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ONEONONE

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of the New York State Bar Association

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Message from the Chair

At this year's joint Annual Meeting of the General Practice Section and the Committee on Professional Ethics, part of the program addressed attorneys' ethical considerations. The Oscar award-winning movie, "Spotlight," was previewed and panelists weighed in on the spectrum of different ethical considerations that confronted counsel in the film. Listening to each of the panelists led me to question what I would have done in the same situation and underlined the differences in views that any reasonable lawyer could have. The great turnout and thoroughly engaged Q & A session spoke to the CLE's educational value.

While there are countless GP Section members to thank, the Annual Meeting was used to honor Martin "Marty" Minkowitz, whose contribution to the Section continually inspires our membership. The Annual Meeting was just one of many events and initiatives that could not have come together without Marty's professionalism, guidance, and determination. Marty continues to be a great mentor and friend.

As always, we welcomed Timothy J. O'Sullivan from the New York State Lawyers' Fund for Client Protection in Albany to update our Section on the work of the fund. We closed our Annual Meeting program with hot tips from the experts and a rapid-fire presentation that has consistently provided useful guidance for the GP attorney.

We are still looking for members to participate in our "Lessons Learned" Series. Participants will be asked to speak about lessons they have learned as practicing attorneys. Our Section's membership encompasses a broad range of practice areas: criminal law, accident and personal injury law, bankruptcy, business law, family law, estate planning, insurance law, litigation, and real estate. We better than most Sections stand prepared to offer our members the greatest range of topics to discuss as part of our lessons learned. Please contact me at jojesq@gmail.com if you are interested in participating in the "Lessons Learned" Series or would like to suggest a CLE topic of interest.

I encourage all of you to contact me about getting more involved in the activities of the General Practice Section to enhance its benefits even more. I hope you enjoy this issue of *One on One* and look forward to receiving submissions highlighting the issues our members face in their individual practices.

John Owens Jr.

Message from the Co-Editors

Richard Klass

As the Co-Editors of *One on One*, we endeavor to provide our members and readers with a great selection of topical articles on issues affecting the varying and diverse areas of law in which our General Practice Section members practice. As always, our journal provides the most recent New York ethics opinions.

This issue, we are pleased to offer you the following articles, which we hope will be found very helpful and informative:

Stop Work Orders—*One on One*'s Co-Editor Martin Minkowitz shares his expertise in an article providing an insightful look into the disruptive effects of Stop Work Orders and how this authority exists.

Article 3—Equitable Distribution—Joann Feld highlights one of the most difficult and stressful events in a person's life and how the division of marital property can be challenging and rife with emotions, and rarely equal.

Fair Is Fair: Transitioning the Closely Held Business to the Actively Employed Child—Michael Markhoff provides answers to important questions regarding closely held businesses in estates.

Revoking an Irrevocable Trust Where Infants Are Beneficially Interested—Gina Ciorciari presents an overview of the ways modification or revocation may occur when an infant is beneficially interested.

Arc of Justice: by Kevin Boyle—James Riley discusses a winner of the 2004 National Book Award, which brings up issues of race relations, civil rights and the role of practicing attorneys and of our system of justice.

Tips for Being an Effective Mediator of Employment Disputes—Ruth Raisfeld highlights the best tips that apply to employment disputes.

Evolving Joint Employer Concept and the NLRB—Paul Millus gives an expert view into the nuances of the Joint Employer Concept.

Martin Minkowitz

The Dangers of Pokémon Go—Eva Pearlman grapples impacts to both civil and criminal law from the newest and most interactive game to hit the public and the courts.

Article Submission

The General Practice Section encourages its members to participate on its committees and to share their knowledge with others, especially by contributing articles to an upcoming issue of *One on One*.

Your contributions benefit the entire membership. Articles should be submitted in a Word document. Please feel free to contact either Martin Minkowitz at mminkowitz@stroock.com (212-806-5600), Richard Klass at richklass@courtstreetlaw.com (718-643-6063), or Matthew Bobrow at matthew.bobrow@law.nyls.edu (908-610-5536) to discuss ideas for articles.

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

Sincerely,
Martin Minkowitz
Richard Klass
Matthew Bobrow
Co-Editors

Stop Work Orders

By Martin Minkowitz

"Stop Work Orders have been issued by the Board when its investigators have determined that an employer has failed to secure proper Workers' Compensation coverage as required by § 50 WCL."

What could disrupt a business more than a state agency issuing an order to "stop work"? Such an order can be issued by the Workers' Compensation Board's (Board) Chair. The Workers' Compensation Law, in 2007, was amended to give the Chair of the Board that authority. It also gave it authority to issue subpoenas outside the state. This is on the theory that an employer who has not provided for "compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment"[1] is deemed as "an immediate serious danger to public health, safety or welfare."[2] If the Board's decision is that there was an employer/employee relationship and the employer did not provide for compensation coverage, if that is supported by substantial evidence the Stop Work Order will not be overturned on appeal.

Stop Work Orders have been issued by the Board when its investigators have determined that an employer has failed to secure proper Workers' Compensation coverage as required by § 50 WCL. Such a failure, as the statute requires, has been deemed to be an immediate serious danger to public health, safety or welfare, and sufficient to justify a Stop Work Order by the Chair.

The Chair can bring an action for a judgement in the Supreme Court and if it has been obtained against an employer, and it has not been vacated or modified, after a 90-day notice, a Stop Work Order can be issued against that employer. This gives the employer sufficient time to try to prevent the issuance of the order.

A Stop Work Order once served affects all of the employer's worksites and substantially owned affiliates in the state that do not have coverage, until the Chair issues a release from the order upon a finding that the employer had complied with the law. The employer may seek a redetermination upon an affidavit for a review of the Chair's order if it believes it has not violated the law. The Chair will issue a written decision after he has reviewed the issues raised by the employer in the application for redetermination.

The Chair can negotiate a settlement of the order with the employer. In such a situation the employer can be given a conditional release of the order with an agreement to make payments on money due to the Board over a period of time. A violation of the agreement would result in a reinstatement of the Stop Work Order.

If a final assessment of a Stop Work Order is given, as an additional penalty that employer cannot bid on any public work contracts or subcontracts with the state or a municipality for either one or five years depending on the basis for the issuance of the order.[3]

As a condition of obtaining a release from the order an employer can be required to file periodic reports of compliance with the Board for up to two years from the release date.[4]

In court the Chair is represented by the State's Attorney General.

If the Chair believes that an employer is violating the order he may request the Attorney General to file a complaint in the State Supreme Court to obtain an injunction against the employer from violating the order and also seeking costs and counsel fees.

The intent of this law is obviously to give greater enforcement authority to the Chair of the Board to prevent employers from hiring employees without providing for the Workers' Compensation coverage. However it should be recognized that an order which has the effect of stopping work is punitive to both employers and the employees who would be out of work, and it should therefore be used cautiously.

Endnotes

1. § 10 WCL.
2. § 141-a, 4 (a) WCL; *Mamorneck Vil. Tile Distribs. Inc. v. WCB*, 68 A.D.3d 1423 (2009), *Saratoga Skydiving Adventures v. WCB*, __A.D.3d__(2016), § 141–a(4) WCL.
3. See § 141–b WCL.
4. See 12 N.Y.C.R.R. 308.4 and 5.

Martin Minkowitz is counsel to Stroock & Stroock & Lavan LLP and practices in the area of Insurance and Workers' Compensation regulation.

Revoking an Irrevocable Trust Where Infants Are Beneficially Interested

By Gina M. Ciorciari

Despite its moniker, pursuant to New York law an irrevocable trust may in fact be amended or revoked. If done properly, by way of written and acknowledged consent of all beneficiaries, the sought-after amendment or revocation will be successful and litigation will be avoided. A distinct problem, however, arises where an infant is among the class of persons beneficially interested.

Where a trust instrument makes no "provisions for revocation or amendment, an irrevocable trust can only be amended pursuant to statute."[1] The controlling statute, EPTL 7-1.9(a), provides that the creator of an irrevocable trust may revoke or amend it only upon the written and acknowledged consent of all persons beneficially interested.[2]

Infants are deemed under a disability and unable to consent to the revocation or amendment of an irrevocable trust.[3] Moreover, neither a guardian ad litem nor a general guardian can consent on their behalf.[4] Indeed, in *Matter of Mergenhagen*,[5] the Fourth Department held that because the grandchildren of the grantors, who were beneficiaries of the trust, were minors at the time of the purported revocation and did not and could not consent to such revocation, the trust was not validly revoked.

Virtual representation, codified by SCPA 315(5), does not save the day for those seeking to revoke or amend an irrevocable trust where an infant is involved. SCPA 315(5) provides, in relevant part, "where a party to the proceeding has the same interest as a person under a disability, it shall not be necessary to serve the persons under a disability." In determining if this statute applies, courts rely on the following: (1) similarity of economic interest between representor and representee; 2) the absence of a conflict of interest; and 3) the adequacy of representation.[6] EPTL 7-1.9(a), however, specifically provides that a creator may revoke or amend an irrevocable trust upon the acknowledged written consent of "all persons beneficially interested in the trust."[7] Thus, virtual representation cannot apply, because the controlling statute, EPTL 7-1.9(a), requires actual consent by the respective beneficiary.

Courts may, however, permit revocation or amendment of a trust without consent of infants or other beneficiaries who are unable to give their consent, where the proposed revocation or amendment benefits those particular parties.[8] This exception to the rule only applies upon approval by the court, where the court concludes that the beneficiaries will clearly benefit. For instance, in *Matter of Cord*,[9] the grantor of an irrevocable trust subsequently executed a will, which altered the direction of the payment of taxes. There, the question arose whether the beneficiaries of the irrevocable trust needed to consent to such change. The Court of Appeals, relying on both the grantor's intent in creating the instruments and the fact that the change benefited the beneficiaries, ultimately held that consent was not required. Similarly, in *Matter of Silverstein*,[10] the Court allowed a trust to be revoked without the consent of the infant contingent remainderperson because the trust would be replaced with a new trust instrument that would name the infant as the remainderperson. Alternatively, in *Matter of Mergenhagen*,[11] the Court held that the "narrow exception to the requirement of consent from all beneficially interested persons" did not apply because the record did not show that the proposed revocation would "'only have added to and not cut down the benefits available to the beneficiaries.'"

Since an irrevocable trust may only be amended or revoked pursuant to its terms, or by written acknowledged consent of all persons beneficially interested, the attorney draftsperson of the irrevocable trust should inquire whether an infant will be a beneficiary and draft accordingly. In order to avoid litigation where an infant is a person who is beneficially interested, it is advisable to either confirm that the infant-beneficiary will benefit from the proposed amendment or revocation, or to advise clients to steer clear of a costly losing battle.

Endnotes

1. *Matter of Siegel*, NYLJ, July 22, 1996 at 29, col. 4 (Sup. Ct., Nassau Co.) [internal citations omitted]; *see also Matter of Brock*, NYLJ, June 2, 2011 at 44, col. 105 (Sur. Ct., Kings Co.) *citing Gilbert* v. *Gilbert*, 39 N.Y.2d 663 (1976); *see also Perosi* v. *LiGreci*, 98 A.D.3d 230, 235, 948 N.Y.S.2d 629 (2nd Dep't 2012).
2. *See also Whitehouse v. Gahn*, 84 A.D.3d 949, 951, 922 N.Y.S.2d 546 (2nd Dep't 2011) ["an irrevocable trust...cannot be modified except with the consent of all the beneficiaries"].
3. *Matter of Bostwick*, NYLJ, August 27, 1991 at 26, col. 3 (Sur. Ct., New York Co.) [internal citations omitted]; *Matter of Michael*, 70 Misc. 2d 161, 162, 333 N.Y.S.2d 301 (Sup. Ct. New York Co., 1971).
4. *Matter of Bostwick, supra* at 26; *Matter of Michael*, *supra* at 162, 301.
5. *Matter of Mergenhagen*, 50 A.D.3d 1486, 1487, 856 N.Y.S.2d 389, 391 (4th Dep't 2008).
6. *Matter of Appleby*, 14 Misc. 3d 1208(A), 831 N.Y.S.2d 357 (Sur. Ct., Nassau Co. 2006); *see also Matter of Dickey*, 195 Misc. 2d 729, 731, 761 N.Y.S.2d 473 (Sur. Ct. Nassau Co. 2003).
7. *See also Matter of Scalamandre*, 2013 Slip Op. 33576(U) (Sur. Ct. Nassau Co.).
8. *Matter of Cord*, 58 N.Y.2d 539, 546, 449 N.E.2d 402 (1983).
9. *Id.*
10. *Matter of Silverstein*, 2009 WL 8479154 (Sur. Ct. Kings Co., 2009).
11. *Matter of Mergenhagen, supra* note 5, at 391, 1488 [internal citations omitted].

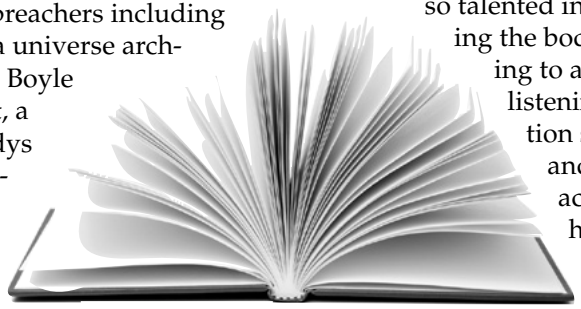
Arc of Justice—A Saga of Race, Civil Rights, and Murder in the Jazz Age

By Kevin Boyle | *New York: Picador Holt (2004)*

Book Review by James K. Riley, Esq.
Pearl River, NY and Montvale, NJ

Someone recently inquired whether I was familiar with the book, *The Arc of Justice* by Kevin Boyle, which was the winner of the 2004 National Book Award in nonfiction. I had to answer "no"; now, after reading this excellent work, I realize that I should have been able, much sooner, to respond "yes." Without question, *The Arc of Justice* is an important and relevant work as issues of race relations, civil rights and the role of practicing attorneys and of our system of justice in responding to those issues that continue to challenge each of us.

The book's title is derived from the teachings of progressive Protestant abolitionist preachers including Theodore Parker who envisioned "a universe arching towards justice." Author Robert Boyle describes how in 1923 Ossian Sweet, a Detroit physician, and his wife Gladys Mitchell Sweet, both black individuals, bought a small home in an "all white neighborhood" in Detroit, Michigan in 1923. The house was available to them only because it was not located within a neighborhood controlled by pernicious racial restrictive covenants. The fact that there was no *de jure* discrimination, however, certainly did not bar *de facto* discrimination, which, in the case of the Sweet family involved belligerent KKK, induced demonstrations in their front yard; the demonstrations quickly increased to the level of mob action and violence including the throwing of rocks against the structure and through its windows. In the end, some of the individuals who had joined ranks to help defend the Sweets in their home, including close relatives, in fear and desperation, discharged firearms into the mob with resulting loss of two lives among those individuals gathered outside.



All nine individuals inside the Sweet residence, including Dr. Sweet and his wife, were charged with murder. The N.A.A.C.P. and it newly formed Legal Defense Fund participated in the defense. The Legal Defense Fund, with some controversy, sought to retain an attorney with "star power" to lead the defense team and therefore engaged Clarence Darrow who, along with Dr. Sweet, occupy center stage in the *Arc of Justice*.

Without question, Darrow was a remarkably talented attorney, perhaps second to none in the history of criminal defense advocacy in the American judicial system; he was a groundbreaker in his strategies and creative efforts dedicated to the attainment of justice. Further, during his time and ever since, he occupies the position of "hood emblem" as to what an attorney can accomplish in the pursuit of justice with a blend of courage and diligence.

The *Arc of Justice* is filled with interesting moments. The selection of Darrow was not without controversy; it displaced a local team of very capable lawyers including several black attorneys. On the trial of the matter, Darrow's examination of the prospective members of the jury was a lengthy accomplished exercise in strategy; Darrow was a skilled early proponent of jury selection by use of methodologies based on the social sciences. And he was so talented in this exercise, astoundingly studying the body language and nuances and listening to a prospective juror remarks—isn't listening the most important communication skill an attorney can exercise? — and as a result securing a begrudging acknowledgement from the juror that he was in fact a member of the Klan.

His cross examination of witnesses was in most instances based upon classic approaches often with timing and astute analysis helping to build the defense case by tiny, but essential, increments. As one example, he quietly asks a police officer, who searched the Sweet residence immediately after the shooting, several of his many great questions during the trial, "What did you find in the bedroom [where the shots were fired from] besides a bed and a few chairs?" The officer's answer, "…a small stone." Darrow calmly moves in: "Did you find any broken glass? Yes, there were shards of glass"… Darrow more sharply, "Why didn't you mention finding broken glass on the floor of the bedroom? ...Would the fact that there was glass inside the house lead a policeman to the idea that [the stone] was thrown from outside?" Detective: "I do not doubt that at all." On this trial effort, Darrow was just getting started.

Darrow whose practice was based in Chicago, was assisted by co-counsel from New York—the progressive Arthur Garfield Hays who had worked with him on the Scopes' "Monkey" trial against opposing counsel, William Jennings Bryan. During the trial of Dr. Sweet and the other 8 defendants, Hays skillfully handled most of the

motions and procedural arguments while Darrow, with his remarkable, artful trial measures, handled most of the case in chief.

There is so much of importance in this book; every attorney should be familiar with the history of civil rights as exhibited in the details of the Sweet case as identified in *Arc of Justice*—the establishment and growth of the N.A.A.C.P Legal Defense Fund, the challenges to equal access of American citizens presented by racial restrictive covenants, racial prejudice in action as exhibited by thugs and mobs, jury selection techniques, prosecutorial abuse, an extraordinarily fair minded local presiding judge ultimately destined for a seat on the U.S. Supreme Court. An added benefit of this book is the exploration of the trial techniques developed or refined by Darrow that are still useful and relevant today.

