podiatric malpractice shall be computed pursuant to the fee schedule in Judiciary Law, section 474-a.

(b) The following is the schedule of reasonable fees referred to in subdivision (a) of this section: either,

SCHEDULE A

(1) 50 percent on the first $1,000 of the sum recovered,

(2) 40 percent on the next $2,000 of the sum recovered,

(3) 35 percent on the next $22,000 of the sum recovered,

(4) 25 percent on any amount over $25,000 of the sum recovered; or

SCHEDULE B

A percentage not exceeding 33 1/3 percent of the sum recovered, if the initial contractual arrangement between the client and the attorney so provides, in which event the procedure provided in this section for making application for additional compensation because of extraordinary circumstances shall not apply.

(c) Such percentage shall be computed by one of the following two methods to be selected by the client in the retainer agreement or letter of engagement:

(1) on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action; or

(2) in the event that the attorney agrees to pay costs and expenses of the action pursuant to Judiciary Law section 488(2)(d), on the gross sum recovered before deducting expenses and disbursements. The retainer agreement or letter of engagement shall describe these alternative methods, explain the financial consequences of each, and clearly indicate the client's selection. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or self-insurers or insurance carriers.

(d) In the event that claimant's or plaintiff's attorney believes in good faith that Schedule A, of subdivision (b) of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the client and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to a special term of Supreme Court in the judicial district in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in Schedule A, of subdivision (b) of this section; provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the client and the attorney. If the application be granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

(e) Nothing contained in this section shall be deemed applicable to the fixing of compensation for attorneys representing infants or other persons, where the statutes or rules provide for the fixation of such compensation by the court.

(f) Nothing contained in this section shall be deemed applicable to the fixing of compensation of attorneys for services rendered in connection with collection of first-party benefits as defined in article XVIII of the Insurance Law.

XVI. Statute of Limitations in Legal Malpractice Actions

Court of Appeals Concludes That Doctrine of Continuous Representation Creates a Question of Fact on Timeliness of Legal Malpractice Action

In *Grace v. Law*, 24 N.Y.3d 203, 997 N.Y.S.2d 334, 21 N.E.3d 995 (2014), a law firm withdrew from representing the plaintiff in a medical malpractice action in federal court after discovering it had a conflict of interest. Following this withdrawal, another law firm took over the prosecution of the federal action. The exact date of the transfer of the representation was not clear, but on December 8, 2008, an order was signed by the federal district court directing the substitution of counsel.

Plaintiff commenced a legal malpractice action against both law firms on December 5, 2011. The law firm that withdrew from the representation in the federal court action moved for summary judgment based on the three-year statute of limitations in CPLR 214(6), claiming that plaintiff should have known by September 26, 2008, that the firm was no longer able to represent him and that successor counsel would be taking over the representation. The Court of Appeals affirmed the Fourth Department's denial of defendant's motion for summary judgment, agreeing that it was "unclear" when the firm's representation of plaintiff in the federal action concluded. *See also Farage v. Ehrenberg*, 124 A.D.3d 159, 996 N.Y.S.2d 646 (2d Dep't 2014) ("[W]here… facts establish a client's discharge of counsel on a date preceding execution and filing of the Consent to Change Attorney form, the continuing representation toll of the statute of limitations for legal malpractice runs only to the date of the actual discharge and not to the date of the later Consent to Change Attorney.").

The decision is discussed in further detail in Siegel, New York Practice § 42 (Connors ed., July 2015 Supplement).

XVII. New York State Bar Exam Replaced by Uniform Bar Exam

The Court of Appeals appoints and oversees the Board of Law Examiners and promulgates the rules for the admission of attorneys to practice. In a February 26, 2016 Outside Counsel piece in the New York Law Journal, we discussed the Court's changes to the New York State Bar Exam, which will essentially be replaced with the Uniform Bar Exam. *See* Patrick M. Connors, "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?," N.Y.L.J, Feb. 26, 2016, at 4. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

Law firms and lawyers with managerial responsibility or supervisory authority will now have additional responsibilities. They must be especially mindful of ensuring that newly admitted lawyers practicing in areas requiring knowledge of New York law are competent to do so. *See* New York Rules of Professional Conduct, Rule 5.1 ("Responsibilities of Law Firms, Partners, Managers, and Supervisory Lawyers"); Rule 1.1 ("Competence").