The *Arc of Justice* is not always an easy read; its detail requires a good amount of studied time to complete; however, any such attention will prove to be very worthwhile for any attorney interested in the improvement of advocacy skills and also in the pursuit or attainment of justice.

Unfortunately, the title carries with it a modicum of both disappointment and poignancy—the efforts to secure justice rise and fall in that Arc; Darrow recognized this fact to a greater extent than most. Of course, the real world "arc of justice" continues its dynamic swirl—upward and downward—to this day.

We will all have a better understanding of that fact with the help of this very important book that is now recommended without reservation.

Article 3—Equitable Distribution

By Joann Feld

Divorce can be one of the most difficult and stressful events in a person's life and the division of marital property can be challenging and rife with emotions. New York is an Equitable Distribution State, Section 236B of the Domestic Relations Law of New York State. The basic preliminary assumption of divorcing parties is that all marital assets and all marital debts will be divided equally between husband and wife. I caution the practitioner to realize this does not necessarily happen, since property may be acquired throughout a marriage by gift, bequest, devise, descent or as provided for in a prenuptial or postnuptial agreement or as compensation from a personal injury case.

When a married couple divorces, only the marital property is to be divided equitably or fairly, but not necessarily equally, and since separate property is an equitable distribution consideration, then the property ought to be valued and assigned a dollar amount.

Presumably, each spouse enters into his or her marriage with separate or non-marital property. Separate property is the property, money, investments and assets each of the people owns prior to saying "I do."

Separate property includes real and personal property owned or inherited prior to the marriage; the proceeds of a vested pension wherein the payee became legally entitled to receive the pension proceeds prior to the marriage; property obtained by inheritance or gift from someone other than the spouse during the marriage; property obtained during the marriage in exchange for separate property; property identified as separate in a written agreement between the spouses; the increase in value of the separate property—to the point the increase in value is not due to efforts or contributions of either spouse during the marriage, in other words, if the asset has appreciated in value, then the marital portion or the appreciation would be subject to equitable distribution based upon the contributions made; or compensation for personal injuries during the marriage, unrelated to loss of wages or earning capacity.

So, unless you have commingled (mixed) your separate property with marital property, separate it does remain. Conversely, if you commingle your separate property with marital property, it may just lose its classification as separate property and be deemed marital, and thus subject to division with your divorcing spouse. For instance, if you deposit money into a jointly held bank account, most likely that money will be transmuted or altered into marital property, having lost its character as separate property.

Please note that generally, such rule does not apply to real estate, where there may be a separate property contribution at the time of the purchase. This event will be commonly termed a "look-back" and you should be able to get your separate property contribution returned to you, typically after the property is sold.

But just as a new couple you begin to form a life together, so too are you building a marital estate. Marital property acquired during the term of the marriage is often times referred to as the marital estate. Property obtained during the marriage is marital property.

By contrast, marital property includes personal property bought during the marriage; bank accounts, cash, retirement accounts acquired during the marriage; advanced educational degrees acquired during the marriage; and real estate purchased during the marriage.

A prenuptial or postnuptial agreement is a marital agreement, which may, by written agreement executed with the proper formalities, exclude certain property from the marital estate.

New York property will not automatically be divided down the middle or in half. This means that property must be valued and divided equitably or fairly.

> With the use of a neutral, third party mediator rather than a judge, if the clients do not agree on the type of property being addressed, the clients produce proof of separate ownership for consideration. However, if they cannot agree on a division of the property, then after trial, the court will decide what would be fair and equitable, not necessarily equal since property is not automatically divided by two and distributed to each spouse. But keep in mind, if the property was acquired during the marriage, the spouse claiming that property is his or her separate property carries the burden of proving the property is in fact, separate property and that debt obligations are also taken into consideration when dividing marital property for equitable distribution purposes.

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

Bearing all this in mind, a court may look to the following factors by which to determine the equitable nature of the property:

1. The income and property of each spouse at the time of the marriage, and at the time of the divorce;
2. The length of the marriage and the age and health of both spouses;
3. If there are minor children involved, the need of the spouse who has custody of the children to live in the marital residence and to use or own its household contents;
4. The loss of inheritance and pension rights of each spouse because of the divorce;
5. The loss of health insurance benefits of each spouse because of the divorce;
6. Any award of support or maintenance the court will be making;
7. Whether one spouse made contributions to marital property that the spouse does not have title to; for example, where one spouse helps the other spouse increase their ability to earn more money by getting a degree or certification;
8. The liquid or non-liquid character of all marital property ("liquid" means that the property can easily be converted to cash);
9. The probable future financial circumstances of each party;
10. The impossibility or difficulty of determining the value of certain assets, like interests in a business, and whether one spouse should be awarded the business so it can be run without interference by the other spouse;
11. The tax consequences to each party;
12. Whether either spouse has wasted or used up any of the marital property while the divorce was ongoing;
13. Whether either spouse transferred or disposed of marital property at less than market value, knowing that the divorce would be happening.

In New York divorces, whether referred to as pensions, profit sharing plans, 401ks or Individual Retirement Accounts, retirement plans are taken into consideration when structuring an equitable distribution award. Under the Equitable Distribution Law in New York, the value of these assets can be ascertained and then divided and awarded to each spouse within the context of equitable distribution.

To the extent that the retirement plans benefits accrued during a marriage and before the commencement date of the divorce action, these benefits are subject to equitable distribution. Oftentimes as not, the courts and mediators will employ the *Majauskas* formula to calculate the split of retirement plans with the accrued benefit to be received by the spouse upon his or her retirement. A Qualified Domestic Relation Order ("QDRO") will divide most retirement plans and must be signed by a Judge. A QDRO is a court order detailing proper procedure for the distribution of the payee's retirement benefits in the future, ensuring that each spouse receives his or her rightful benefits.

"IRAs that are funded with earnings earned during the course of the marriage will entitle the other spouse to a proportionate amount of IRA assets."

IRAs that are funded with earnings earned during the course of the marriage will entitle the other spouse to a proportionate amount of IRA assets. IRA funds are transferred tax-free from one spouse to the other, so long as it is in a written Judgment of Divorce or unless it is rolled or transferred into his or her own IRA. Without such documentation, a 20% federal income tax will be imposed.

Also worthy to note, the IRS does not generally consider the transfer of assets between divorcing spouses to be a taxable event. So long as it can be shown that the reason behind the asset transfer was a divorce, then it is not a taxable event.

Some assets are not easy to divide between the spouses. An interest in a business or professional practice may be difficult to value or divide, yet the educational degree, profession or license is considered "property" and will be subject to equitable distribution. For some of these impractical occasions, a court may order a distributive award or if in mediation, a couple may introduce a payment to balance things out. In other words, the court may order a sum to balance out the irregular distribution of the marital property.

Fair Is Fair: Transitioning the Closely Held Business to the Actively Employed Child

By Michael Markhoff

INTRODUCTION

While most individuals who are interested in designing an estate plan are typically focused on minimizing estate taxes as well as ensuring that assets pass according to their wishes, often with certain controls and stipulations, owners of closely held businesses have their own checklist of additional concerns. These businesses typically comprise a majority of the owner's taxable estate, which leads to analyses of efficient uses of the gift and estate exemptions and techniques such as GRATs, IDGTs, ESOPs, etc. However, of equal, if not more importance and weight, is a dialogue involving management and control of the business after the death of the parents/owners.

Anyone who has started a business has typically devoted significant time, energy and resources to the endeavor while sacrificing other aspects of his or her personal and professional life, with the focus initially on growth of revenue and stock value. As the business matures, the prudent owner should devote some of his or her focus to considering who will take over so that future generations can continue to benefit from the profits, while all family members are treated fairly regarding management and equally regarding equity.

GOAL: INCOME FOR THE SURVIVING SPOUSE

There are a few goals that the business owner would like to achieve when planning for the future. First, after the death of the owner, the surviving spouse must receive sufficient income from the business. The surviving spouse should be able to live in the same manner to which he or she was accustomed without any significant change in lifestyle. Income to a surviving spouse is the equivalent to a tangible asset whereas principal is akin to an intangible asset and of lesser concern. The fact that the company is valued at $5 million or $50 million is less important to the surviving spouse than the fact that he or she is able to draw a salary or receive dividends and be able to take the same vacations and drive the same car as he or she did when the spouse was alive.

In effect, income is how the surviving spouse measures the success of the estate plan. To do so, there are a number of assets that can be used to solve this problem if they are planned for correctly and concurrently. Also, there is a delicate balancing act here because, simultaneously, the actively employed child (or children) are handling the day-to-day operations of the business and wish to be compensated for their efforts.

Spouse Is QTIP Trust Beneficiary

Regarding the business, the ideal scenario would involve having the actively employed child draw a W-2 salary from the company and any residual profit would flow through on a Schedule K-1 (used to report the share of the partnership's income, deductions and credits) to the credit shelter and/or qualified terminable interest property ("QTIP") trust with the surviving spouse as sole beneficiary. This way, both the child and the surviving spouse are satisfied. However, in order to understand the mechanics of this technique, aspects of corporate law, trusts and estates law and tax law must be coordinated. Under corporate law, the credit shelter/QTIP trustees are the shareholders of the company. Shareholders, in turn, elect directors and directors are responsible for declaring dividends. If the actively employed child is a trustee of the QTIP trust, there is an immediate conflict of interest. The more dividends the child pays, the less working capital the child has to operate the business. On the contrary, if the child declares a small dividend, there is less income to maintain the parent's lifestyle as the deceased business owner would have wanted.

There is also a significant tax problem in having the child as trustee of the QTIP trust. According to TAM 9139001, the trust will not qualify for the marital deduction for two reasons. First, the child could direct principal to himself or herself because, as trustee and director of the company, the child has the power to do so. Second, the surviving spouse may not receive all of the income from the trust because the actively employed child controls the right to vote the stock and declare dividends. In order to avoid this problem, a corporate fiduciary or independent person must serve as co-trustee with the child.

Commercial Real Estate

The next source of income for the surviving spouse is commercial real estate. Typically, a number of years after acquiring the business, the owner will purchase the office

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real estate so that he or she pays himself or herself rent instead of to a third party. However, it is necessary to look at basic asset protection planning before using real estate as part of the succession plan.

There are basically two options as to how the building can be owned. Before 1986, the S corporation was the preferred entity of choice because it afforded liability protection and only one level of taxation. The one significant negative attribute of the S corporation is that the mortgage refinance proceeds are trapped inside the corporation and may be taxed upon distribution at the shareholder level. By contrast, the preferred entity of choice today is the limited liability company (LLC) because it has the same asset protection as an S corporation without the refinance issues.

Once the entity issue has been resolved, hopefully the business owner can avoid another land mine: common ownership of the real estate and the operating business. There is a potential liability issue if the operating business and real estate are owned by the same entity. If an individual is injured on the property and sues the business, both the company and the real estate are reachable by creditors. A tax-free spinoff[1] cannot be used in this case to separate the business and real estate into separate entities because real estate is not the conduct of an active trade or business. Therefore, as part of the planning when the building is purchased, it is imperative that a new LLC own the real estate.

Furthermore, there should be a lease between the operating business and real estate at this point. Typically, the business owner, during his or her lifetime, would sign a long-term triple net lease in which the tenant pays a fixed amount of rent with cost-of-living increases every five years or so as well as real estate taxes, insurance and maintenance or repairs. This way, both the surviving spouse and actively employed child are satisfied. The credit shelter trust/QTIP will receive a fixed amount of rent to sustain the surviving spouse's lifestyle and the actively employed child does not have to negotiate the rent with his or her parent and can operate the business knowing the fixed costs.

Employment Contract

If necessary, the business owner may decide to also sign an employment contract during his or her lifetime with the business in order to provide for a source of income to the surviving spouse. Various companies, including public companies, have provided this benefit as a death benefit for their executives.

The Internal Revenue Service challenged these contracts from an estate tax perspective for a number of years on the premise that the commuted value of the payments should be included in the decedent/employee's estate. The IRS had mixed success with this argument[2] until 1981, when the 100% marital deduction became law with the Economic Recovery Tax Act of 1981.[3]

At that point, the IRS switched tactics and argued against deductibility by the business for these payments. In *Ring Power Corp. v. United States*,[4] the district court held that the payments were deductible by the business as long as the agreement provided that (a) the payments were in consideration for past services rendered and (b) the employee/owner was undercompensated in the formative years of the business.

GOAL: MINIMIZE ESTATE TAXES

The second goal of the business owner is to plan in such a way as to minimize estate taxes. The business is obviously an illiquid asset and will consist of a significant portion of the estate. While the Code allows for a deferral of estate taxes over 14 years when certain requirements are met,[5] it would be best to minimize and/or eliminate the estate tax through the use of the annual gift tax exclusion and the lifetime estate and gift tax exemption. Ideally, the business owner would consult with an insurance professional and purchase life insurance to be owned by an irrevocable trust as a source of liquidity to pay the estate taxes.

GOAL: TREAT CHILDREN FAIRLY

The third goal would be for the children to be treated in a fair and equitable manner. Furthermore, the child or children who will continue to run the business must have incentives to do so or else the entire succession plan will fail.

The starting point of discussion is identifying which family member or members will head the organization. Few discussions with estate planning clients are as fraught with emotion as is the decision to choose a leader or leaders for the next generation of a closely held family business. Oftentimes this choice is made by the Darwinian theory of survival of the fittest: whoever has demonstrated ability, sound judgment, leadership, interest and business acumen, among many other traits, while employed in the business will likely win the golden ticket to steward the family for the foreseeable future. While it is human nature for every family member involved with the company to think that he or she is the most significant contributor to the company's success and that any bad decisions or adverse results are the fault of everyone else, reality says otherwise. In the family business context, for better or worse, this decision is often made by the senior generation owners.

EXAMPLE

There is an S corporation called Vandelay Industries, which was started by the parents, Frank and Estelle, in 1970, and they both died in 2016. They have two

children: George, who has worked at the company for 20 years, beginning in sales, and is now a manager; and Lloyd, who, since 1998, has worked at a series of startup companies that he hoped would become the next Google and is now an employee at a more stable company.

While they were alive, Frank and Estelle identified George as their choice to succeed them as owners of the company. Vandelay Industries was valued at $12 million on their estate tax returns and comprised 80% of the overall estate valued at $15 million (including a $1 million house and a $2 million IRA). The goal of the estate plan was that each child would receive one-half of the estate, but George would run the company without interference from his brother Lloyd. How can this be accomplished?

on them entering into a shareholders' agreement in which George has the right to buy Lloyd's shares (a "call") and Lloyd would have the right to sell his shares to George (a "put"). George's call can be exercised at any time he decides. If he has sufficient assets to pay for the Lloyd's shares, he can do so immediately or in the future. Conversely, the timing of the exercise of Lloyd's put should be limited to five to 10 years after the death of the survivor as between Frank and Estelle. The reason is that George should be given an opportunity to operate the company without the threat of an immediately large loss of capital. George should have time to get accustomed to operating the business without his parents and to build the working capital account. Since the goal of this planning is the successful transition of control to George,

"Because succession planning involves knowledge of the tax law, corporate law and trusts and estates law, each advisor's input is critical to ensure a smooth transition of management and ownership."

The wills should direct that, upon the death of Frank and Estelle, the stock in Vandelay Industries be recapitalized into voting and non-voting stock.[6] (If this were a limited liability company, the will should direct that the LLC be amended to be a manager-managed LLC.) A prudent recapitalization would create 10 shares of voting stock and 90 shares of non-voting stock. The will should further direct that when dividing the estate into 50/50 shares, the 10 shares of voting stock and as many non-voting shares (to equal one-half of the total value of $15 million) shall be allocated to George's 50% share of the estate and the remaining non-voting stock and the house and IRAs be allocated to Lloyd's 50%. In other words, George would receive the 10 voting shares and 52½ non-voting shares worth $7.5 million (or 50% of the $15 million estate) (62.5% $12 million = $7.5 million) and Lloyd would receive the remaining 37½ shares of non-voting stock worth $4.5 million plus the house and IRAs valued at $3 million, also for a total of $7.5 million.

Both children are being treated equally from an equity perspective, but what would happen if we stopped at this point? Both George and Lloyd would be upset. George would argue that he will continue to grow the business for the next 20 years and when there is some type of liquidity event, Lloyd will have been unjustly enriched by riding George's coattails. On the other hand, Lloyd would argue that the business has never declared a dividend since 1970 and that this stock is like wallpaper and is worthless. The solution would be to incorporate a buy/sell agreement into the will to create a market for the stock and to satisfy both shareholders.

Therefore, the will should further provide that the distribution to George and Lloyd would be contingent

it would be unfair to immediately drain the company coffers of cash for buyout purposes. The thought is that five years should be enough time for George to save money to buy out Lloyd.

Purchase price is always a delicate discussion with closely held businesses, but in this situation, it isn't as controversial. The executor must obtain an appraisal of the business in order to prepare the estate tax return for the parents. Therefore, the will should provide that the purchase price would be calculated using the same methodology as used on the estate tax return and updated as of the date of the exercise of the put or call. In order to avoid running afoul of Chapter 14 of the Code because this is a family transaction, the executor will need a fair market value appraisal anyway. This same appraisal can just be updated with the current financial situation to provide a fair price to George and Lloyd.

Ideally, life insurance should play a significant role in the transaction. George should have purchased a term life insurance policy on the surviving parent (or a survivorship policy on both parents) in order to create an instant influx of cash that can be used by him to buy out Lloyd. If there is no life insurance to pay Lloyd (or only enough for a down payment), George will give Lloyd a promissory note. The terms of the note should be spelled out in the will. There would be interest at the greater of the applicable federal rate or the prime rate and the note would be self-amortized over five, 10 or 15 years, depending on Lloyd's need to be paid and George's ability to meet that demand based on cash flow. Practically speaking, the note should not be paid over more than 15 years because both parties would like to put the transaction behind them. Also, the IRS

will treat a note lasting more than 15 years as equity and not debt, which will cause certain unintended tax consequences.[7]

The shareholders' agreement would also include a recapture clause as well as a tag along clause. A recapture clause is meant to create fairness between the parties in case the business is later sold for a higher price. An example of this would be if George bought out Lloyd for $4.5 million in 2017 and in 2018, he then sold Vandelay Industries to Kramerica Industries for $15 million. In a situation where the company is sold within two to three years after it was purchased, it is highly likely that this increase in purchase price is more luck and timing than business acumen. Because the price George sold for was a theoretical fair market value, it is only fair that Lloyd share in this increase. The recapture clause provides that the seller will receive his pro-rata share of the increased sales price, or, in other words, Lloyd would receive $1,125 million of the $15 million sales price (37.5% of the extra $3 million value [$15 million – $12 million]).

On the other hand, if neither party has exercised his put or call and continues to own the stock and a third party is interested in buying the business, a tag along clause is necessary to ensure that the minority stockholder cannot stymie the sale of the company. As previously mentioned, George will own all 10 shares of voting stock and 52½ shares of non-voting stock with Lloyd owning the 37½ shares of non-voting stock. While George may decide to sell his voting stock to Kramerica Industries, it is unlikely that the buyer will be satisfied with owning less than 100% of the stock of a closely held business. Therefore, the stockholders' agreement should have a clause mandating that if the owner of the voting stock wants to sell his shares, all of the remaining stockholders must sell his or her shares to the same buyer as well.

CONCLUSION

As is evident from this article, there are many contingencies to consider when developing a business succession plan. Each party at each generational level has his or her own opinion and needs that must be considered in the design. Also, the solutions cannot be arrived at in a vacuum by just the client and attorney. All estate plans, especially those involving succession planning, are a team effort among the attorney, accountant, financial advisor and trust company. Because succession planning involves knowledge of the tax law, corporate law and trusts and estates law, each advisor's input is critical to ensure a smooth transition of management and ownership.

Once the clients and advisors are satisfied with the plan, it is important that the family meet (including the sons-in-laws and daughters-in-laws) so that the parents can present the results and everyone can air their pleasure or objections. It is preferable to have the children (and their spouses, who occasionally wield the power) understand the decisions made by the parents while they are both alive and able to articulate their thoughts instead of having a plan thrust upon them by the executor without any knowledge of the background of the succession plan. The intent is that this will hopefully avoid any fights between or among the children and allow the business to flourish under the capable leadership of the child (or children) who have been chosen to lead the next generation.

Endnotes

1. § 355. All section references ("§") are to the Internal Revenue Code of 1986, as amended ("the Code"), or the Treasury regulations thereunder, unless otherwise indicated.
2. *Estate of Schelberg v. Commissioner*, 612 F.2d 25 (2d Cir. 1979); *Estate of Fusz v. Commissioner*, 46 T.C. 214 (1966); Rev. Rul. 92-68, 1992-2 C.B. 257; Rev. Rul. 81-31, 1981-1 C.B. 475.
3. Pub. L. No. 97-34.
4. 89-1 USTC ¶9109 (M.D. Fla. Oct. 24, 1988).
5. § 6166.
6. Reg. § 1.1361-1(1)(1).
7. Rev. Proc. 2017-3, 2017-1 I.R.B. 130.

Tips for Being an Effective Mediator of Employment Disputes

By Ruth D. Raisfeld

Mediation has become an integral process in the life of labor and employment disputes. Each of the federal courts and an increasing number of state courts not only have ADR programs, but may require mediation of pending cases right out of the box or later during a litigation. More and more attorneys have an opportunity to serve as a mediator, either through court-annexed appointments, volunteer assignments or when retained by parties who believe they can help serve as an honest broker in a private or pending matter.

The bridge from being a litigator to becoming an effective mediator, however, is neither straight nor short! It is essential to be mindful of the transition from the role of advocate to that of a neutral third party dedicated to resolving the dispute. Here are some tips that may help in making it easier to wear the hat of "mediator."

1. Be Neutral

The mediator's role is to facilitate negotiations leading to a settlement of a pending litigation. It is not to be the lawyer for one side or the other or both. This is true even if you would handle the case differently for one side or the other or believe that the attorneys who have appeared are not as prepared or thoughtful as you would be. Strive to be neutral!

2. Respect the Attorney-Client Relationships

The mediator is there to help but not to commandeer the negotiations. It is important not to criticize or critique the performance of each side's lawyer or to do anything that would undermine the lawyer in front of his or her client. If you believe a lawyer is an obstacle to effective negotiations, in certain circumstances you might consider talking to the lawyer outside the presence of the client or calling for an "all lawyers" meeting and attempt to put the lawyers on a more productive and constructive path, but it is rarely appropriate to diminish the lawyer in the eyes of his or her client.

3. Be Prepared

The parties should provide submissions in advance of the mediation. Read them in advance. You can also call each attorney in advance especially if you have an inkling that they haven't prepared. This does not mean you need to do extensive research: ask them to send you cases they think you should read. Further, encourage counsel to get you important documents or testimony before the mediation; it is very hard to get the essence of the argument when things are read for the first time at the mediation.

4. Encourage Parties to Calculate Best Case/Worst Case Damage Scenarios

If the parties haven't done this in advance, work with each side separately prior to and during the mediation to do damage estimates depending on the nature of the case, remedies available, whether plaintiff has lost employment or become reemployed, out-of-pocket expenses, medical expenses, emotional distress, attorneys' fees, etc. This helps to get the parties "reality testing" on their own before the mediation, so some of the hard work of getting to a settlement zone is done without you.

5. Do Not Put a Value on the Case

Sometimes inexperienced counsel and clients will turn to the mediator and say *"What do you think the case is worth?"* This is not your job. Whatever you say, one side will think you don't believe them or you are taking sides. While at some point you might offer a mediator's proposal to break impasse, you should be careful to say, "This is not what I think the case is worth, but this is what I think both sides can agree to and live with."

6. Listen

Be sure to give both sides an opportunity to share their side of the story with you before you start to reality test. Remind the participants that you are not the judge or the jury but simply there to discuss some of the strengths and weaknesses that they may wish to factor into their settlement analysis. Be sensitive to the needs of the parties and remember that there are potential emotional issues on both sides. A plaintiff's emotional state will probably be different in a sexual harassment case than it would be in a wage case. Similarly, a large employer will often have different needs and requirements than a small employer. Don't size up the situation without fully listening and letting participants speak.

7. Mix It Up

Be creative in conducting joint and separate sessions. Sometimes it is helpful to speak with counsel separately from their clients; it is never appropriate to speak with clients without counsel present. Sometimes it may be help-

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ful to reconvene a joint session or to allow clients to speak with each other privately.

8. Keep Track of Time

Do not burn through the entire day discussing the facts and the law. At some point, state, "Well, it sounds like the parties can agree to disagree," and move to a discussion of the future. With a plaintiff, ask questions such as: Have you found a job? Are you getting emotional support and/or medical attention? Do you understand how long and complicated lawsuits can be? With a defendant, ask questions such as: Has the employee and/or supervisor been replaced? Are potential witnesses available? Do you have access to documents? Does the defendant understand how much time, effort and expense goes into defending an employment decision?

9. Be Persistent

Do not give up on settling just because the parties are far apart at 2 p.m. Mediation of employment disputes takes a long time but MOST disputes do settle within one day.

10. It Ain't Over 'til It's Over

If the parties come to an agreement, assist in the preparation of a terms sheet, or if there is time, an agreement. If the parties do not sign a final agreement in your presence, then set a schedule for drafting the agreement, notifying the court, and filing a stipulation. After the mediation, follow up. Many settlements are derailed by delay and remorse.

The Evolving Joint Employer Concept and the NLRB

By Paul F. Millus

Whether an employer is subject to joint employer liability depends on many factors. Does the case deal with a parent-subsidiary relationship? A purported independent contractor situation? A contractor/subcontracting relationship? Two separate companies with common management? A franchisor/franchisee relationship? One must then decide which factors are relevant in determining whether a joint employer relationship exists. Add to the mix the many types of cases where a court would need to determine whether joint employment is present, such as in breach of contract, Fair labor Standards Act (FLSA), Title VII or under the National Labor Relations Act (the "Act"). It is abundantly clear that this area of law is complex, and the issue is of significant importance to both employers and employees. For example, being designated a joint employer under the Act can mean the putative employer is subject to unfair labor charges and open to being included in a representative election and the unionization of its workforce.

The National Labor Relations Board (the "Board") is the tip of the spear promoting a more expansive way to evaluate whether an employer is indeed a joint employer. The impact of the Board's efforts goes far beyond the typical labor law dispute under the Act, and may eventually redefine the employer-employee relationship in other areas of the law. This evolution is in its early stages, but if the Board is ultimately successful in achieving its goal, employers will have a new set of obligations that they never thought would be imposed on them *vis a vis* workers they never viewed as employees.

What Is a "Joint Employer?"—A Brief Overview

The joint employer doctrine's history is not as long as one might think. The first time the U.S. Supreme Court used the words "joint employer" was in a 1941 NLRB case.[1] The first Second Circuit case to use the term in an employment case was in 1962.[2] The New York State Supreme Court first examined a joint employment issue in 1953, in connection with a decision by the Workman's Compensation Board.[3]

One of the first statutes to impact the joint employer analysis was the Labor Management Relations Act of 1947 (LMRA), better known as the Taft-Hartley Act. The LMRA specifically excluded "independent contractors" to ensure that the Board and the courts applied general agency principles when distinguishing between employees and independent contractors. Invariably, in such cases courts have looked to traditionally employed common-law agency concepts in joint employment cases where courts assess the amount of control the putative employer has over the worker.[4] However, in a 1961 FLSA case, the Supreme Court held that an entity that suffers or permits an individual to work may, as a matter of "economic reality," function as the individual's employer. In his opinion, Justice Douglas made it clear that "'economic reality' rather than 'technical concepts' [was] to be the test of employment."[5]

The "economic reality test" was born. After some refinement by the courts, the test came to include inquiries into: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[6] In FLSA matters, it has long been recognized that no one factor standing alone is dispositive. The "economic reality" test encompasses a "totality of circumstances" approach—any relevant evidence may be examined so as "to avoid having the test confined to a narrow legalistic definition"[7]

In a 2003 FLSA case involving subcontracting, the Second Circuit delineated a revised test to determine whether an employer was a joint employer. The factors were: (1) whether the putative employer's premises and equipment were used for the plaintiffs' work; (2) whether the company which was the immediate employer had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to the putative employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative employer or its agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the putative employer.[8]

Where independent contractor status is at issue in a FLSA matter, the employer's identity is also relevant. In such cases, the Second Circuit has applied a different and more expansive test, examining (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.[9]

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In the Title VII context, the Second Circuit has stated that a four-part test developed by the Board is the appropriate guide for determining when parent companies may be considered the employer of a subsidiary's employee. This test analyzes the (1) interrelation of operations; (2) centralized control of labor operations; (3) common management; and (4) common ownership or financial control with the focus on "centralized control of labor relations."[10] From these examples it is clear that the courts continue to outline partial bright-line tests to provide as much guidance as they can on the issue.

As far as the Board is concerned, a pair of NLRB 1984 rulings originally set the standard for what constituted a joint employer for purposes of enforcement of the Act. *Laerco Transportation* and *TLI, Inc.* held that the Regional Director correctly ruled that joint-employer status is established when there is "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[11] That ruling was later interpreted by the Board to require "direct and immediate" control by the putative employer over employment matters.[12]

There is no question that courts have been guided by Board decisions in connection with joint employment issues, and have applied those concepts to other cases when joint employment is at issue. Unquestionably, what the Board does today will influence the courts, not merely in terms of their approach to appeals from Board decisions, but also in other joint employer cases.

As for the Board itself, the definition of "joint employer" is significant. As stated, it affects collective bargaining. Instead of allowing for larger collective bargaining units and the power of numbers they provide, a more narrow definition of a joint-employer limits opportunities for unionization—potential members are splintered among hundreds of small companies. As the Board is charged with investigating and prosecuting unfair labor practices under the Act, employers who believed they had no involvement with certain terms and conditions of employment are suddenly and potentially liable for violations. Accordingly, Board decisions on this issue are poised to have far reaching implications.

The Board's Gambit: *Browning-Ferris* and the McDonald's Cases

In the recent case of *BFI Industries of California, Inc. and FRR-II, LLC d/b/a Leadpoint Business Services and Local 350, International Brotherhood of Teamsters,* the Board considered whether it should adopt a different standard for what constitutes a joint employer in the context of a subcontracting case. Petitioner, Local 350, International Brotherhood of Teamsters ("Local 350") sought to represent all full time and regular part-time employees jointly employed by FRR-II, LLC d/b/a Leadpoint Business Services ("Leadpoint"), a temporary staffing agency, and BFI Industries of California, Inc. ("BFI"), the client to whom Leadpoint supplied employees. The Regional Director rejected Local 350's claim that Leadpoint and BFI were joint employers. On appeal, the sole issue before the Board was whether BFI jointly employed Leadpoint's workers.[13]

Local 350 argued that while the facts supported a finding that the employers were joint employers even under the existing standard, the Board needed to adopt a broader standard to effectuate the purposes of the Act and to conform with prior case law and "industrial realities." Local 350 maintained that "require[d] the Board to consider not merely the indicia of control exerted over the employees by each employing entity, but also the relationship, and the extent of control as between the two employing entities," which, it concluded, "require[d] consideration of indirect control." From Local 350's standpoint, the Board's narrow view of employment "ma[de] even less sense in our current economy" where "the modern worker is awash in a sea of multi-layered and dependent relationships, and the current joint employment standard leaves him or her bereft of meaningful resort to the protections and processes of the Act."

BFI's opposition was based on the argument that the proposed joint employer standard was, in reality, no standard at all and thus failed to satisfy due process. BFI posited that the "standard" argued by the union and the General Counsel provided no guidance for businesses on how to structure their operations to provide certainty as to whether they were, or were not, joint employers under the Act. Using its own version of the "industrial realities" standard, BFI and Leadpoint pointed out that business relationships typically involve agreements that indirectly, but necessarily, impact the terms and conditions of employment. They argued that service contracts often involve significant control by the customer over the service provider, and when services are performed on the customer's property the amount of control is even greater. Moreover, BFI reasoned that the standard proposed by Local 350 would violate the Act by failing to give ordinary meaning to the term "employee," namely, that "an employment relationship does not exist unless the worker is directly supervised by the putative employer." Finally, BFI argued that adoption of the new standard would violate the Taft Hartly Act. Taft Hartly directed the Board to apply common law agency principles, requiring "a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction."

On August 27, 2015, by a 3-2 margin, the Board issued its decision citing that "the diversity of workplace arrangements in today's economy has significantly expanded," pointing to the growth in the temporary help services industry from 1.1 million workers in 1990 to 2.87 million workers in August of 2014.[14] The Board noted that past decisions narrowed the joint employer definition and said it would follow a common law agency test it argued was supported by the Supreme Court's decision in *Boire v. Greyhound*.[15] It stated, "the Board may find that two or

more entities are joint employers of a single workforce if they are both employers within the meaning of the common law, and if they share or co-determine those matters governing the essential terms and conditions of employment." The Board also remarked it would no longer require a joint employer to not only possess the authority to control employee's terms and conditions of employment but also to exercise that authority and do so directly, immediately, and not in a "limited and routine manner." Thus *Laerco and TLI* as well as several other prior Board decisions were overruled. Under this new test, if the employer can "[r]eserve[] authority to control terms and conditions of employment, even if not exercised," indirect control, even through an intermediary, would suffice to establish a joint employer relationship.

The union subsequently prevailed in an election, with the Board certifying it as the collective bargaining representative of those employees. Browning-Ferris then refused the union's request to bargain. An unfair labor practice charge resulted, alleging that the refusal to bargain was unlawful. On January 12, 2016, the Board found that BFI and Leadpoint, as joint employers, had violated the Act. On February 26, 2016, BFI appealed to the District of Columbia Court of Appeals. In its "Statement of Issues to Be Raised" Browning-Ferris contended that the Board's new joint employer standard was defective for several reasons: (i) it was contrary to the definition of "employee" established by Congress in the 1947 Taft-Hartley amendments; (ii) improperly relies on a "economic realities" standard; (which was prohibited by Congress in the 1947 Taft-Hartley amendments); (iv) fails to promote stable collective bargaining relationships as required by the Acts; and (v) it is arbitrary and capricious because it is "hopelessly vague."

In July, 2014, the NLRB turned its attention to the joint employer concept in connection with franchising. It's general counsel authorized the filing of consolidated complaints against multiple McDonald's franchisees and their franchisor, McDonald's USA LLC ("McDonald's"), as joint employers. On December 19, 2014, the Regional Directors from six Regions issued Complaints or Consolidated Complaints based on charges that a multitude of franchisees were joint employers under the Act. Sixty-one separate unfair labor practice charges were filed between November 28, 2012 and September 22, 2014, involving 21 separate and distinct Independent Franchisees and a single McDonald's-owned restaurant. The NLRB alleged 181 unrelated alleged violations against McDonald's occurring at 30 separate restaurants, each with its own ownership, management, supervision, and employees, located in five states, and spanning the entire continental United States.[16]

On December 19, 2015, the NLRB's General Counsel commenced litigation alleging that McDonald's USA and its franchisees violated the rights of employees working at its restaurants around the country by, *inter alia*, "making statements and taking actions against them for engaging in activities aimed at improving their wages and working conditions, including participating in nationwide fast food worker protests about their terms and conditions of employment."[17] The Board's General Counsel transferred the cases from 5 Regions to the Regional Director for Region 2, here in New York on January 5, 2015. The following day the Regional Director for Region 2 consolidated the transferred cases for a hearing with previously consolidated cases from Region 2.

In this current McDonald's case, the focus is on franchising and the "economic realities" attendant to that business relationship. As a result, McDonald's (and its individual franchisees) must defend these 61 unfair labor practice charges involving the 31 franchisees from 30 different locations in one proceeding.