XVIII. Misconduct Under Rule 8.4

A. ABA Model Rule 8.4: Misconduct (amended August 2016)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.4 Misconduct – Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and

participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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New York's Rule 8.4(g) provides:

> A lawyer or law firm shall not:
>
> (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination

> by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

B. Rule 8.4(a)(1): "[A]ttempt to violate the Rules of Professional Conduct."

***Geauga County Bar Association v. Bond*, 146 Ohio St. 3d 97 (2016)**

The Supreme Court of Ohio affirmed the Board of Professional Conduct's sanctions against an attorney who loaned money to a person he believed was his client. The sanctions consisted of a public reprimand. Although the purported client was really a thief who was trying to steal money from the attorney, the Court agreed with the Board that the attorney violated Ohio Professional Conduct Rule 8.4(a) in his attempt to violate Ohio Professional Conduct Rule 1.8(e), which prohibits attorneys from loaning money to clients.

Ohio Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation, with limited exceptions. Ohio Rule 8.4(a) provides that "[i]t is professional misconduct for a lawyer to …(a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." *See* ABA Rule 8.4(a)("It is professional misconduct for a lawyer to…violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another").

New York Rule 1.8, Comment 9B states that "[e]xamples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above."

The opinion states:

> On February 18, 2014, Bond filed a report with the Chardon Police Department alleging that he had received a phone call earlier that month from Patrick Paul Heald, who stated that he had been referred to Bond to discuss his personal-injury case. Bond reported that when he met Heald at a diner in Willoughby, Ohio, on February 3, 2014, Heald's right arm was bandaged and he was limping. Heald claimed that he had been badly burned in an industrial accident and requested financial assistance to pay for medication and living expenses until he received his next paycheck. Later

> that day, Bond entered into a contingent-fee agreement to represent Heald in his personal-injury matter. He also had Heald sign a photocopy of seven $100 bills with the notation, "Temporary loan of $700.00 cash advanced 2/3/14 by Daniel E. Bond to Patrick Paul Heald" and then gave him the cash and a check for $1,300. Heald did not repay the loan as agreed and made excuses for his failure to do so.

Subsequently, the attorney received another inquiry about a personal-injury matter and this prompted him to contact the police. As a result, the fake-client Heald was arrested, sentenced to jail for 8 months and ordered to pay restitution of $2,000.

The Board found that the attorney violated Ohio Professional Conduct Rule 8.4(a). The Court, in agreeing with the Board, found that there was not an attorney-client relationship present and thus, there was not a violation Ohio Professional Conduct Rule 1.8(e). Nevertheless, the court found the attorney's attempt to violate Ohio Professional Conduct Rule 1.8(e) led to an actual violation of Ohio Professional Conduct Rule 8.4(a)(misconduct). In accordance with the Board, the Court also dismissed the complaint's allegations that included violations of Ohio Professional Conduct Rules "1.18(a) (providing that a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client to whom the attorney may owe certain duties) and 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law)."

In support of the sanction of a public reprimand, the court cited two cases where a lawyer violated the predecessor provision to Rule 1.8(e), DR 5–103(B). *See Cleveland Bar Assn. v. Nusbaum*, 93 Ohio St.3d 150, 753 N.E.2d 183 (2001) (publicly reprimanding an attorney with no prior discipline who advanced $26,000 to a personal-injury client); and *Cleveland Bar Assn. v. Mineff*, 73 Ohio St.3d 281, 652 N.E.2d 968 (1995) (publicly reprimanding an attorney who provided $5,300 to a client to cover the client's living expenses during the pendency of his workers' compensation claim).

C. "The ABA Overrules the First Amendment"

See Ron Rotunda, *The ABA Overrules the First Amendment*, THE WALL STREET JOURNAL (Aug. 16, 2016 7:00 p.m.), http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418 ("Consider the following form of 'verbal' conduct when one lawyer tells another, in connection with a case, 'I abhor the idle rich. We should raise capital gains taxes.' The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.").

See also Ron Rotunda, The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought, The Heritage, (Oct. 6, 2016), http://www.heritage.org/research/reports/2016/10/the-aba-decision-to-control-what-lawyers-say-supportingdiversity-but-not-diversity-of-thought.

D. New York State Bar Association Committee on Professional Ethics Opinion 1111 (1/7/17)

Topic: Client representation; discrimination

Digest: A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a representation amounts to unlawful discrimination.

Rules: 8.4(g)

FACTS

1. A lawyer has been requested to represent a person desiring to bring a childhood sex abuse claim against a religious institution. The lawyer is of the same religion as the institution against which the claim is to be made. Because of this religious affiliation, the lawyer is unwilling to represent the claimant against the institution.