On March 9, 2016, the NLRB's counsel argued that McDonald's uses business consultants—who monitor staffing and business practices and conduct periodic reviews of implementation of those practices—to exert control over its franchisees. Pointing to McDonald's operating manual and point-of-sale and scheduling systems, the NLRB concluded that franchisees' actual control over the terms and conditions of their workers' employment is limited. NLRB counsel viewed McDonald's as the true puppet master, arguing that McDonald's set the times in which a burger should be served, the job classifications of workers, and instituted a uniform computer scheduling system across the restaurants. It thus concluded that McDonald's co-determines the working conditions of franchisees' employees thereby making it a joint employer under the NLA. McDonald's made seven requests to obtain special permission to appeal the Administrative Law Judge's procedural rulings in connection with subpoenas served by both sides, including a severance motion it filed, arguing that the joint employer allegations alone could not justify consolidation where the unlawful conduct alleged in each charge is separate and distinct, involving individual restaurants, separate actors and wholly unrelated entities. McDonald's posited that the defenses to the joint employer allegations as well as the underlying unfair labor practice charges will invariably vary from case to case. Thus far, the motion practice has not found favor with the Administrative Law Judge or the Board.[18]

McDonald's counter argument is that it is essentially doing its due diligence as a franchisor. It further stated that the company does not tell business owners whom to hire or when to schedule its employees. Rather, its counsel maintained that McDonald's exerts the level of control that any franchisor would expect in order to maintain a uniform customer experience across all franchisees, adding, "[a]ll franchisors, if they're successful, do precisely the same thing."

At this point, the NLRB's general counsel has not outlined in detail the specifics supporting his view that McDonald's USA should be deemed a joint employer. However, assuming an approach consistent to that applied in

Browning-Ferris, the impact of what the Administrative Law Judge and, eventually, what the Board decides, cannot be understated. In addition to holding franchisors liable for unfair labor practices committed by franchisee owners across the country, the franchisors may be responsible for Workers' Compensation claims, unemployment insurance, OSHA compliance, wage and hour violations, and liability under state and federal discrimination statutes.

Potential Impact of an Evolving Joint Employer Standard

While far from settled, it is clear that courts were predisposed to identifying narrow factors in order to make the question of joint employment easier to determine. Courts often attempt to establish tests that can measure evidence with some precision in order to effectuate predictable outcomes. Predictability can serve both the courts and the litigants. If anything can be drawn from the Board's decision in *Browning-Ferris* and its stated goal of finding McDonald's to be a joint employer, it is that the NLRB eschews a formulaic approach to the issue. Almost any aspect of the relationship between the putative employer and the worker was fair game. In *Browning-Ferris*, while dismissing the dissent's position that the Board is reverting to an "economic reality test" rejected by the Supreme Court and Congress, the majority's commentary on the "diversity of workplace arrangements in today's economy" and its citation to statistics or the growth of the temporary help industry over the last two decades, seem to support the dissenters' view regarding the NLRB's motivation. Nevertheless, the Board's approach will most certainly make it easier for workers to maintain viable cases (if not win them outright) where they allege joint employment. Where in the past such cases might have been ripe for dismissal, they now may have new, longer, and more fruitful lives.

Moreover, there is no reason to think that only parties before the Board will be impacted. Indeed, the U.S. Department of Labor issued an "administrator's interpretation" on January 20, 2016, discussing the distinction between employees and independent contractors under the Fair Labor Standards Act. It emphasized the importance of whether an individual's services are an integral part of the company's business, and downplayed the importance of whether the business actually controls an individual's work—sounding very similar to the Board's approach in *Browning-Ferris*. It seems likely it will argue this in the McDonald's case.[19] Also, in a recently discovered draft of an Occupational Safety and Health Administration's (OSHA) internal memorandum, OSHA investigators advised that "a joint employer's standard may apply where the corporate entity exercises direct or indirect control of the work conditions, has the unexercised potential to control working conditions or based on economic realities."[20] The Board's actions in *Browning-Ferris* and the McDonald's case foreshadow how the court may view the issue of joint employment in a myriad of other types of cases, leaving employers and employees uncertain as to what the future holds.

Endnotes

1. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 61 S.Ct. 908 (1941).
2. *Empresa Hondurena de Vapores, S. A. v. McLeod*, 300 F.2d 222 (2d Cir. 1962) judgment vacated 372 U.S. 10 (1963).
3. *Diaz v. Ulster Vegetable Growers Co-op.*, 282 A.D. 426, 123 N.Y.S.2d 321 (3d Dept 1953).
4. *Frankel v. Bally, Inc.*, 987 F.2d 86 (2d Cir. 1993).
5. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) citing United States v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, 67 S.Ct. 1473 (1947).
6. *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), *citing Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).
7. *Herman v. RSR Sec. Services Ltd.*, 172 F.3d 132 (2d Cir. 1999), *citing See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473 (1947) (whether an employer-employee relationship exists does not depend on isolated factors but rather "upon the circumstances of the whole activity").
8. *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003).
9. *See Superior Care*, 840 F.2d 1054 (2d. Cir. 1988) (citing, *inter alia, United States v. Silk*, 331 U.S. 704, 716, 67 S.Ct. 1463 (1947)).
10. *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir.1995), *citing Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, 85 S.Ct. 876 9 (1965) (per curiam).
11. *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enfd. mem.*, 772 F.2d 894 (3d Cir. (1984); *Laerco Transportation*, 269 NLRB 324 (1984).
12. *Airborne Express*, 338 N.L.R.B. 597 (2002); *Clinton's Ditch Co-op Co., Inc. v. N.L.R.B.*, 778 F2d 132 (2d Cir. 1985).
13. *BFI Industries of California, Inc.* and *FRR-II, LLC d/b/a Leadpoint Business Services* and *Local 350, International Brotherhood of Teamsters*, 32-RC-109684.
14. *Id.*
15. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).
16. *McDonald's USA, LLC, a joint Employer, et al. and Fast Food Workers Committee and Service Employees International Union, CTW, CLE et al.* Cases 02-CA-09893 et al, 04-CA-125567, *et al.*, 13-CA-106490, *et al.*, 20-CA-132103 *et al.*, 25-CA-114819 *et al.*, and 31-CA-127447, *et al.*— Board Decision January 8, 2016.
17. https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against.
18. *Id.* Board Decision March 17, 2016.
19. U.S. Dep't of Labor, Wage and Hour Division Administrators Interpretation No. 2016-1 (www.dol.gov/whd/flsa/Joint_Employment_AI.htm.
20. http://edworkforce.house.gov./uploadedfiles/osha_memo.pdf.

The Dangers Of Pokémon Go

By Eva Brindisi Pearlman

It is a trend spreading all over the world. Children of the 90s rejoice as they reminisce on one of the favorite franchises of their childhood. Nintendo recently released the Pokémon Go app, an interactive and more modern way to bring this card game to life. In the game, players use their mobile device's GPS to locate, capture, battle and train virtual creatures called Pokémon, who appear on the screen as if they were in the same real world location as the player.

Pokémon Go is now on more android phones than the dating app Tinder and has been neck and neck in popularity with the social media platform Twitter, according to recent analytics. Pokémon Go made a whopping $35 million in revenue from in-app purchases in its first two weeks and brings approximately $1.6 million per day from its iPhone users alone. It remains the top selling app in the app store since its release.

While it seems like all fun and games, Pokémon Go has led users to unusual situations while attempting to catch their favorite Pokémon. A teen in Wyoming discovered a body in a river while catching water Pokémon. There have also been instances where criminals lure in users and attack them while they are distracted by the game. They use the geolocation feature to anticipate a location and the seclusion of unsuspecting users.

There have also been numerous reports of pedestrian injuries as well as at least one report of a pedestrian hit by car while playing Pokémon Go. Users are so enthralled with the game that they wander aimlessly through city streets, risking being struck by oncoming vehicles. Nintendo has placed a pop-up warning as the Pokémon Go app loads to warn its users prior to the start of the game to watch your surroundings as you play; however, this is a difficult task when users' eyes are glued to their phones while searching for nearby Pokémon, gyms and various poke-stops.

Pedestrian injuries due to distracted walking have been common since the age of texting began but Pokémon Go has taken the phrase "injured by a smart phone" to a whole new level. Pokémon Go users are bumping into stationary objects and people on the streets, resulting in minor bruises and scrapes. However, there have also been reports of more serious injuries resulting from falling. In Martinsburg, West Virginia, a 12-year-old boy suffered a broken femur while running in the dark and falling off a five foot high storm sewer. In California, two men fell off of a 90-foot ocean bluff cliff while playing Pokémon Go, resulting in them being taken to a trauma center. There is also a serious risk of being hit by a car, as pedestrians drift into the road to catch Pikachu, oftentimes blindly walking into oncoming traffic. In Tarentum, Pennsylvania, a 15-year-old teen girl was struck by a car while playing Pokémon Go and suffered a collar bone and foot injury that required hospitalization. If hit by a car, Pokémon Go users could suffer very serious injuries, including, broken bones or even death.

Pokémon Go has also hurt the fight against distracted driving. Forget changing the song on your iPhone, Pokémon Go has its users watching the road through their phone screen while searching for Pokémon. All of their focus is on where the Pokémon are and not where the road is. In Auburn, New York, a driver wrapped his car around a tree while playing Pokémon Go behind the wheel. In Baltimore, Maryland, a Pokémon Go user slammed into a parked police car while playing the game. These are very real situations and can lead to serious risks to pedestrians and motorists as a result of distracted walking or driving. If users are not paying attention, Pokémon Go could be a dangerous threat to entire communities.

Driving while using any mobile device is illegal and, worse yet, could have serious legal consequences if you cause harm or injury to someone. Further, studies have shown that 37% of your brain activity is focused on looking at your mobile device while it should be on driving. Your eyes may be on the road, but your brain is not.

Moreover, AAA found that mental distractions can last up to 27 seconds after the distraction has taken place. This type of unaware driving could lead to running stop signs, not paying attention to other drivers, and a slower reaction time. In no time at all, your vehicle can turn into a weapon if you do not invest 100 percent of your attention into driving, which could also have criminal and civil legal consequences.

There are several ways to prevent pedestrian or motor vehicle accidents or injury while playing Pokémon Go. Police are urging game users to be diligent and aware of their surroundings at all times while playing on the app. They also suggest playing with friends if the game takes you to new or unfamiliar places for safety. Most importantly, never play Pokémon Go while driving. Always put your phone away even before starting the car, and don't ever let your eyes linger from the road too long while driving. Distracted driving and walking has become an epidemic for deaths among people around the world. But it is 100% preventable. So, remember to be smart while you're out there playing Pokémon Go and trying to "catch them all"!

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New York State Bar Association Committee on Professional Ethics Ethics Opinions 1108–1120

Opinion 1108 (11/15/16)

Topic: Financing legal fees in litigation, third-party funding

Digest: A lawyer representing clients in criminal defense matters may refer potential clients to third-party financing for the lawyer's legal fees and expenses, even though the lawyer pays certain fees to the lender in connection with that financing program and is informed by the lender whether the client has qualified for a loan and in what amount, as long as the lawyer obtains informed consent from the client and otherwise complies with Rule 1.8(f), and as long as the fees the lawyer pays to the lender do not constitute financial assistance to the client. If the lawyer is not advising on the risks and benefits of procuring such financing, the lawyer should so inform clients.

Rules: 1.2(c), 1.4(b), 1.8(e) & (f)

FACTS

1. The inquirer is a sole practitioner exclusively engaged in criminal defense work. Some potential clients ask for payment plans to pay the inquirer's legal fees and expenses. The inquirer would like to refer such clients to a particular third-party financing company.

2. The inquirer would either give potential clients a link to the financing company or post the link on his website, which would lead clients to the financing company's loan application forms. The inquirer might also put a banner on the website indicating that potential clients can finance the fees for legal representation. If a client completes the application, the financing company would decide whether to lend the client money and on what terms. The loan funds would be disbursed directly to the client, but the inquirer would be provided with a "portal" on which to find out whether a potential client had applied for a loan, and when and in what amount funds were disbursed to the client. The financing company's website advertises maximum lines of credit of varying lengths in amounts ranging from $10,000 to $25,000, with interest rates ranging from 10.9% to 29.99%, depending on the borrower's credit score. The loans would be based on the creditworthiness of the client (and any co-signer) and would not be non-recourse (i.e., the client would be responsible to repay the loan whether or not the client prevailed in the case).

3. In order to participate in these programs, the inquirer would pay fees to the financing company of several hundred dollars either in the form of one-time "registration fees" or in the form of monthly "subscription fees."

QUESTION

4. May a lawyer bring a third-party lender to the attention of potential clients by giving the link directly to clients or by posting the link on the lawyer's website, in order to assist potential clients in obtaining funding for legal fees and expenses?

OPINION

5. This Committee has previously opined that a lawyer may refer clients to third-party sources to finance legal fees under certain conditions, including that (1) the confidentiality of client information provided to the lawyer is maintained, (2) the lawyer does not own an interest in the financing company, (3) the lawyer does not receive any referral fee (except under certain circumstances), and (4) the transaction is not illegal. N.Y. State 769 (2003); N.Y. State 666 (1994). See also N.Y. City 2011-2 (addressing issues raised by non-recourse litigation financing arrangements).[1]

6. The proposed financing arrangements here raise three particular issues that we discuss below.

Advice on financing alternatives and related conflicts of interest

7. The first issue is the extent to which the inquirer should or must advise the client on the costs and benefits of the financing arrangements and the alternatives. In N.Y. State 769, which dealt with non-recourse litigation financing in which a financing company takes an interest in the proceeds of litigation, we noted that a lawyer facilitating such a transaction should ensure that the client is informed of relevant considerations. N.Y. City 2011-2 cautioned that the lawyer may have a personal conflict of interest in rendering such advice where, for example, "the client cannot afford to commence or continue litigation absent a third party advance of the lawyer's fees," because of the lawyer's personal interest in being paid.

8. This situation is different, and these concerns are considerably diminished, because these are not non-recourse loans. In non-recourse litigation financing, the financing company generally needs to know a great deal about the litigation in order to determine whether to take the lending risk, and the involvement of the financing company with the litigation raises significant legal ques-

tions on which clients generally need advice. By contrast, the financing at issue here is a relatively straightforward lending transaction based on ordinary commercial terms. Further, the lawyer's involvement here is less than in the typical case of non-recourse litigation financing.

9. Nonetheless, the lawyer does owe the client a certain level of disclosure. Rule 1.8(f) says:

> 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.

Here, while the money advanced is a loan, it is closely tied to the representation. For all practical purposes, the lawyer is accepting fees "from one other than the client" (the lender). Moreover, although the funds are not paid directly to the lawyer, the lender informs the lawyer when the funds are disbursed, presumably to help ensure that the lawyer gets paid. When the lender gives the lawyer information about disbursement, that information is something "of value" that triggers Rule 1.8(f). As part of obtaining the client's "informed consent" to the funding arrangement pursuant to Rule 1.8(f)(1), the lawyer should ordinarily ensure that the client understands the pros and cons of the funding arrangement and understands that the client may have alternatives to obtaining funds from this particular litigation funding company.

10. However, if a potential client might believe that the lawyer is exercising professional judgment in recommending a funding source appropriate for that particular client, or if the client might believe that lawyer has evaluated the loan terms, the lawyer should ensure that the client understands the limited role the lawyer is playing. As provided in Rule 1.2(c): "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances [and] the client gives informed consent . . . ." Rule 1.2(c) is consistent with N.Y. State 769, where we said that a lawyer may limit the scope of the engagement to exclude advice with respect to litigation financing. We stated:

> The lawyer should consider that an unsophisticated client may reasonably assume that by facilitating the [non-recourse litigation financing] transaction, the lawyer is also endorsing the entering into of the proposed transaction and/or the terms thereof. To address this possibility, the lawyer must either disclaim such responsibility, see N.Y. City 2001-3 ("[T]he scope of a lawyer's representation of a client may be limited in order to avoid a conflict"), or advise the client of the costs and benefits of the proposed transaction, as well as possible alternative courses of action.

Similarly here, the inquirer may limit the scope of the engagement to exclude advising on financing options. For example, the lawyer could state on the website near the link to the financing company's application page, and in the initial discussion with the client about financing, that the lawyer has not evaluated the loan terms and is not recommending the loan or advising clients on whether the loan is appropriate for any particular client.

Disclosure to lawyer of loan status

11. The second issue we address is raised by the proposal for the funding company to give the lawyer access to a portal to inform the lawyer whether a potential client has applied for and whether and in what amount the funding company has extended a loan. This portal presumably is important to the lawyer because the lawyer's purpose in referring the client to the financing source is to provide a source of funds for the lawyer to be paid, so the lawyer needs to know whether the funds are available. This provision does not concern the lawyer's disclosure to a third party of client confidential information, so it does not implicate Rule 1.6 or other Rules regulating confidentiality. Nevertheless, a client's financial and banking affairs usually are protected by privacy laws. Because a potential client might believe that dealings with the third-party financing company will be kept confidential, the lawyer should inform the client that the finance company will give the lawyer access to information about the status of the loan application and timing and amount of the loan. See Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

Fee payments by lawyer

12. The lawyer's payment of "registration fees" or "subscription fees" raises questions under Rule 1.8(e), which prohibits advancing or guaranteeing financial assistance to clients in litigation matters, with certain exceptions. That Rule provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, the repayment of

which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

In this case, none of the exceptions applies. Paying registration or subscription fees does not involve contingent fees or advancing of costs and expenses of litigation that are repayable only upon success, so Rule 1.8(e)(1) and (3) do not apply. See generally Rule 1.5(d) (barring contingent fees in criminal defense matters). The inquirer advises that the clients who inquire about payment plans do not qualify to be represented by a public defender, so we assume that they are not "indigent" within the meaning of Rule 1.8(e)(2).

13. Whether the registration or subscription fees constitute "financial assistance" to the client depends on the purpose of the registration or subscription fees. If these fees compensate the financing company for the risk of lending to the attorney's potential clients, the lawyer's payment of the fees would appear to be financial assistance to the clients: the fees may be seen as in the nature of "points" that mortgage companies charge or as a way for the finance company to charge extra interest. On the other hand, if the purpose of the fees is to pay for the "portal" by which the lawyer can track the financing status of potential clients, that is something in which the client has no particular interest, and the financing company's fees would not be financial assistance to clients. We do not have sufficient facts to resolve this factual question definitively, so we opine only that if the fees do constitute financial assistance to clients in obtaining financing, the lawyer is barred from participating in the programs unless the lender waives the fees or the client pays the fees.

CONCLUSION

14. A lawyer may bring a third-party financing program to the attention of clients to assist them in funding the lawyer's legal fees and expenses, as long as the fees the lawyer pays to the lender do not constitute financial assistance to the client and the lawyer complies with the other conditions set forth herein.

(30-16)

Endnote

1. As in those opinions, we express no opinion as to whether the proposed financing here would be a violation of usury or other laws. If the lawyer knows that the financing arrangements are illegal, the lawyer must not facilitate them. See N.Y. Rules of Professional Conduct (the "Rules") Rule 1.2(d) (a lawyer shall not "assist a client, in conduct that the lawyer knows is illegal"); N.Y. City 2011-2; N.Y. State 769 (2003). Under New York law, charging interest rates of more than 16% per year on loans to an individual of less than $250,000 constitutes civil usury. N.Y. Gen. Oblig. L. §5-501(1), (6); N.Y. Banking L. §14-a. Charging interest or taking any money or other property as interest on a loan of any money, at a rate exceeding 25% per year is a criminal offense. N.Y. Penal L. §190.40. Some lenders take a position that a non-recourse extension of credit is not a loan. See Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 777 (N.C. Ct. App. 2008 ("[A] transaction in which the borrower's repayment of the principal is subject to a contingency is not considered a loan because the terms of the transaction do not necessarily require that the borrower repay the sum lent"); Plaintiff Funding Corporation d/b/a LawCash v. Echeverria, No. 1014040/2005 (N.Y. Sup. Ct. 2005) (declaratory judgment that contract was valid and not covered by New York's usury statutes). It is our understanding that the loans at issue here are based on the creditworthiness of the client and are not non-recourse. Although any illegality might be on the part of the lender and not the client, the lawyer's providing of the information about the lender might be viewed as a recommendation of the transaction and the lawyer's payment of registration or subscription fees might be viewed as participation in the loan transaction.

Opinion 1109 (11/15/16)

Topic: Use of Pre-Paid Debit Cards to Transmit Funds to Clients

Digest: A lawyer may use a fully loaded pre-paid debit card to pay a client funds to which the client is entitled, provided that the lawyer, upon adequate disclosure of the relative merits of the payment method, follows the client's instructions.

Rules: 1.15(c)(4), 1.15(e), 1.4(a), 1.4(b), 1.0(j).

FACTS

1. The inquirer represents clients in personal injury actions under contingency fee arrangements. The amounts in controversy in many of the lawyer's matters tend to be small, as are the amounts obtained in those cases in which the lawyer achieves a settlement. The majority of the lawyer's clientele consists of unsophisticated consumers of legal and financial services lacking in both economic wherewithal and any sustained relationship with a financial institution such as a banking or checking account. As a result, the inquirer explains, the clients resort to check-cashing service companies, which, for a fee, will redeem the check and pay the client-customer.

2. The inquirer would like to offer clients the choice between receiving the client's settlement (or judgment) proceeds by a pre-paid debit card rather than by check. If the client opts for the card, then the client would receive a card fully loaded with the total amount owed the client.

The firm would charge no fee for this option, nor retain any amount due the client. The law firm would remit the entire amount due the client to the account of the card-issuing entity.

QUESTION

3. May a lawyer give a client the option of receiving payment of money due the client by a fully loaded pre-paid debit card rather than by check?

OPINION

4. Judgment and settlement checks often are made out to the lawyer and the client. In many cases, the lawyer deposits the check in an attorney trust account, withdraws the amount to which the lawyer is entitled and issues a check in favor of the client in the amount to which the client is entitled. The client then must cash the check to gain access to the funds. Clients who do not have a banking relationship often use a check-cashing service. They may then maintain funds on a pre-paid debit card.

5. A study by the Federal Deposit Insurance Corporation (FDIC) found that approximately 28% of U.S. households either do not have bank accounts or are underbanked. FDIC, 2013 National Survey of Unbanked and Underbanked Households (Oct. 2014). Although in the past, the demographic of these households tended to be economically challenged, the increasing popularity of technological options has attracted many younger adherents to supplant conventional cash for other forms of currency. See K. S. Rogoff, The Curse of Cash (Princeton U. Press 2016). We make these observations not to endorse any trend but to recognize its existence.

Alternative Financial Services

6. A very brief and general description of the alternatives may be useful to place the inquiry in context.

7. The New York Department of Financial Services ("DFS") describes cash-checking as a "business that charges consumers a fee for cashing a check, draft or money order." In New York, the providers of these services must be registered and are subject to assorted regulations. NY Banking L §367 (2012). The DFS has regulations on the amounts that may be charged. See 3 NYCRR §400.11. As of March 2016, the maximum check cashing fee that may be charged to an individual is 2.01% of the face amount of the check.

8. According to the Consumer Financial Protection Bureau ("CFPB"), a pre-paid debit card is a card used to access money a consumer has loaded onto the card in advance. Most cards allow the consumer to spend money on the card at merchants that accept the card or to withdraw cash from an ATM. See CFPB website, at http://www.consumerfinance.gov/askcfpb/search/?selected_facets=category_exact:prepaid-cards. Each card has its own set of rules and fees. It often is difficult to ascertain the terms of the cards before purchase. Some issuers offer no-fee cards; many charge fees that may be opaque to the consumer, especially those unsophisticated in their use. Fees include some or all of the following: monthly usage or transaction fees, reload fees, bill payment fees, ATM withdrawal fees, balance inquiry fees and inactivity fees. Even where the issuer provides for free ATM withdrawals at certain ATMs, these may not be the locations most convenient to the holder.

9. Pre-paid cards may be issued by firms that are not financial institutions. Although the DFS licenses non-bank issuers of prepaid debit cards, many widely used debit cards are issued by banks that are not New York State-chartered and therefore are not regulated by the DFS. Although the CFPB recently finalized regulations that will provide added protections to consumers of prepaid debit cards, those regulations will not become effective until October 1, 2017. http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/prepaid-accounts-under-electronic-fund-transfer-act-regulation-e-and-truth-lending-act-regulation-z/. At present, these cards offer consumers fewer safeguards than bank-issued debit cards linked to a checking account.

The Rules of Professional Conduct

10. The issue, then, is simple: Is there anything wrong with a lawyer using a fully-loaded pre-paid debit card to disburse client funds to a client if the client gives informed consent?

11. We do not think so. Rule 1.15(c)(4) of the New York Rules of Professional Conduct (the "Rules") says that a lawyer must "promptly pay or deliver to the client or a 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." The inquiry here does not implicate any issues about third parties, client entitlement, or other questions that Rule 1.15(c)(4) may occasionally raise. The lawyer is holding money that unquestionably belongs to the client, and the sole issue, one of first impression, is whether the lawyer may transfer those funds to the client with a fully loaded pre-paid debit card rather than a check.

12. We believe that Rule 1.15(c)(4)'s direction that the lawyer pay funds due the client "as requested by the client" obligates the lawyer to seek the client's consent before using a pre-paid debit card to do so, as the inquirer intends to do. We believe, too, that Rules 1.4(a)(1)(i) & 1.4 (a)(2), and Rule 1.4(b)— each concerned with communicating with the client about matters material to the representation which require the client's informed consent as defined in Rule 1.0(j), including matters relating to settlement—obligate the lawyer to explain to the client, in the words of Rule 1.0(j), "the material risks of the proposed course of action and reasonably available alternatives." This means, at a minimum, that the lawyer should

be prepared to explain to the client the options available for payment, and the relative risks and rewards of each, including the charges associated with each option. If the client is thus informed, we see nothing in the Rules that would prohibit a lawyer from remitting settlement funds to a client by means of a fully loaded pre-paid debit card.

13. We note that Rule 1.15(e) says that all "special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party, by bank transfer." Thus the lawyer is obligated to assure that the card issuer will accept transfers by one of these means, and, if a wire transfer is used, then the client must approve of the transfer in writing.

14. We also are aware that some issuers of prepaid debit cards may compensate persons who assist in the issuance of cards. See J. Silver-Greenberg and S. Clifford, "Paid via Card, Workers Feel Sting of Fees," N.Y. Times (July 1, 2013) at p. A1. If the lawyer were being compensated by the card issuer for steering customers, the lawyer would have a personal conflict of interest within the meaning of Rule 1.7(a). See N.Y. State 1086 (2016) (an attorney may not accept a fee or commission from an investment firm for referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict.)

CONCLUSION

15. A New York lawyer may use a fully loaded prepaid debit card to pay a client funds to which the client is entitled, provided that the lawyer, upon disclosure of the relative merits of the payment method, follows the client's instructions.

(33-16)

Opinion 1110 (11/23/16)

Topic: Advertising; solicitation; educating lay persons

Digest: Lawyer may (i) organize and participate in online webinars and live seminars for non-lawyers on topics within lawyer's fields of competence, (ii) publicize the same by individual invitation, social media or other lawful means, and, (iii) following a webinar/seminar, discuss representation with participants, all subject to compliance with applicable rules on advertising and solicitation.

Rules: 1.0(a); 7.1; 7.3

FACTS

1. The inquirer, an intellectual property lawyer practicing in New York, plans to conduct online webinars and live seminars on topics within his principal fields of practice for persons who may have a business interest in those topics and a need for legal services. Inquirer contemplates identifying persons fitting that description by use of commercially available business listings, including such listings on government agency web sites, such as business entity lists. Admission to the webinars and seminars may be free or may be for a fee.

QUESTIONS

2. The inquirer asks a number of questions:

A. May the lawyer attract possible attendees to seminars and webinars by sending invitations to addresses found on commercially available business entity lists?

B. May the lawyer advertise the seminars on social media using social media-provided filters to target a specific audience?

C. Does it matter whether the lawyer charges a fee for the seminars and webinars?

D. May the lawyer solicit prospective clients to register for the seminars?

E. May the lawyer notify webinar/seminar participants of future webinars/seminars?

F. May the lawyer solicit webinar/seminar participants for legal representation after the program ends?

OPINION

Sponsoring Seminars for Non-lawyers

3. This Committee has explained that, under both the current Rules of Professional Conduct (the "Rules") and the former Code of Professional Responsibility (the "Code"), lawyers may participate in legal seminars designed for non-lawyers. See N.Y. State 918 (2012), citing N.Y. State 830 (2009) (under the Rules) and N.Y. State 508 (1979) (under the Code). We noted in N.Y. State 918 that "participation in such programs is not only permitted but encouraged." Id. See Rule 7.1, Cmt. [9]. Under the Rules, there is no difference in this regard between seminars conducted in person and those conducted over a website. Consequently, in this opinion, we will refer generically to "seminars" to include both live programs and web-based programs.

4. Before the Supreme Court's holding in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), which extended First Amendment protection to lawyer advertising, the Code prohibited lawyers and law firms from organizing

legal seminars for nonlawyers. Rather, sponsorship was allowed only by a "bar association, school or other responsible public or private organization." N.Y. State 508, supra. The post-Bates amendments to the Code removed restrictions on lawyer sponsorship of such seminars and programs. Id.

5. If such seminars were to be available and useful to significant numbers of people, lawyers needed to publicize them. Therefore, we held that a lawyer may ethically mail notices of such seminars. See N.Y. State 508 (1979) (absent a judicial holding that mailing of advertisements violates §479 of the Judiciary Law, law firm may organize and promote by mail a legal seminar designed for non-lawyers).

Publicizing the Seminars—Does the Seminar or the Publicity for the Seminar Constitute Advertising?

6. The inquirer's questions regarding the means a lawyer may use to publicize proposed seminars involve more than just the mail. Under the Rules, the answers to the inquirer's questions depend on whether the seminar itself (or the advertising for the seminar) would constitute "advertising" within the meaning of Rule 1.0(a) that is subject to Rule 7.1 or "solicitation" within the meaning of Rule 7.3(b) that is subject to Rule 7.3. If the seminar (or the publicity for the seminar) does not constitute advertising, then the provisions of Rule 7.1 will not apply (and, since solicitation is a subset of advertising, neither will the prohibitions of Rule 7.3). If the seminars (or the publicity for the seminars) do constitute advertising, the inquirer must adhere to Rule 7.1. If the seminar constitutes solicitation, then the provisions of Rule 7.3 will apply, and if it also involves in-person or telephone contact or interactive computer-accessed communication, then the seminar will be prohibited unless it is advertised only to current and former clients and close friends or relatives of the inquirer.

7. We begin with what constitutes advertising and what constitutes solicitation under the Rules. Rule 1.0(a) defines an "advertisement" as follows:

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

8. A solicitation is a particular kind of advertisement defined in Rule 7.3(b) as follows:

> (b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is *directed to*, or *targeted at*, a *specific recipient or group of recipients*, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client. [Emphasis added.]

Significantly, under this definition, what differentiates a solicitation from a garden variety advertisement is that a solicitation is "directed to, or targeted at, a specific recipient or group of recipients." Furthermore, if a communication is not an advertisement, it is not a solicitation. Thus the first issue to resolve here is whether the inquirer's proposed publicity constitutes advertising subject to Rule 7.1.

9. In order to answer the questions posed, we must address whether the proposed seminars constitute advertising. In N.Y. State 848 (2010), which considered whether an educational newsletter constituted advertising, we weighed three factors: (1) the intent of the communication, i.e., whether it is primarily educational or whether instead a substantial or significant purpose is to secure the retention of the lawyer or law firm publishing the newsletter; (2) the content of the communication; and (3) the targeted audience of the communication.

10. Scholars have suggested that, in determining the primary purpose of publicity, courts are likely to interpret the "primary purpose" to mean "substantial" or "significant." Roy Simon & Nicole Hyland, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 23 (Thompson Reuters 2016 ed). The determination of the "primary purpose" of publicity is subjective and judged in light of all the circumstances. See N.Y. State 1009 (2014), citing N.Y. State 873 (2011); see also N.Y. City 2015-7 (2015) ("We conclude that the 'primary purpose' standard refers to the subjective intent of the lawyer who makes the communication, but that this intent may be inferred – at least in certain instances – from other factors, including the content of the communication and the audience for the communication.").

11. To determine whether retention of the lawyer is the primary purpose of a communication, we must consider what other purpose the lawyer might have. The comments to Rule 7.1 address the application of the primary-purpose test to educational programs:

> A lawyer's participation in an educational program is ordinarily not considered to be advertising because its primary purpose is to educate and inform rather than to attract clients. Such a program might be considered advertising if, in addition to its educational component,

> participants or recipients are expressly encouraged to hire the lawyer or law firm. Rule 7.1, Cmt. [9].

12. In N.Y. State 918 (2012), we discussed the primary purpose test in the context of educational programs as follows:

> [I]f a program goes beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire that lawyer, then the lawyer may need to comply with the rules on advertising. But absent the inclusion of some such hiring pitch, a legal seminar will generally not be considered advertising as long as it is a bona fide educational program. N.Y. State 918, ¶5.

On the other hand, in N.Y. State 848 ¶9 we said, "Contact or biographical information about the lawyers or the law firm . . . does not, without more, transform an otherwise educational communication into advertising." See Rule 7.1, Cmt. [8]; cf., Rule 7.1, Cmt. [10]. The same reasoning would apply to publicity about a legal seminar or webinar.

13. The second factor considered in N.Y. State 848 is the "content" of the communication. The Committee pointed to Comment [7] to Rule 7.1, to the effect that newsletters or blogs focused on current developments in the law generally are not considered advertising, but that one that discusses developments in the law primarily as a vector for delivering information about the lawyer or law firm's personnel, clients, skills and achievements "would be considered advertising."

14. The third factor considered in N.Y. State 848 is the "audience." Communications that might otherwise be considered advertising subject to Rule 7.1 are excluded from the ambit of that Rule if directed to a close friend, a relative, an existing or former client, or a lawyer.

15. Assuming that the seminar and the communications used to publicize the seminar do not go beyond education to discuss the lawyer's skills or reputation, or give other reasons to hire the inquirer, we believe they would not constitute advertising, and, therefore, would not involve solicitation. In that case, the inquirer could use any of the methods proposed in questions to publicize the seminar.

16. The remainder of this Opinion, however, assumes that the seminar and the publicity for the seminar is not so limited, but that a substantial or significant purpose of the seminar or the publicity for the seminar is to encourage prospective participants to retain the inquirer. They therefore would constitute advertising.

Publicizing the Seminars for Non-Lawyers – Does the Seminar or the Publicity for the Seminar Constitute Solicitation?

17. If a communication constitutes an "advertisement" subject to the requirements set forth in Rule 7.1, the question then arises whether it also constitutes a "solicitation" subject to Rule 7.3.

18. As noted above, an advertisement constitutes "solicitation" under Rule 7.3(b) if it "is directed to, or targeted at, a specific recipient or group of recipients". Two Comments to Rule 7.3—Comments [3] and [4]—provide gloss on the interpretation of the phrase "directed to, or targeted at, a specific recipient or group of recipients."

19. Comment [3] states that an advertisement may be considered to be "directed to, or targeted at, a specific recipient or group of recipients" in two different ways: (1) if it is made by in-person or telephone contact or by real-time or interactive computer-accessed communication, or (2) if it is addressed so that it will be delivered to the specific recipient or recipients, as in the case of letters, emails and express packages. The Comment points out that advertisements made by in-person or telephone contact or by real-time or interactive computer-accessed communication are prohibited unless the recipient is a close friend, relative, former client or current client. Advertisements not delivered by those means, but addressed so that they will be delivered to a specific recipient or recipients, may be sent to a broader group of recipients, but they are subject to additional rules, including a filing requirement, to make them more easily subject to disciplinary oversight and review.