QUESTIONS

2. Is a lawyer ethically required to accept every request for representation?

3. Does the refusal to accept a representation under the facts of this inquiry amount to illegal discrimination?

OPINION

Lawyer's Freedom to Decide Which Clients to Represent

4. It has long been a principle of the practice of law that a "lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client . . ." EC 2-35 [formerly EC 2-26] of the former Code of Professional Responsibility (the "Code"). Although this language was not carried over to the current Rules of Professional Conduct (the "Rules"), the principle remains sound. The principle that lawyers have discretion to determine whether to accept a client has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma." Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York*, 7 Geo. J. Legal Ethics 280, 280-81 (1993). *See also Restatement (Third), The Law Governing Lawyers §*14 cmt. b (Am. Law Inst. 2000) ("The client-lawyer relationship ordinarily is a consensual one.

Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination"); Henry S. Drinker, Legal Ethics 139 (1953) ("[T]he lawyer may choose his own cases and for any reason or without reason may decline any employment which he does not fancy"); Canon 31, ABA Canons of Professional Ethics (1908) ("No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment."); George Sharswood, *An Essay on Professional Ethics* 84 (5th ed. 1884) (stating, in one of the earliest American works on legal ethics, that a lawyer "has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion").

5. We applied this principle in N.Y. State 833 (2009), where we held that a lawyer ethically was not required to respond to an unsolicited written request for representation sent by a person in prison.

Prohibition Against Unlawful Discrimination

6. However, a lawyer's unfettered ethical right to decline a representation is subject to federal, state and local anti-discrimination statutes.

7. For example, N.Y. Exec. Law §296(2)(a) provides: "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation ... because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof ...." In *Cahill v. Rosa*, 674 N.E.2d 274, 277 (N.Y. 1996), a case involving a dentist in private practice who refused to treat patients whom he suspected of being HIV positive, the Court of Appeals held that a dental practice is a "place of public accommodation" for purposes of the Executive Law. At least one scholar has argued that *Cahill v. Rosa* prohibits lawyers from discriminating as well. *See* Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 Albany L. Rev 153 (2000) (discussing whether discrimination by New York lawyers is illegal after *Cahill*); *but see* G. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. New Eng. L. Rev. 9 (1998) (arguing that a lawyer should not be required to undertake representation where the lawyer cannot provide zealous representation).

8. Rule 8.4(g) recognizes that anti-discrimination statutes may limit a lawyer's freedom to decline representation, stating that a lawyer or law firm "shall not ...

unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. ...” What constitutes “unlawful discrimination” within the meaning of Rule 8.4(g) is a question of law beyond the jurisdiction of this Committee. Consequently, we do not opine on whether a lawyer’s refusal to represent a prospective client in a suit against the lawyer’s own religious institution constitutes “unlawful discrimination.”

CONCLUSION

9. A lawyer is under no obligation to accept every person who may wish to become a client unless the refusal to accept a person amounts to unlawful discrimination. Whether a lawyer’s refusal to represent a particular client amounts to unlawful discrimination is a question of law beyond this Committee’s jurisdiction.

E. Kellyanne Conway Complaint, February 20, 2017

GEORGETOWN LAW

Abbe Smith
Professor of Law

February 20, 2017

Office of Disciplinary Counsel
Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

To the Office of Disciplinary Counsel:

Please be advised that the below signed law professors, all of whom teach courses relating to legal ethics, are hereby filing a disciplinary complaint against District of Columbia bar member Kellyanne Conway, currently listed as a member of the bar under her name before marriage, Kellyanne E. Fitzpatrick,[1] under DC Rule of Professional Conduct 8.4(c) [hereinafter DC Rules].

As Rule 8.4(c) states, "It is professional misconduct for a lawyer to [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This is an admittedly broad rule, as it includes conduct outside the practice of law and, unlike 8.4(b), the conduct need not be criminal. We are mindful of the Rule's breadth and aware that disciplinary proceedings under this Rule could lead to mischief and worse. Generally speaking, we do not believe that lawyers should face discipline under this Rule for public or private dishonesty or misrepresentations unless the

[1] Ms. Conway, née Fitzpatrick, was admitted to the DC bar on January 19, 1995 and is currently suspended for nonpayment of dues. Presumably, if she resumes payment she would be readmitted.

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lawyer's conduct calls into serious question his or her "fitness for the practice of law," DC Rule 8.4, Comment 1, or indicates that the lawyer "lacks the character required for bar membership." DC Bar, Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, at https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm.