20. Comment [4] makes clear that, unless an advertisement falls within Comment [3], if it appears in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or group of recipients, simply because it is intended to attract potential clients with needs in a specified area of the law. For example, the Comment notes that an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine where it is placed is geared toward inventors.

21. With this background, we now turn to the inquirer's questions on the method of conducting and publicizing the seminars, assuming that the seminar and the materials used to publicize it are advertising.

Seminars and Webinars

22. A seminar is conducted in person. A webinar is usually conducted via real-time or interactive computer-accessed media. In each case, if the inquirer included a pitch for his own services, it would constitute solicitation that is in-person or using real-time or interactive computer-accessed media. See Rule 7.3(a); Comment [3] to Rule

Continued on page 32

2017 Annual Mee
General Prac

On January 24th, the General Practice Section sponsored a program during NYSBA's 2017 Annual Meeting on the disclosure of client confidence, and how new ethics rules apply. This perennial favorite included hot tips from the experts and rapid-fire updates on the latest issues on a variety of legal topics.

A key highlight from the event was the review of the Academy Award-winning movie, *Spotlight*, by an expert panel who later fielded questions on the ethical issues involved, such as Attorney-Client Privilege.

eting
ctice Section Highlights

GP Awards

January 24, 2017 | NYC

Above, Emily F. Franchina receives a plaque in recognition of her service as chair of the General Practice Section from current Chair John Owens Jr. At left, Martin Minkowitz receives recognition for his outstanding and innovative service to the General Practice Section for the Improvement of the Daily Practice of Law for General Practitioners in New York State.

Opinion 1110

Continued from page 29

7.3. For guidance on what constitutes real-time or interactive computer-accessed communication, see Rule 1.0(c); Simon and Hyland, supra at 1769-1770. Thus, Rule 7.3(a) would limit participants to close friends, relatives and former or existing clients of the inquirer.

23. If the webinar were not real-time or interactive, then the inquirer would not be limited in the invitees, but the seminar would be considered solicitation and subject to the filing and other requirements of Rule 7.3(c).

Invitations Addressed to Particular Persons

24. The inquirer proposes to send seminar invitations to prospective attendees whose contact information appears on government lists.[1] Simon and Hyland state:

> As a quick rule of thumb, letters and emails are always "directed to, or targeted at" specific recipients — they have an address on them . . . . Likewise, every advertisement delivered in-person to an individual known in advance, and every telephone call (live or recorded), is to a "specific recipient."

Simon and Hyland, supra at 1791. Thus, if the communications contain a "hiring pitch" or other advertising, they constitute solicitation and must comply with Rule 7.3.

Soliciting Prospective Participants by Other Means

25. The inquirer asks about "soliciting" prospective clients to register for the seminars, without defining "soliciting." As in the case of sending communications to prospective attendees on commercially available mailing lists, if the communication constitutes an advertisement, any form of solicitation must comply with Rule 7.3.

Communications to Former Seminar Participants

26. The answer does not differ where the recipients are former seminar participants, whether the inquirer wishes (i) to send notices of future seminars that constitute advertising or (ii) to offer former participants legal representation on IP matters. Thus, the inquirer may not solicit in person or by real-time or interactive computer-accessed communications unless the recipient is a close friend, relative, former client or existing client—and the fact that a person participated in a webinar does not turn the participant into a client or close friend. And any solicitation not involving personal or real-time or interactive computer-accessed communications would have to comply with Rule 7.3.

Charging for Seminars

27. The inquirer asks if it makes a difference if the lawyer charges those who attend the seminars. There is nothing inherently unethical about charging for educational seminars. However, when a lawyer charges for seminars targeted at lay people, the lawyer should make clear that the seminar cannot give individualized legal advice. As expressed in Rule 7.1, Cmt. [9]:

> A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for nonlawyers should caution them not to attempt to solve individual problems on the basis of the information contained therein.

Otherwise, the attendees may believe that their payments entitle them to receive legal advice.

Communications Using Social Media with Target Filters

28. The inquirer asks whether it is ethically permissible "to advertise the webinars/seminars on social media, using social media provided filters to target a specific audience." In N.Y. State 1016 (2014), we discussed a lawyer's sending advertisements through internet message boards for specific groups, such as parenting groups, neighborhood specific groups and parents of children with special needs and concluded that advertisements sent through such message boards would not constitute solicitation. We assumed that such messages would not be individually addressed, but rather would be posted on the message board. We therefore concluded that the advertisements were akin to public media and would not be deemed to be directed to or targeted at a specific recipient. We also concluded that the internet message boards did not involve real time or interactive computer-accessed communications. Because the proposed advertisement was not directed to, or targeted at, a specific recipient or group of recipients, and was not sent using real time or interactive computer communications, we concluded it would not be a solicitation.

29. Here, the inquirer has not provided information on the nature of the social media that the inquirer would use in the proposed communications. Consequently, we cannot determine whether the advertisements would be individually addressed or sent using real time or interactive computer-accessed media.

CONCLUSION

30. A lawyer may organize and participate in online webinars and live seminars for non-lawyers on topics within the lawyer's fields of competence, publicize the same by individual invitation, social media or other lawful means, and following a webinar or seminar discuss representation with webinar/seminar participants, all subject to compliance with applicable rules on advertising and solicitation as discussed in the body of this opinion.

(22-16)

Endnote

1. Questions of law are outside our jurisdiction, so we do not opine on whether using government agency or commercial business lists to develop a list of invitees may violate any federal or state law, e.g., with respect to privacy. Cf., Driver's Privacy Protection Act 18 U.S.C.A. §§2721-2725; Maracich v. Spears, 133 Sup. Ct. 2191 (2013).

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.

(34-16)

Opinion 1112 (1/7/17)

Topic: Attorneys' Fees: Credit Card Payments

Digest: 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 within 20 days from the date of the lawyer's bill for such amount, as long as the credit card charge complies with the requirements previously set forth in our opinions, including that the client is expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration) before the lawyer charges such amount, and the lawyer does not charge the client's credit card account for any disputed portion of the lawyer's bill.

Rules: 1.5(a) & (b); 1.15

FACTS

1. A firm wishes to add to its retainer agreement the following provision:

> "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:_____"

QUESTION

2. May a law firm impose through its retainer agreement a 20-day time limit for payment upon clients, after which the law firm may automatically bill the client's credit card for the full amount of the unpaid balance of the moneys outstanding?

OPINION

3. It is well-established that, in certain circumstances, New York lawyers may allow their clients to pay their attorneys' fees by credit card. *See*, *e.g.*, N.Y. State 1050 (2015); N.Y. City 2014-3; Nassau County 13-5 (2013); N.Y. State 763 (2003); N.Y. State 362 (1974), as modified by N.Y. State 763 (2003).

4. A lawyer may accept credit card payments of legal fees so 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. Id. *See* also N.Y. State 763 (2003) and nn. 3&4.

5. It is not appropriate for a lawyer to charge a credit card for any disputed portion of the lawyer's bill. *See* N.Y. City 2014-3; Nassau County 13-5 (2013); cf. Rule 1.15(b)(4) of the New York Rules of Professional Conduct (the "Rules") (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). Consequently, the proposed 20-day provision would be consistent with the Rules only if the retainer agreement also expressly informed the client of the right to dispute any invoice (and to request fee arbitration in accord with applicable court rules, prior to the imposition of any disputed credit card charges).

CONCLUSION

6. 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 within 20 days from the date of the lawyer's bill for such amount, as long as the credit card charge complies with the requirements previously set forth in our opinions, including that the client is expressly informed of the right to dispute any invoice of the lawyer (and to request fee arbitration) before the lawyer charges such amount and that the lawyer does not charge the cli-

ent's credit card for any disputed portion of the lawyer's bill.

(37-16)

Opinion 1113 (1/10/17)

Topic: Per diem lawyers; online legal directories

Digest: A lawyer may participate in a non-lawyer owned online legal directory that permits lawyers needing per diem lawyer services to select lawyers available to provide those services, where the directory does not recommend or select the participating lawyers, the service is available only to lawyers (not to prospective non-lawyer clients) and the participating lawyers pay a flat fee for listing their availability in and having access to the lawyers listed in the online directory. Client consent is not necessary if the purpose of the per diem representation is routine and non-substantive. Both the hiring lawyer and the per diem lawyer are responsible for checking for conflicts.

Rules: 1.1, 1.2(c), 1.3(a), 1.4(a), 1.5(b), (c) & (g), 1.6(a), 1.7, 1.8, 1.9, 1.10(a) & (e), 3.3(f), 4.1, 4.2, 5.1, 7.1, 7.2(a) & (b)

FACTS

1. The inquirer wishes to use the services of an online service that connects litigators to per diem lawyers (the "Service"). The Service provides users (referred to herein as "hiring lawyers") with a list of lawyers who are available to handle court appearances and calendar calls on a per diem basis ("per diem lawyers"). (We refer to both the hiring lawyers and the per diem lawyers as "participating lawyers").

2. The Service is operated by non-lawyers. It charges a flat fee to participating lawyers, whether as hiring lawyers or per diem lawyers.

3. Participating per diem lawyers provide their rates, availability and areas of practice to the Service. A hiring lawyer sends a request to the Service indicating the date, time and location of the requested appearance, as well as the case caption. The Service generates a list of attorneys who are available to act at the time and place specified, and sends that list to the hiring lawyer, along with information as to each per diem lawyer's rate. The hiring lawyer then may choose an attorney from the list to retain on a per diem basis. The per diem lawyers set their own rates.

4. The Service does not permit non-lawyer clients or other non-lawyers to access the listings or to hire per diem lawyers directly. The Service and the services provided by per diem lawyers in the directory are strictly lawyer-to-lawyer services.

QUESTIONS

5. May a New York lawyer use an online service owned by non-lawyers to request and hire per diem lawyers to cover court appearances for the lawyer's clients?

6. May a prospective per diem lawyer ethically arrange to be listed in an online legal directory owned by non-lawyers and accept assignments to cover court appearances for other lawyers?

7. Must a hiring lawyer obtain client consent before hiring a per diem lawyer to cover a court appearance?

OPINION

8. Lawyers throughout New York State sometimes need the services of per diem lawyers. Lawyers and law firms may have unavoidable scheduling conflicts or may be obliged to appear in distant courts for routine, non-substantive calendar calls. While some courts permit telephone appearances by counsel for ministerial or routine matters, courts do not permit telephone participation in all circumstances.

9. One solution has been the creation of a market for per diem lawyers to appear on behalf of the attorneys of record. Some providers of per diem legal services are law firms. This inquiry, however, involves a service that would be provided by an entity owned by non-lawyers. The inquirer asks whether a hiring lawyer or a per diem lawyer seeking assignments may use the Service.

Background: The Per Diem Relationship

10. Per diem lawyers are hired by the attorneys of record, not by the clients. Per diem lawyers typically do not have client contact and are unlikely to have ongoing involvement in the pending matter after appearing on the specific date for which they are hired. They may or may not be privy to confidential client information. Per diem lawyers may be hired to cover a court appearance to assure that record counsel is not defaulted or to ensure that the client is not prejudiced for failing to appear on a scheduled date. Sometimes, per diem lawyers are hired for more substantive appearances, including for status conferences or for arguments on particular motions.

11. Although per diem lawyers are hired by the attorney of record, they represent the client and are being hired to "appear" on behalf of the client. *See* N.Y. City 1988-3 (the relationship between the temporary lawyer and the client is no different from the traditional lawyer-client relationship); ABA 88-356 (temporary lawyer who works on a matter for a client of a firm "represents" that client for purposes of the conflicts rules). As such, they have professional obligations under the Rules of Professional Conduct and other court rules. Per diem lawyers, although

hired for a limited purpose, owe duties to clients, adversaries, and courts. The nature and extent of those duties depends on the circumstances.

12. We will not attempt to catalog all of the ethical duties of per diem lawyers, but we will suggest several. Under Rule 1.1, they should be competent, and thus should obtain whatever knowledge is necessary to handle an appearance. Under Rule 1.3(a), they must be diligent, and must be on time for the matters they have been retained to handle. Under Rule 1.4(a)(3), they must keep the client (through the client's agent, the hiring lawyer) reasonably informed about the status of the matter. Under Rule 1.6, they must preserve the confidentiality of any client confidential information to which they are privy. As further explained below, under Rule 1.10(e) they must check for conflicts and, if consentable, obtain consent or decline the proffered representation. *See generally* D.C. Op. 284 (1998) (a temporary lawyer has the same ethical obligations as any other lawyer to be competent to handle the matter tendered, to exercise independent professional judgment, to devote undivided loyalty to the client, and to preserve the client's confidences and secrets, and temporary lawyers and their employing lawyers each have an obligation to ensure that the appropriate standards are met); ABA 88-356.

13. Per diem lawyers also owe duties to adversaries. For example, under Rule 4.1, they must not make a false statement of fact or law to an adversary or other third person. Under Rule 4.2, they must not communicate on the subject of the representation with a party they know to be represented by counsel unless they have that counsel's prior consent.

14. In addition, per diem lawyers owe duties to courts. Rule 3.3(f)(1) provides that, in appearing before a tribunal, a lawyer shall not fail to comply with local customs of practice of a particular tribunal, so per diem lawyers must comply with the relevant court rules for the courts and parts in which they appear. As noted below, court rules may impose additional obligations, but interpreting those rules is beyond our jurisdiction.

Distinction Between an Online Directory and a Legal Referral Service

15. The answer to the questions posed here depends on whether the Service is a "directory" or a "referral service." This matters because Rule 7.2(b)(3) generally prohibits a lawyer from being recommended by or cooperating with a "lawyer referral service" unless the service is "operated, sponsored or approved by a bar association or authorized by law or court rule."

16. In N.Y. State 799 (2006), this Committee discussed the differences between a legal "directory" and a legal "referral service" and attempted to determine at what point an online directory becomes a referral service. For example, we said that an online version of the "yellow pages" that was available to ultimate clients could provide tools by which a potential client can filter a list of attorneys by geography and/or practice area (*e.g.*, to create a list of attorneys in a particular geographical area who do a particular kind of legal work) without becoming a referral service. We noted, however, that the line would be crossed if the website recommended a particular lawyer or lawyers for the prospective client's problem. Consistent with this distinction, we assume that the Service gives a hiring lawyer access to the names of all of the per diem lawyers who meet the requirements of the hiring lawyer (*e.g.*, time, jurisdiction, area of expertise, and billing rate) without winnowing down the list in any manner other than using criteria supplied by the hiring lawyer. If our assumption is correct, then the Service would not be making recommendations, and would not be a referral service. *Compare* N.Y. State 976 (2013) (if payments to the non-lawyer would include not only a monthly fee but other fees that could constitute payments for recommendations, those payments would violate Rule 7.2(a)); N.Y. State 902 (2012) (lawyer may not base marketing fee on number of actual or potential clients the marketer introduces to the lawyer).

17. Even if the Service is not a "referral service," however, Rule 7.2(a) prohibits a lawyer from compensating a person or organization "to recommend or obtain employment by a client" or as a reward for having made a recommendation resulting in employment by a client. Rule 7.2 appears in a section of the Rules relating to advertising and solicitation. Although the definition of "advertisement" in Rule 1.0(a) specifically excludes communications to other lawyers, Rule 7.2 is not limited to advertisements and does not exclude communications to other lawyers. Consequently, Rule 7.2 applies to a lawyer-to-lawyer service such as the one here. But paying a fee to the Service to be listed in does not violate Rule 7.2(a) if the Service is a "directory" rather than a "referral service." As Comment [1] to Rule 7.2 points out, paragraph (a) "does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of . . . online directory listings."

Conflicts of Interest

18. We assume that in the typical case the per diem lawyer is retained by the hiring lawyer to represent a client of the hiring lawyer. Consequently, conflict of interest rules regarding current and former clients will apply. Rule 1.7, 1.8, 1.9. *See* N.Y. State 715 (1999) (contract lawyers, like other lawyers, must comply with the conflicts rules with respect to current and former clients).

19. Even if the per diem lawyer is hired solely to cover a specific appearance or to argue a specific motion, a per diem lawyer could not later appear on behalf of the other side in that case or one that is substantially related. *See* Rule 1.9 ("Duties to Former Clients"). *See also* ABA 88-356; N.Y. City 1996-8, 1989-2, 1988-3 and 1988-3A.

20. Moreover, under Rule 1.10(e), both the hiring law firm and the per diem lawyer must maintain a written record of engagements, at or near the time of each new engagement, and maintain a system by which proposed engagements are checked against current and previous engagements. Under Rule 1.10(e)(3), this conflict check must be performed by the hiring firm whenever the firm hires or associates with another lawyer. Although the Service may assist participating lawyers in identifying conflicts by obtaining information about the case caption and about the hiring lawyer, the obligation under Rule 1.10 to check for and identify conflicts falls on both the hiring lawyer and the per diem lawyer.

21. Although the direct conflict rules apply to the per diem lawyer, vicarious disqualification would not apply in the case of a one-off representation by a per diem lawyer. Rule 1.10(a) provides: "While lawyers are *associated* in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9" (Emphasis added.) In the case of a one-off representation arranged by the Service here, the per diem lawyer would not be "associated" with the hiring law firm for purposes of Rule 1.10(a). *See* N.Y. State 715 (whether vicarious disqualification applies depends upon whether the relationship of the contract lawyer to the employing law firm rises to the level of an "association" with the firm); D.C. Opinion 352 (2010) (whether a temporary contract attorney is "associated with" the hiring law firm will depend on the scope and nature of the temporary contract attorney's relationship with the firm and the potential for exposure to the confidences of the firm's clients for matters on which the temporary lawyer is not working); *ALI, Restatement, The Law Governing Lawyers*, Section 123, Comment c(iii) (co-counsel who associate for purposes of handling a particular case are not subject to vicarious disqualification). Consequently, Rule 1.10(a) does not impute to a per diem lawyer or hiring firm whatever conflicts the other may have under Rules 1.7, 1.8, or 1.9 with respect to matters not related to the per diem representation.

Sharing Fees with Non-lawyers

22. The inquirer states that the Service would charge flat fees for attorneys' participation in the Service. Assuming that the fees collected by the Service are not related to the amount of the fees charged by the per diem lawyers, the inquiry does not involve a lawyer sharing legal fees with a non-lawyer. *See* N.Y. State 976 (2013) (arrangement could constitute impermissible fee sharing if the lawyer's payment to the intermediary is insufficiently related to the value of the company's services); N.Y. State 885 (2011) (finding improper fee sharing where there appeared to be no relation between the funds to be received by the non-lawyer company and the value of the services performed).

Lawyer Ratings and Reviews

23. The inquiry states that hiring lawyers will choose per diem lawyers based on various factors, including "the per diem lawyer's rate, rating and reviews," but it does not state whether the Service will provide for such ratings and reviews. This Committee has issued several opinions on ratings and reviews, focusing on lawyers who advertise such ratings or reviews. See N.Y. State 1052 (2015) (lawyer may give clients a credit on their legal bills if they rate the lawyer on an internet website, if the credit is not contingent on the content of the rating and the ratings and reviews are done by the clients, not the lawyer); N.Y. State 1007 (2014) (lawyer may advertise inclusion in "best lawyers" publication if the lawyer's assessment of the methodology used to determine inclusion demonstrates that it is an unbiased, nondiscriminatory and defensible process); N.Y. State 877 (2011) (lawyer's website may accurately quote bona fide professional ratings or comments from any ratings publication if the ratings or comments are factually supportable when published and are not be false, deceptive or misleading). Consistent with these opinions, we believe that, if the Service publishes ratings and reviews of a per diem lawyer, the per diem lawyer should ensure that they are accurately described. *See generally* Rule 7.1, Cmt. [13] (Bona Fide Professional Ratings).

Limited Scope Representation

24. A per diem lawyer usually is hired for purposes of a single court appearance, and typically has no ongoing involvement in the matter once the court appearance is over. Rule 1.2(c) permits limited scope representations under prescribed circumstances: "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." *See* N.Y. State 856 (2011). However, we do not believe that the inquiry before us implicates Rule 1.2(c), because the per diem lawyer is contracting with the hiring lawyer, not with the client. The hiring lawyer is not entering into a limited scope representation with the client. The hiring lawyer is simply outsourcing a particular, discrete task to a lawyer outside the lawyer's own office.

Considerations Under Relevant Court Rules

25. As noted above, Rule 3.3(f)(1) provides that, in appearing before a tribunal, a lawyer shall not fail to comply with local customs of practice of a particular tribunal. Thus per diem lawyers must comply with the relevant court rules for the courts and parts in which they appear. While it is outside our jurisdiction to interpret court rules, we note that the Uniform Rules for the Supreme Court and the County Court, 22 NYCRR §202.12(b), require attorneys appearing at preliminary conferences to be "thoroughly familiar with the action and authorized to act on behalf of the party" and to be "sufficiently versed in matters relating to their clients' technological systems

to discuss competently all issues relating to electronic discovery." *See also* Rule 1(a) of the Commercial Division, 22 NYCRR §202.70(g), (which requires all counsel who appear to be fully familiar with the case and authorized to enter into substantive and procedural agreements on behalf of their clients).

26. Failure to comply with these court rules may result in the imposition of sanctions and professional discipline. *See* 22 NYCRR §130-2.1(a) (imposing sanctions or awarding costs and legal fees upon attorney who, without good cause, fails to appear at a court-scheduled matter); Commercial Division Rules 1(a) & 12, 22 NYCRR §202.70(g) (authorizing sanctions, including dismissal, for failure of fully authorized counsel to appear); *Alveranga-Duran v. New Whitehall Apartments, LLC*, 40 A.D.3d 287, 836 N.Y.S.2d 24 (1st Dep't 2007) (appearance of per diem lawyer without settlement authority at conference required imposition of sanction). Such failure may also violate Rule 1.3(a) ("A lawyer shall act with reasonable diligence and promptness in representing a client").

Client Consent to Hire a Per Diem Lawyer

27. The inquirer asks whether a hiring lawyer must obtain client consent before hiring a per diem lawyer to cover a court appearance. Ethics opinions decided under the Code of Professional Responsibility were based largely on DR 2-107(A) (prohibiting a lawyer from dividing a fee for legal services with another lawyer not in the lawyer's law firm without client consent), EC 2-31 [formerly EC 2-22] (prohibiting a lawyer, without the consent of the client, from associating in a particular matter another lawyer outside the lawyer's firm) and EC 4-2 (prohibiting a lawyer from associating another lawyer outside the first lawyer's firm in the handling of a matter with client consent). Although the prohibition against dividing fees now appears in Rule 1.5(g), which also requires client consent where there will be a division of fees, we do not believe that Rule 1.5(g) applies where a hiring lawyer is hiring a per diem lawyer on an hourly or fixed fee basis that is based on the fair value of the work and that is similar to what the hiring lawyer would pay an employee of the firm. Rather, as we noted in N.Y. State 715, whether a hiring law firm needs to disclose to the client and obtain consent for the participation of a contract lawyer depends upon whether confidences will be disclosed to the lawyer, the degree of involvement of the per diem lawyer in the matter and the significance of the work the lawyer will perform.

28. In 2015, the New York State Bar Association amended the Comments to Rule 1.1 to address the outsourcing of legal work by law firms to lawyers outside the firm. As explained by Professor Simon, "To help ensure that outside lawyers perform legal work competently [the State Bar Association expanded] the Comments to New York Rule 1.1 ("Competence") to provide greater guidance and clarity regarding a lawyer's responsibilities when engaging outside lawyers to provide legal services to clients." Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 65 (Thompson Reuters 2016 ed.)

29. The most relevant new comment provision is Rule 1.1, Comment [6A], which says:

> Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

30. Thus, where the hiring lawyer reasonably expects a court appearance to involve a simple scheduling matter, the hiring lawyer need not obtain client consent. However, if the hiring lawyer knows (or reasonably should know) that a court appearance is likely to involve substantive or strategically significant issues or the sharing of client confidences, then the hiring lawyer ordinarily must obtain client consent to use a per diem lawyer. *See* Rule 1.1, Comment [7A] ("if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client"). Comment [7A] also provides that "whenever the retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a)." *See also* N.Y. State 715 (1999) (whether client consent is necessary before contracting to have work done by a temporary or contract lawyer depends on whether (i) the lawyer will receive confidential client information, (ii) whether the work to be done by the temporary lawyer will involve strategic decisions or other work that the client would expect of the senior lawyers working on the client's matters, and the work will not be supervised by the hiring lawyer); D.C. Op. 284 (1998) (lawyer should advise and obtain consent from client whenever proposed use of a temporary lawyer to work on client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations).

Billing the Cost of a Per Diem Lawyer

31. Rule 1.5(b) enjoins a lawyer to communicate to a client "the basis or rate of the fee and expenses for which the client will be responsible." If the law firm wishes to bill the client for the cost of the per diem lawyer, the lawyer should communicate this possibility to the client. The issues of whether the hiring lawyer may mark up the cost of a per diem lawyer or charge the cost of a per diem lawyer as an expense in a contingent fee matter are beyond the scope of this opinion. On the other hand, the fee paid to the Service may not be included in the legal fee charged by the law firm to its client. Rather, if the law firm wishes to pass it on to the client, it must separately bill it as a disbursement. *See* N.Y. City 1989-2.

Supervising the Per Diem Lawyer

32. In N.Y. State 715, we noted several different models for using temporary lawyers. In one model, the temporary lawyer is an independent contractor with discretion on how to accomplish the assigned task. In another, the hiring lawyer provides the same type of supervision he or she would provide to an employee. In that opinion, we noted, citing ABA 88-356, that if a temporary lawyer is performing independent work for a client involving substantive or strategic issues without the close supervision of a lawyer associated with the law firm, the hiring lawyer must inform the client. As noted above, in 2015, the comments to Rule 1.1 were amended to provide that "[c]lient consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm."

33. Rule 5.1(b)(2) provides: "A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules." However, even if the work that the per diem lawyer will perform does not involve discretion and is not closely supervised by the hiring lawyer, we believe that the hiring lawyer must (i) determine that the per diem lawyer is competent to perform the assigned task, (ii) ensure that both the firm and the contract lawyer perform conflict checks before hiring the per diem lawyer to determine that the per diem lawyer has not formerly appeared for the opposing party in the same or a substantially-related matter, and (iii) confirm that the per diem's assignment was performed satisfactorily by obtaining a report on the assignment from the per diem lawyer.

CONCLUSION

34. A lawyer may participate in a non-lawyer owned online legal directory that permits lawyers needing per diem lawyer services to select lawyers available to provide those services, where the directory does not recommend or select the participating lawyers, the service is available only to lawyers (not to prospective non-lawyer clients) and the participating lawyers pay flat fees for listing their availability in and having access to and hiring the lawyers listed in the online directory. Client consent is not necessary if the purpose of the per diem representation is routine and non-substantive. The hiring lawyer has direct supervisory authority over the per diem lawyer and must make reasonable efforts to ensure that the per diem lawyer conforms to the Rules, including by maintaining a system by which the proposed engagements are checked for conflicts of interest.

(14-16)

Opinion 1114 (2/9/17)

Topic: Trust or special accounts; IOLA; authorized signature on special account checks

Digest: Attorneys may electronically sign checks issued from their law firm's "special," trust or IOLA account, provided that an authorized signatory who is a New York lawyer personally reviews and approves the issuance of the check with his or her digitized signature.

Rules: 1.15(b), (d) & (e)

FACTS

1. A multi-state law firm with offices in New York has a centralized out-of-state location for issuing checks from the attorney special or trust account that the firm maintains in a New York bank.

2. In accordance with Rule 1.15(e) of the New York Rules of Professional Conduct (the "Rules"), the firm has designated firm lawyers who are admitted to practice law in New York and are based in its New York offices as "authorized signatories" of the special or trust account. Currently, when a check is to be issued from the account, the requested check is printed locally utilizing a MICR (magnetic ink character recognition) printer. The check is then presented to an authorized signatory, along with all supporting documentation regarding the transaction, for review and execution. After review, if the documentation complies, the authorized person manually signs the check (sometimes referred to as a "wet ink signature"). The check and supporting documentation is then given to a second authorized signatory for review and execution. Presently, all checks from the account are signed in ink by two authorized signatories.

3. The firm would like to move to an electronic approval and signing process. In the new process, the firm would notify the authorized signatories electronically of one or more pending checks to be issued from the attorney special or trust account. The authorized signatories would be provided with all supporting documentation and would conduct the same review that is currently being conducted with respect to wet ink checks. How-

ever, rather than signing the checks manually in ink, the authorized signatory would electronically approve the issuance of the check. After an authorized signatory approves, the check will be printed. Just as with the current process, checks would be printed in the firm's local office (here, the New York office) utilizing the MICR printer. The printed checks would also contain the electronically affixed digitized (machine readable) signature of each authorizing signatory.

QUESTIONS

4. A. May a law firm utilize MICR (magnetic ink character recognition) digitized signatures on checks issued from its IOLA account in lieu of manual (wet ink) signatures?

B. May the approval process for checks issued from the law firm's IOLA account utilize a batch process to authorize the MICR signatures?

OPINION

MICR Signatures on IOLA Checks

5. Rule 1.15(b) requires a lawyer who is in possession of funds belonging to another person incident to the lawyer's law practice to maintain those funds in a "special account," also known as "trust account." Under Judiciary Law Section 497(4)(b), where the lawyer receives moneys incident to the lawyer's practice that the lawyer believes are too small in amount (or will be held for too short a time) to generate sufficient interest income to justify a separate account, the lawyer is required to place them in an interest-bearing account, also known as an Interest on Lawyers Account or IOLA Account. Court rules contain several requirements regarding IOLA Accounts. *See* 21 NYCRR Part 7000. However, that rule contains no requirement regarding authorized signatories of special account checks. Only Rule 1.15(e) governs authorized signatories.

6. Rule 1.15(a) specifies that an attorney who possesses client funds has a fiduciary obligation with respect to those funds. Moreover, Rule 1.15(e) states that "[o]nly a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account." The answer to the question here thus hinges on what is encompassed by the term "signatory."

7. Recently, the State of North Carolina amended its version of Rule 1.15 to include a provision that specifically prohibits trust account checks from being signed utilizing "signature stamps, preprinted signature lines, or electronic signatures." *See* North Carolina Rules of Professional Conduct, 1.15(s). New York, however, has no such prohibition.

8. Rule 1.15(e) in New York provides that only a New York attorney may be an authorized signatory, but it does not specify how a trust or special account check may be signed. Rule 1.0(x) defines what constitutes a writing for purposes of Rules that require the client's written consent. It was amended effective January 1, 2017 to include electronic records within the meaning of a writing. As amended, Rule 1.0(x) provides: "A 'signed' writing includes an electronic . . . process attached to . . . a writing and executed or adopted by a person with the intent to sign the writing." (Emphasis added.) As the New York State Bar Association's Committee on Standards of Professional Conduct ("COSAC") explained when it proposed this change, "COSAC recommends clarifying the definition of 'writing' to make clear that it encompasses evolving forms of *electronic* communications." However, the term we must interpret here is not "writing" but "signatory." Consequently, the recent amendment is instructive but not dispositive.

9. In N.Y. State 693 (1997), this Committee stated that it was permissible for a lawyer, as part of a real estate closing, to delegate to a paralegal the task of signing the lawyer's name on an escrow account check utilizing a rubber stamp, as long as the lawyer supervised the delegated work closely. The rationale underpinning that opinion was that it was the attorney, not the paralegal, who ultimately approved the transaction—the attorney was merely delegating the task of affixing the signature for a discrete and limited purpose.

10. Here, no delegation would be involved. Therefore, if the law firm's procedures for authorizing checks from the special or trust account and for affixing the digitized signature of each authorized signatory assure that only an authorized signatory or signatories may initiate these steps, and if using the MICR signature renders the check negotiable within the meaning of banking laws and regulations, then Rule 1.15 neither requires a law firm to use a "wet ink signature" nor prohibits a law firm from using electronic or digitized signature media such one affixed by an MICR printer.

11. The law firm also must ensure that the electronically generated records of the special or trust account are maintained in accordance with Rule 1.15(d).

Batch Processing of IOLA Checks

12. The inquirer also asks whether the firm may utilize a "batch process" to authorize the MICR signatures. The inquiry does not define "batch processing," but we understand that the term can mean two different things. The first involves running a series of computer steps with minimum human interaction. The second involves scheduling a series of activities for the same time, so as to use computer time most efficiently. As this Committee has stated, "*responsibility* for client funds may not be delegated…." *See* N.Y. State 693 (emphasis added). As long as (i) the firm's authorized signatories approve the issuance of each individual check from the firm's special or

trust account, and (ii) the firm's computer system saves information about authorization of checks to be printed and signed digitally and prints out the digitally signed checks in a single batch, the firm would be in compliance with Rule 1.15.

CONCLUSION

13. A law firm may issue electronically signed and approved checks from its trust account provided that an authorized signatory who meets the requirements of Rule 1.15(e) personally reviews and approves the issuance of each check.

(36-16)

Opinion 1115 (2/17/17)

Topic: Public defender; part-time judge; conflict of interest

Digest: A member of a public defender office may not represent a client in the same court where another member of the public defender office serves as a part-time judge because it would violate Rule 8.4(f), which prohibits a lawyer from causing a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct not to "permit his or her partners or associates to practice law in the court in which he or she is a judge."

Rules: 1.0(h), 1.0(p), 1.10(a), 7.2(b), 8.4(f)

FACTS

1. The inquirer lives in a locality where City Court judges serve on a part-time basis. These part-time judges may also practice law. *See* 22 N.Y.C.R.R. 100.6(B) (a part-time judge may accept private employment or public employment in a Federal, State or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties). The inquirer here is a member of a public defender office. Another member of the public defender office is a part-time judge in the City Court.

QUESTION

2. May a lawyer who is a member of a public defender office appear in the court where another member of the public defender office serves as a part-time judge?

OPINION

Current Law and Court Rules

3. Although the jurisdiction of this Committee does not include interpreting laws or court rules, the question posed here is affected by law and court rules.

4. Section 471 of the Judiciary Law provides:

> A law partner of, or person *connected in law business with* a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member . . . . [Emphasis added]

Similarly, Section 100.6(B) of the Rules of Judicial Conduct, 22 N.Y.C.R.R. §100.6(B)(3), provides:

> A part-time judge:
>
> * * *
>
> (2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;
>
> (3) shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law, but may permit the practice of law in his or her court by the partners or associates of a judge of a court in another town, village or city who is permitted to practice law . . . . [Emphasis added]

5. Whether a lawyer is "connected in law business" with a judge or is an "associate" of a judge within the meaning of Section 471 of the Judiciary Law or Section 100.6(B) of the Rules of Judicial Conduct are legal questions beyond the jurisdiction of this Committee.

6. Under the New York Rules of Professional Conduct (the "Rules"), attorneys who are members of the same public defender office usually are considered to be part of the same firm. Rule 1.0(h) defines the terms "firm" or "law firm" to include "lawyers employed in a qualified legal assistance organization." Rule 1.0(p) defines a "qualified legal assistance organization" as an "office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof." Finally, Rule 7.2(b)(1) lists the following types of qualified legal assistance organizations:

> a legal aid office or *public defender office*: (i) operated or sponsored by a duly accredited law school; (ii) operated or sponsored by a bona fide, non-profit community organization; (iii) operated or sponsored by a governmental agency; or (iv) operated,

sponsored, or approved by a bar association. [Emphasis added.]