However, we believe that lawyers in public office—Ms. Conway is Counselor to the President—have a higher obligation to avoid conduct involving dishonest, fraud, deceit, or misrepresentation than other lawyers. Although the DC Rules contain no Comment specifically relating to 8.4(c), the American Bar Association's Model Rules of Professional Conduct (MR) make this point. MR 8.4(c), Comment 7 states that "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Cf.* DC Rule 1.11 (on the special conflict of interest rules for lawyers who have served in government).

It is not surprising that the Model Rules distinguish lawyers in public office from other lawyers. The ABA knows well the history of professional responsibility as an academic requirement in American law schools: following the Watergate scandal, which involved questionable conduct by a number of high-ranking lawyers in the Nixon administration, the ABA mandated that law students take such a course in order to graduate.

Some of the signers of this complaint practice in the District of Columbia and/or are members of the DC Bar. We feel compelled to file such a complaint under DC Rule 8.3(a), which states that "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Those of us who do not practice in DC are members of other state and federal bars. We all believe it is critically important that lawyers in public office—especially those who act as spokespersons for the highest levels of government—be truthful.

The DC Bar has issued an Ethics Opinion on lawyers working in government in a non-representational capacity that supports this complaint. *See generally* Ethics Opinion 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm. In addressing an inquiry about attorneys employed by an intelligence or national security agency who engage in clandestine activities, the Opinion distinguishes those government officials whose official duties require them to "act deceitfully" from other lawyers in government. Though the Opinion finds lawyers "whose duties require the making of misrepresentations as authorized by law as part of their official duties" do not violate Rule 8.4(c), the drafters emphasize the Opinion's narrow scope: it applies "only to misrepresentations made in the course of official conduct when the employee…reasonably believes that applicable law authorizes the misrepresentations."

Significantly, for purposes of this complaint, Ethics Opinion 323 makes plain that its conclusion in the above narrow context does not provide "*blanket permission for an attorney employed by government agencies to misrepresent themselves*." [Emphasis added] The drafters further explain:

> Nor does [the Opinion] authorize misrepresentation when a countervailing legal duty to give truthful answers applies…. And, of course, this opinion does not authorize deceit for non-official reasons, or where an attorney could not, objectively have a reasonable belief that applicable law authorizes the actions in question.

Ms. Conway's misconduct under DC Rule 8.4(c) is as follows:

- On several occasions, including in an interview on MSNBC in early February, 2017, Ms. Conway referred to the "Bowling Green Massacre" to justify President Donald Trump's executive order banning immigrants from seven overwhelmingly Muslim countries. Not only was there no "massacre" in Bowling Green, Kentucky (or Bowling Green, New York, for that matter), but Ms. Conway knew there was no massacre. Although Ms. Conway claimed it was a slip of the tongue and apologized, her actual words belie her having misspoken: "I bet it's brand-new information to people that President Obama had a six-month ban on the Iraqi refugee program after two Iraqis came here to this country, were radicalized, and were the masterminds behind the Bowling Green Massacre. Most people don't know that because it didn't get covered." *See generally* Clare Foran, *The Bowling Green Massacre that Wasn't*, THE ATLANTIC, February 3, 2017, at https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-bowling-green-massacre-alternative-facts/515619/. Moreover, she cited the nonexistent massacre to media outlets on at least two other occasions. *See* Aaron Blake, *The Fix: Kellyanne Conway's 'Bowling Green Massacre' wasn't a slip of the tongue. She has said it before*. WASH. POST, February 6, 2017, at https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/kellyanne-conways-bowling-green-massacre-wasnt-a-slip-of-the-tongue-shes-said-it-before/?utm_term=.b2de9c3f0582.

- Compounding this false statement, in that same MSNBC interview Ms. Conway also made a false statement that President Barack Obama had "banned" Iraqi refugees from coming into the United States for six months following the "Bowling Green Massacre." *Id.* However, President Obama did not impose a formal six-month ban on Iraqi refugees. He ordered enhanced screening procedures following what actually happened in Bowling Green—the arrest and prosecution of two Iraqis for attempting to send weapons and money to al-Qaeda in Iraq. The two men subsequently pled guilty to federal terrorism charges and were sentenced to substantial prison terms. *See* Glenn Kessler, *Fact Checker: Trump's facile claim that his refugee policy is similar to Obama's in 2011*, WASH. POST, January 29, 2017, at https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm_term=.87f35b046de2.

- This was not the first time Ms. Conway had engaged in conduct involving "dishonesty, fraud, deceit, or misrepresentation." On January 22, 2017, on the NBC television show *Meet the Press*, Ms. Conway said that the White House had put forth "alternative facts" to what the news media reported about the size of Mr. Trump's inauguration crowd. She made this assertion the day after Mr. Trump and White House press secretary Sean Spicer accused the news media of reporting falsehoods about the inauguration and Mr. Trump's relationship with intelligence agencies. *See* Nicholas Fandos, *White House Pushes 'Alternative Facts.' Here are the Real Ones*. N.Y. TIMES, January 22, 2017, at https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html. As many prominent commentators have pointed out, the phrase "alternative facts" is especially dangerous when offered by the President's counselor. Moreover, "alternative facts' are not facts at all; they are *lies*. Charles M. Blow, *A Lie by Any Other Name*, N.Y. TIMES, January 26, 2017, at https://www.nytimes.com/2017/01/26/opinion/a-lie-by-any-other-name.html.

- Ms. Conway has also misused her position to endorse Ivanka Trump products on February 9, 2017 in an interview on Fox News from the White House briefing room with the White House insignia visible behind her. While this conduct does not fall within DC Rule 8.4, it is a clear violation of government ethics rules, about which a *lawyer* and member of the Bar should surely know. Federal rules on conflicts of interest specifically prohibit using public office "for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives or persons with whom the employee is affiliated in a nongovernmental capacity." The government's chief ethics watchdog denounced Conway's conduct in a letter to the White House. Richard Perez Pena, *Ethics Watchdog Denounces Conway's Endorsement of Ivanka Trump Products*, N.Y. TIMES, February 14, 2017, at https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html. *See also* DC Rule 1.11, Comment 2 (noting that, in addition to ethical rules, lawyers are subject to statutes and regulations concerning conflict of interest and suggesting that, given the many lawyers who work in the federal or local government in the District of Columbia, "particular heed must be paid to the federal conflict-of interest statutes.")

We do not file this complaint lightly. In addition to being a member of the DC Bar, Ms. Conway is a graduate of the George Washington University Law School, one of the District's premier law schools. We believe that, at one time, Ms. Conway, understood her ethical responsibilities as a lawyer and abided by them. But she is currently acting in a way that brings shame upon the legal profession. As the Preamble to the Model Rules states, a lawyer plays an important role as a "public citizen" in addition to our other roles.

If Ms. Conway were not a lawyer and was "only" engaging in politics, there would be few limits on her conduct outside of the political process itself. She could say and do what she wished and still call herself a politician. But she is a lawyer. And her conduct, clearly intentionally violative of the rules that regulate her professional status, cries out for sanctioning by the DC Bar.

Respectfully submitted,

John Bickers
Professor of Law
Northern Kentucky University

Susan Brooks
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Lawrence Fox
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American University
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Hofstra University

F. *In the Matter of Richard M. Nixon, an Attorney*, 53 A.D.2d 178 (1st Dep't 1976)

Per Curiam.

The respondent, formerly the President of the United States, is an attorney, admitted to the practice of law in the State of New York on December 5, 1963.

An investigation of allegations of professional misconduct on the part of respondent was begun by the Grievance Committee of the Association of the Bar of the City of New York in September, 1974.

A petition containing five specifications of misconduct was mailed to Mr. Nixon's attorney on January 21, 1976, which attorney ultimately informed counsel to petitioner that Mr. Nixon would not accept service of the papers.

On January 28, 1976, personal service was attempted via the Sheriff's office of Orange County, California. When this attempt was unsuccessful, an order of this court dated February 4, 1976 authorized service of the necessary papers upon Mr. Nixon by regular mail addressed to Casa Pacifica, San Clemente, California.

The material mailed included a notice that responsive papers were due before February 19, 1976. On March 18, 1976, the Appellate Division directed a reference and appointed a Justice of the Supreme Court, New York County to take testimony regarding the specifications alleged. Copies of the order of reference and notice of conference were mailed to the respondent.

Mr. Nixon has neither responded personally nor appeared by counsel. No papers have been filed with the court on his behalf, nor has he served any papers upon the petitioner.

The specifications, succinctly stated, allege that Mr. Nixon improperly obstructed an FBI investigation of the unlawful entry into the headquarters of the Democratic National Committee; improperly authorized or approved the surreptitious payment of money to E. Howard Hunt, who was indicted in connection with the Democratic National Committee break in, in order to prevent or delay Hunt's disclosure of information to Federal law enforcement authorities; improperly attempted to obstruct an investigation by the United States Department of Justice of an unlawful entry into the offices of Dr. Lewis Fielding, a psychiatrist who had treated Daniel Ellsberg; improperly concealed and encouraged others to conceal evidence relating to unlawful activities of members of his staff and of the Committee to Re-elect the President; and improperly engaged in conduct which he knew or should have known would interfere with the legal defense of Daniel Ellsberg.

Each of the allegations is substantiated by documentary evidence, such as the tapes of Mr. Nixon himself, excerpts of testimony of individuals given to various Congressional committees, and affidavits. This material, which is uncontested and unrebutted, forms a prima facie case and warrants our sustaining of the charges.

The failure of the respondent to answer the charges, to appear in the proceeding, or to submit any papers on his behalf must be construed by this court as an admission of the charges and an indifference to the attendant consequences (*Matter of Liesner*, 43 AD2d 223; *Matter of Schner*, 5 AD2d 599, 600).

As we have already indicated, we find the documentary evidence submitted sufficient to sustain all of the charges preferred.

At this juncture, we pause to consider the points advanced in the dissent. It is apparently critical of our procedure on two scores: first, that respondent has not been served, with process in the sense that papers have not been put into his hand; and second, that we have rushed to judgment. As to the first objection, it is elementary that the purpose of service is notice, and quite obviously that was accomplished some months ago, as is set forth early in this writing. Nothing further is to be achieved by a forceful attempt at actual personal service except, quite possibly, an ugly confrontation. Even if successful, it would add nothing to the full information as to the charges already possessed by respondent. Indeed, respondent not alone has had full notice of these proceedings for a long time, but has so acknowledged by his abortive attempts, both here and in the Second Department, to circumvent the proceedings by submitting a resignation from the Bar, but which did not contain the required admission of culpability referred to in the dissent.

As to the second objection, no reason whatever has been shown why a respondent who has chosen to reject or ignore service may by stony silence postpone judgment indefinitely. We have not 'on the basis of alleged inability to make personal service ... proceed[ed] forthwith to judgment.' Following the March 18 order of reference, respondent was notified of proceedings to be held before the Referee on April 13. Default was noted then. More than two months have passed since, and it is now more than four months since respondent received the petition. Charges have been 'properly proffered with the opportunity to defend'; that opportunity has been rejected. There is neither defense nor acknowledgment except as herein before indicated. We should proceed to conclude the matter.

The petitioner has moved this court to sustain the charges preferred on default, or, in the alternative to grant additional time for the petitioner to conduct hearings before the Referee. As we have noted, the respondent has defaulted in appearance before the Referee after due notice. Furthermore, the Referee has permitted a

motion to be made before this court for default judgment, which we hereby grant to the extent hereinafter set forth. The further services of the Referee previously appointed by this court are dispensed with, and the documents submitted in support of this motion are considered by this court in the manner of an inquest. Upon such inquest, we find that the conclusions of fact pleaded as specifications in the petition have been supported by those documents. We have accordingly sustained all of the charges preferred against the respondent.

The gravamen of respondent's conduct is obstruction of the due administration of justice, a most serious offense, but one which is rendered even more grievous by the fact that in this instance the perpetrator is an attorney and was at the time of the conduct in question the holder of the highest public office of this country and in a position of public trust.

We note that while Mr. Nixon was holding public office he was not acting in his capacity as an attorney. However, the power of the court to discipline an attorney extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar (*Matter of Dolphin*, 240 NY 89, 92-93; Matter of Kaufman, 29 AD2d 298). We find that the evidence adduced in the case at bar warrants the imposition of the most severe sanction available to the court and, accordingly, we direct that respondent should be disbarred.

Kupferman, J.

(Dissenting in part).

My dissent is with respect to the procedural aspects and not as to the substantive aspects, except, of course, in the sense that the procedure raises questions of substance.

The respondent attempted to resign while under investigation. His resignation was rejected because he did not submit the affidavit required by the rules governing the conduct of attorneys, which in section 603.11, entitled 'Resignation of attorneys under investigation or the subject of disciplinary proceedings,' requires an acknowledgment that 'he could not successfully defend himself on the merits against such charges.' (22 NYCRR 603.11.) The purpose of the affidavit requirement is well set forth in the Report of the New York Committee on Disciplinary Enforcement (Eighteenth Annual Report of NY Judicial Conference, 1973, pp 234, 275 [Problem 12]). That report suggested for codification the specific language of this court's section 603.11. To every extent possible, matters were not to be left in limbo, but charges were either to be acknowledged or properly proffered with the opportunity to defend, and prosecuted to a conclusion.

We now have a situation where, on the basis of alleged inability to make personal service, we proceed forthwith to judgment, no matter how justified it may seem to some. If this procedure is satisfactory, then a resignation in the face of the charges would have been at least as acceptable.

***In the Matter of Richard M. Nixon, an Attorney*, 53 A.D.2d 881 (2d Dep't 1976)**

The above-named attorney, formerly the President of the United States, who was admitted to the practice of law in the State of New York on December 5, 1963 at a term of the Appellate Division of the Supreme Court, First Judicial Department, has submitted his resignation from the Bar of this State after the filing of a complaint with the Joint Bar Association Grievance Committee for the Ninth Judicial District (the Committee) by its Chief Counsel. In that complaint Mr. Nixon is charged with professional misconduct as a consequence of his refusal to co-operate with the Committee in its investigation of the conduct of an attorney who was allegedly involved with other individuals in certain monetary transactions which came to light during the "Watergate" inquiry. Specifically, Mr. Nixon declined to furnish certain affidavits requested of him indicating whether he would answer any written interrogatory concerning the attorney under investigation and certain other named individuals, and, if not, indicating his grounds for refusal to answer.

In an affidavit, sworn to on January 23, 1976, submitted to the Committee and filed by it with this court on January 26, 1976 pursuant to section 691.9 of our rules (22 NYCRR 691.9), Mr. Nixon tendered his resignation, stating therein, inter alia, that: (a) he had been made aware of the complaint by the Committee's Chief Counsel; (b) he was informed that he is the subject of an investigation based upon that complaint; and (c) he acknowledged that if a disciplinary proceeding were commenced against him upon the charge of the Committee's Chief Counsel, he could not successfully defend himself on the merits. He concluded by requesting that this court accept his resignation and enter an order striking his name from the roll of attorneys and counselors at law in the State of New York as of the date of such affidavit. Accordingly, the affidavit contained the required prerequisites for consideration of Mr. Nixon's resignation by this court which, pursuant to our rules, permitted the entry of an order either disbarring him or striking his name from the roll of attorneys.

However, on February 4, 1976, when the matter of Mr. Nixon's resignation came up for consideration by this court, it was learned that (a) since 1974, Mr. Nixon had been the subject of an investigation into allegations of misconduct by the Committee on Grievances of the Association of the Bar of the City of New York, the Departmental Disciplinary Committee for the First Judicial Department and (b)

a petition, dated January 15, 1976, containing charges of professional misconduct, and a notice of petition, dated January 16, 1976, had been prepared and mailed to Mr. Nixon's attorney during the week of January 19, 1976. Predicated thereon, this court, in keeping with established principles of comity, deferred action on Mr. Nixon's attempted resignation pending the conclusion of the proceedings stemming from the foregoing investigation and action by the Departmental Disciplinary Committee for the First Judicial Department.

In a *Per Curiam* opinion the Appellate Division of the Supreme Court for the First Judicial Department sustained charges of misconduct preferred against Mr. Nixon as a respondent in a disciplinary proceeding instituted by said court, and directed that he be disbarred. An order disbarring the respondent was entered in said court on this date.

Accordingly, consideration of Mr. Nixon's offer to resign filed with this court, is rendered academic.

G. *Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir. Jan. 19, 2001).

AGREED ORDER OF DISCIPLINE

Come now the parties hereto and agree to the following Order of this Court in settlement of the pending action:

The formal charges of misconduct upon which this Order is based arose out of information referred to the Committee on Professional Conduct ("the Committee") by the Honorable Susan Webber Wright, Chief United States District Judge for the Eastern District of Arkansas. The information pertained to William Jefferson Clinton's deposition testimony in a civil case brought by Ms. Paula Jones in which he was a defendant, *Jones v. Clinton*, No. LR-C-94-290 (E.D.Ark.).

Mr. Clinton was admitted to the Arkansas bar on September 7, 1973. On June 30, 1990, he requested that his Arkansas license be placed on inactive status for continuing legal education purposes, and this request was granted. The conduct at issue here does not arise out of Mr. Clinton's practice of law. At all times material to this case, Mr. Clinton resided in Washington, D.C., but he remained subject to the Model Rules of Professional Conduct for the State of Arkansas.

On April 1, 1998, Judge Wright granted summary judgment to Mr. Clinton, but she subsequently found him in Civil contempt in a 32-page Memorandum Opinion and Order (the "Order") issued on April 12, 1999, ruling that he had "deliberately violated this Court's discovery orders and thereby undermined the integrity of the judicial system." Order, at 31. Judge Wright found that Mr. Clinton had "responded to plaintiff's questions by giving false, misleading and evasive answers

that were designed to obstruct the judicial process .... [concerning] whether he and Ms. [Monica] Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." Order, at 16 (footnote omitted). Judge Wright offered Mr. Clinton a hearing, which he declined by a letter from his counsel, dated May 7, 1999. Mr. Clinton was subsequently ordered to pay, and did pay, over $90,000, pursuant to the Court's contempt findings. Judge Wright also referred the matter to the Committee "for review and any action it deems appropriate." Order, at 32.

Mr. Clinton's actions which are the subject of this Agreed Order have subjected him to a great deal of public criticism. Twice elected President of the United States, he became only the second President ever impeached and tried by the Senate, where he was acquitted. After Ms. Jones took an appeal of the dismissal of her case, Mr. Clinton settled with her for $850,000, a sum greater than her initial *ad damnum* in her complaint. As already indicated, Mr. Clinton was held in civil contempt and fined over $90,000.

Prior to Judge Wright's referral, Mr. Clinton had no prior disciplinary record with the Committee, including any private warnings. He had been a member in good standing of the Arkansas Bar for over twenty-five years. He has cooperated fully with the Committee in its investigation of this matter and has furnished information to the Committee in a timely fashion.

Mr. Clinton's conduct, as described in the Order, caused the court and counsel for the parties to expend unnecessary time, effort, and resources. It set a poor example for other litigants, and this damaging effect was magnified by the fact that at the time of his deposition testimony, Mr. Clinton was serving as President of the United States.

Judge Wright ruled that the testimony concerning Ms. Lewinsky "was not essential to the core issues in this case and, in fact, that some of this evidence might even be inadmissible...." *Jones v. Clinton*, 993 F.Supp. 1217, 1219 (E.D.Ark.1998). Judge Wright dismissed the case on the merits by granting Mr. Clinton summary judgment, declaring that the case was "lacking in merit-a decision that would not have changed even had the President been truthful with respect to his relationship with Ms. Lewinsky." Order, at 24-25 (footnote omitted). As Judge Wright also observed, as a result of Mr. Clinton's paying $850,000 in settlement, "plaintiff was made whole, having agreed to a settlement in excess of that prayed for in the complaint." Order, at 13. Mr. Clinton also paid to plaintiff $89,484 as the "reasonable expenses, including attorney's fees, caused by his willful failure to obey the Court's discovery orders." Order, at 31; *Jones v. Clinton*, 57 F.Supp.2d 719, 729 (E.D.Ark.1999).

On May 22, 2000, after receiving complaints from Judge Wright and the Southeastern Legal Foundation, the Committee voted to initiate disbarment proceedings against Mr. Clinton. On June 30, 2000, counsel for the Committee filed a complaint seeking disbarment in Pulaski County Circuit Court, *Neal v. Clinton*, Civ. No.2000-5677. Mr. Clinton filed an answer on August 29, 2000, and the case is in the early stages of discovery.

In this Agreed Order Mr. Clinton admits and acknowledges, and the Court, therefore, finds that:

A. That he knowingly gave evasive and misleading answers, in violation of Judge Wright's discovery orders, concerning his relationship with Ms. Lewinsky, in an attempt to conceal from plaintiff Jones' lawyers the true facts about his improper relationship with Ms. Lewinsky, which had ended almost a year earlier.

B. That by knowingly giving evasive and misleading answers, in violation of Judge Wright's discovery orders, he engaged in conduct that is prejudicial to the administration of justice in that his discovery responses interfered with the conduct of the Jones case by causing the court and counsel for the parties to expend unnecessary time, effort, and resources, setting a poor example for other litigants, and causing the court to issue a thirty-two page Order civilly sanctioning Mr. Clinton.

Upon consideration of the proposed Agreed Order, the entire record before the Court, the advice of counsel, and the Arkansas Model Rules of Professional Conduct (the "Model Rules"), the Court finds:

1. That Mr. Clinton's conduct, heretofore set forth, in the Jones case violated Model Rule 8.4(d), when he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky, in violation of Judge Wright's discovery orders. Model Rule 8.4(d) states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

WHEREFORE, it is the decision and order of this Court that William Jefferson Clinton, Arkansas Bar ID #73019, be, and hereby is, SUSPENDED for FIVE YEARS for his conduct in this matter, and the payment of fine in the amount of $ 25,000. The suspension shall become effective as of the date of January 19, 2001.

IT IS SO ORDERED.