7. Comment [4] to Rule 1.0 indicates that the structure of a legal services organization may determine whether the entire organization, or rather some components of an organization, constitutes a "firm" for purposes of the Rules. The precise scope of a "firm" within a legal services organization is a factual question that is beyond the jurisdiction of our Committee. *See* N.Y. State 1104 (2016); N.Y. State 1036 (2014); N.Y. State 862 (2011).

8. Rule 1.10(a) provides as follows: "While lawyers are *associated* in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." (Emphasis added.) The lawyers in a public defender office are considered "associated" even if assistant public defenders work on a part-time basis. *See* N.Y. State 862 (2011) (the phrase "associated" in Rule 1.10(a) "includes part-time attorneys as well as full-time attorneys"). This Committee has previously concluded that members of a county public defender office may be considered to be "associated" in the same firm for imputation purposes under Rule 1.10(a), even if the lawyers in the public defender office work independently. Compare N.Y. State 975 (2013) (involving a county with a single public defender having a central role in providing legal services under County Law §701 and concluding that all assistant public defenders should be considered to be associated in the office) with N.Y. State 914 (2012) (a panel of lawyers established to provide legal assistance to indigent clients when the Legal Aid Society has a conflict and whose members did not have a common supervisor or share files or confidential information with Legal Aid Society Lawyers was not part of the same "firm" as the Legal Aid Society). The remainder of this opinion assumes that the inquiring public defender would be considered to be associated with the part-time judge because they are both members of the same public defender office.

Prior Opinions of This Committee Regarding Associates of Part-Time Judges

9. We have issued a long line of opinions dealing with the ethical constraints placed upon associates of part-time judges. *See, e.g.* N.Y. State 701 (1998) (lawyer who is co-counsel with a part-time judge in a civil case may not appear before another judge on the part-time judge's court because the public might perceive that the administration of justice is not fairly and impartially served), N.Y. State 670 (discussing practice restrictions on a part-time City Court judge and a part-time DA who are associated with each other in private practice); N.Y. State 118 (1970) (under the Canons of Judicial Ethics, a village police judge may not sit on criminal matters if his partner is an assistant district attorney); N.Y. State 65 (1967) (Judicial Canons prohibit partners of an acting village judge from appearing before a regular judge of the court); N.Y. State 29a (1967) (even if it does not violate the law, an associate in the law firm of a part-time judge may not ethically appear before the other judges on that court, since it is not conducive to building public confidence in the courts). These opinions were based on various sources, including §471 of the Judiciary Law, the Code of Judicial Conduct, and the prior Canons of Judicial Ethics, as well as Canon 9 of the Code of Professional Responsibility and several Ethical Considerations in the Code of Professional Responsibility prohibiting the appearance of impropriety or the appearance of undermining the impartiality of a tribunal. N.Y. State 701 also took the position that, if an appearance before a part-time judge was illegal under §471 of the Judiciary Law, it was also unethical. That view was based on former DR 1-102(A)(4), which considered it misconduct for a lawyer to engage in "illegal" conduct.

10. Some of these bases no longer apply to opinions issued by this Committee. The Canons of Judicial Ethics were replaced by the Code of Judicial Conduct, and, later, the Rules of Judicial Conduct of the Chief Administrator of the Courts. In any case, as noted above, interpreting statutes and court rules is beyond our jurisdiction.

Application of Rule 8.4(f)

11. Rule 8.4(f) provides that a "lawyer or law firm shall not . . . knowingly assist a judge or judicial officer in conduct that is in violation of applicable rules of judicial conduct or other law." Under this provision, a lawyer may not knowingly undertake a representation when doing so would cause a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct (such as the obligation in §100.6(B)(3) not to "permit his or her partners or associates to practice law in the court in which he or she is a judge").

12. For this reason, if the associated part-time City Court judge does not take steps to prevent other lawyers who are members of the same public defender office from practicing before the City Court, then the other public defenders must on their own initiative decline to make such appearances or withdraw.

13. Opinions in other jurisdictions have reached similar conclusions based upon the interplay between a Rule of Judicial Conduct and a lawyer's duty under Rule 8.4(f). *See* Phila. Op. 91-33 (1991) (holding that inquiring attorney could not appear before a member of the Tax Review Board where a retired member of the firm was a member of the Tax Review Board, because the Code of Judicial Conduct would require the Tax Review Board member to recuse himself—and if he failed to do so, then the inquirer would be in violation of Rule 8.4(f) if the inquiring lawyer participated in the hearing because it would be assisting a judge in conduct in violation of the applicable Rules of Judicial Conduct); S.C. Op. 94-05 (1994) (considering whether a lawyer could hire a probate judge as a part-time attorney and noting that, while the question presented might be directed more appropriately

to the Advisory Committee on Standards of Judicial Conduct, because the inquirer was the lawyer who would hire the judge and because the applicable South Carolina ethics rule prohibited the lawyer from knowingly assisting a judge in conduct that violated applicable rules of judicial conduct or other law, the inquiry also fell within the purview of the Ethics Committee).

CONCLUSION

14. A member of the public defender's office may not represent a client in the court where another public defender is a part-time judge, because to do so would violate the public defender's duties under Rule 8.4(f).

(39-16)

Opinion 1116 (3/29/17)

Topic: Nonlegal services, fee-sharing with nonlawyers, payment for referrals, billing practices, disclosing use of nonlawyer assistants, multidisciplinary practice

Digest: A lawyer may enter into an arrangement with a nonlawyer "foreign migration agent" whereby the nonlawyer hires the lawyer on behalf of the client and assists the lawyer in communicating with the client, as well as gathering and translating documents that are required in connection with the representation, as long as (1) the relationship between the lawyer and the nonlawyer is not exclusive, (2) the nonlawyer does not interfere with the lawyer-client relationship, (3) the client consents to the potential conflict of interest resulting from the referral relationship between the lawyer and the foreign migration agent, and (4) the lawyer is not paying the foreign migration agent for referrals. The lawyer must bill the client separately for fees and expenses and must inform the client of the name and amount charged by the foreign migration agent for nonlegal services.

Rules: 1.0(i) & (j), 1.4(a), 1.5(a), (b) & (d), 1.7(a) & (b), 2.1, 5.3(a)&(b), 5.4(a), 5.5(b), 5.8(a)&(c), 7.2(a)&(b)

FACTS

1. The inquirer is a law firm with a principal office outside New York and a small office in New York. The firm has several partners and associates admitted in NY. It practices U.S. immigration law, and one of its services involves helping clients to obtain lawful permanent residence in the U.S. (also known as obtaining a green card), using the so-called EB-5 Program (the "EB-5 Program"). This Program allows a foreign investor ("EB-5 investor") to qualify for a green card by investing $1 million in a U.S. commercial enterprise ($500,000 if the investment is made in a targeted area with high unemployment) and creating or preserving at least 10 full-time jobs for qualifying U.S. workers.

2. Part of the EB-5 Program allows foreign investors to make passive investments in qualifying projects under the auspices of a Regional Center ("Regional Center") designated by U.S. Citizenship and Immigration Services ("USCIS"). Regional Centers sponsor capital investment projects for investment by EB-5 Investors. Many real estate projects in New York are funded by EB-5 investors through a Regional Center.

3. In the Immigrant Visa Petition on Form I-526, the applicant must demonstrate that he or she has invested the required amount and is the legal owner of the capital invested, that the funds are from a lawful source and that the investment directly or indirectly created 10 jobs. If the Form I-526 is approved, the investor obtains conditional lawful permanent residence for two years. Prior to the end of the 2-year period, another petition must be filed to remove the conditional status of the visa by establishing that the investor has continued to meet all the conditions of the EB-5 program, including that the EB-5 investment is ongoing.

4. Many EB-5 investors who invest through Regional Centers rely upon foreign migration agents ("FMAs"), who live in such investors' country, to assist them in understanding the projects offered by various Regional Centers, and in navigating the EB-5 Program. Although the petition on Form I-526 is filed by a U.S.-licensed lawyer, an FMA may assist the EB-5 investor in establishing that the requirements of the EB-5 Program have been met, including that the investor has invested the required amount, that the investor is the legal owner of the capital invested, and that the investment has created the requisite number of direct or indirect jobs.

5. The services provided by FMAs to investors may include the following:

> a. Translating the investor's documents for the EB-5 process
>
> b. Assisting the law firm to collect all documents required for the process from the investor, organizing the financial documentation for the initial submission to USCIS and responding to any requests for additional information
>
> c. Monitoring the status of all processes and filings of the investor
>
> d. Assisting the law firm in communicating with the investor and participating in calls between the investor and the law firm.

6. The FMA may also assist the EB-5 investor by advising on ancillary relocation matters, such as purchasing a home and selecting schools for children.

7. Finally, the FMA may market the projects of various Regional Centers to investors and may participate in the development of the projects. In addition, the FMA may assist a Regional Center in communicating with the investor. It may receive fees from the Regional Center when the investment is made in the Center's project, including (i) a finder's fee, (ii) a proportion of the proceeds of the deal, and (iii) part of the administrative fee paid by the EB-5 Investor.

8. The FMA does not prepare and file the Immigrant Visa Petition. Rather, it directs its clients to U.S. immigration lawyers. Depending on the size of the project and the FMA, the FMA may have dozens of EB-5 investors invest in a single project, who may all be represented by one U.S. law firm or by different law firms. The lawyer, as preparer of the Petition, affirms that he or she has prepared the petition at the request of the EB-5 investor and that it is based on all information of which he or she has knowledge. The engagement letter of the law firm often provides that the EB-5 investor consents to deal with the law firm through the FMA as the investor's agent.

9. Because the EB-5 investor is in a foreign country and may not speak English, the lawyer or the EB-5 investor must hire agents, including accountants and translators, to prepare and translate the necessary papers to document the source of the investment funds and how they were transferred from the investor's control to the project. Here, the FMA is proposing that the law firm engage the FMA to provide the services that would otherwise have to be performed by a foreign-language speaking accounting firm or staff of the law firm. The inquirer represents that the FMA would charge the same fixed fee that an outside firm or the law firm would charge. The FMA also proposes to serve as the point of contact with the client in the client's home country and to liaise with the lawyer in obtaining necessary documentation, for which the FMA would charge the lawyer an additional fee.

10. The law firm asks whether it may charge the client for such nonlegal services, whether it must disclose to the client that any portion of the fees charged to the client are being used to retain a nonlawyer to perform services in connection with the visa application, and whether it must disclose that the FMA is providing these services.

QUESTIONS

11. May a law firm charge the client for nonlegal services?

12. May the lawyer charge the client a single fee that includes a flat fee for the lawyer's services and a flat fee for the services of the nonlawyer?

13. Must the lawyer disclose to the client either the identity of the nonlawyer or the amount paid to the nonlawyer?

14. What other considerations apply when a law firm participates in an arrangement with a nonlawyer whereby the nonlawyer assists the lawyer in communicating with the client, and manages all document gathering and translation in connection with the representation?

OPINION

Nonlawyer Assistants

15. Lawyers often hire nonlawyers to help them provide legal services. These nonlawyers may be employees of the law firm or outside service providers. See New York Rules of Professional Conduct (the "Rules"), Rule 5.3, Comment [3] ("A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include . . . an investigative or paraprofessional service, . . . a document management company . . . , . . . a third party for printing or scanning, and . . . an Internet-based service to store client information").

16. Ordinarily, when use of a communication agent is necessary for effective communication with a client, use of such an agent is ethically required. See N.Y. State 1053 (2015) (use of sign language interpreter to assist communication with a deaf client). As we said in N.Y. State 1053, under Rule 1.4, a lawyer must, among other things, apprise the client of material developments in the client's matter and consult with the client about the means by which the client's objectives are to be accomplished. However, there is also a danger, when the intermediary is the sole source of communication with the client without appropriate participation by the lawyer, that the intermediary could interfere with the lawyer's obligation under Rule 1.4 to communicate with the client. Consequently, the lawyer must ensure that the intermediary is facilitating and not controlling communication with the client.

17. As Rule 5.3, Comment [2] explains, the lawyer must ensure that the conduct of nonlawyers that the lawyer employs or retains is compatible with the lawyer's professional obligations:

> [2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by. . . the law firm . . . is compatible with the professional obligations of the lawyers and firm. Lawyers . . . may employ nonlawyers outside the firm to assist in rendering those services. . . . A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information . . . . A law firm should make reasonable efforts to ensure that the firm

has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer.

Charging the Client for Legal and Nonlegal Services

18. The inquirer asks whether the lawyer may charge a single fee for legal and nonlegal services. Even if the inquirer were willing to be liable for the nonlegal services under the Rules, we believe including the expense for nonlegal services in the fee for legal services would be inappropriate. Rule 1.5(b) enjoins a lawyer to communicate to a client "the basis or rate of the fee and expenses for which the client will be responsible." [Emphasis added]. See also 22 N.Y.C.R.R. Part 1215.1(b) (Written Letter of Engagement Rule requires that the lawyer's letter of engagement address the scope of the legal services to be provided and an explanation of attorney's fees to be charged, expenses and billing practices). This information must be communicated to the client before or within a reasonable time after commencement of the representation and must be in writing where required by statute or court rule. Consequently, in order for the inquirer to bill the client for the expense of services provided by the FMA (or, for that matter, the expenses of third-party accountants and translators), the inquirer must communicate this possibility to the client and the nature of the charges that will be billed to the client.

19. Since these expenses would not constitute legal fees of the lawyer, they would appropriately be listed separately on any legal bill as expenses of the matter. Like legal fees, expenses are subject to the requirements of Rule 1.5(a) that they not be excessive. Moreover, without the consent of the client, the lawyer may bill only the exact amount of the expenses. See N.Y. State 1050 (2015) (citing ABA 93-397 (1993) and N.Y. City 2006-3); Cf. Rule 1.5, Comment [1] (discussing in-house expenses). Since the inquirer states that the FMA would charge the same amount that would be charged by a third-party provider or by the law firm for in-house staffers, these charges may not be clearly excessive. However, the lawyer would have to determine that the FMA provides services of the same quality as those the lawyer's firm could provide itself or through third-party providers.

Must the Lawyer Disclose the Identity of the Nonlegal Services Provider?

20. The inquirer asks whether it is necessary to disclose that nonlegal services are being provided by the FMA or another nonlawyer provider. We assume this means that the nonlegal expenses (e.g., for accounting and translation) would be listed as expenses but the provider would not be identified.

21. The answer to this question is governed by Rule 1.4 on communication with the client. Rule 1.4(a)(2) requires the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and Rule 1.4(a)(4) requires the lawyer to "promptly comply with a client's reasonable requests for information." Comment [5] explains that the client should have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued" and that the lawyer must act in the client's best interests. Thus, the answer depends upon whether it is reasonable to withhold the name of the provider.

22. In any representation, outside service providers may fall within a spectrum of importance to the client. In the case of an outside photocopy service, the name of the service provider likely is unimportant to the client, and the lawyer could reasonably conclude that its name need not be provided on the legal bill (although the client is always entitled to request copies of the bills for nonlegal services received by the lawyer).

23. Here, for several reasons, we believe it would not be reasonable to withhold the name of the provider. First, the FMA will have significant contact with the client, both in the collection of the necessary documents and in assisting in communication with the lawyer. Consequently, we believe it is important that the client be aware that the personnel providing these services are not employees of the lawyer but rather employees of the FMA.

24. Second, since the inquiry lists services that the FMA normally provides directly to the EB-5 investor, it is not clear whether the services for which the law firm would be paying are services for which the EB-5 investor is already being charged. We believe the EB-5 investor is entitled to a listing of services for which the lawyer is charging disbursements and the identity of the service provider, so that the investor may judge whether the charges are reasonable and appropriate and are not duplicative.

25. Third, the FMA here has a potential conflict of interest, which the client is entitled to assess. According to the inquirer, the FMA may be working for itself and a Regional Center, as well as for the law firm and the investor. For itself and the Regional Center, the FMA may (i) participate in the development of Regional Center Projects, (ii) market the projects of various Regional Centers to investors, and assist a Regional Center in communicating with the investor. It may receive fees from the Regional Center when the investment is made in the Center's project, including (i) a finder's fee, (ii) a proportion of the proceeds of the deal, and (iii) part of the administrative fee paid by the EB-5 Investor to the Regional Center. The FMA may also assist the EB-5 investor by advising on ancillary relocation matters, such as purchasing a home and selecting schools for children. We assume this may also involve a fee. In addition, the FMA is proposing to provide services to the law firm, for which it will be paid additional fees. We believe the client is entitled to under-

stand the extent of the total fees that will be paid to the FMA, and to assess whether the FMA is exerting pressure on the client to "close the deal" on a particular Regional Center investment.

26. Fourth, informing the client of the name and compensation of the FMA also enables the client to determine whether the compensation contains an element of payment for the FMA's referral of the lawyer. The client may be the only person in a position to determine whether its interests are served by having the FMA perform the many functions it would be performing in connection with the visa application.

27. Finally, if the reason for failure to disclose the fact that the nonlegal services were provided by the FMA is to hide from the client the fact that the FMA is being paid additional amounts in connection with the immigration visa application, then the bill might be fraudulent within the meaning of Rule 1.5(d)(3) (a lawyer shall not enter into an arrangement for, charge or collect "a fee based on fraudulent billing."); Rule 1.5, Cmt. [1A] ("A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information"); Rule 1.0(i) ("fraud" or "fraudulent" includes conduct that has a purpose to deceive).

28. For all these reasons, we believe the lawyer must disclose to the client the roles and compensation of the FMA.

Other Considerations When a Lawyer Has a Relationship with a Nonlawyer

29. Both the Rules and our opinions note several concerns when lawyers and nonlawyers join to provide legal and non-legal services. These include ensuring that (A) the lawyer does not allow the nonlawyer to affect the lawyer's independent professional judgment on behalf of the client, (B) the client consents to any potential conflicts of interest; (C) the lawyer does not share legal fees with the nonlawyer, (D) the lawyer does not pay the nonlawyer for referrals, (E) the lawyer adequately supervises the work of nonlawyers who assist in the provision of legal services, and (F) the client understands the scope of the representation. See N.Y. State 1068 (2015) (lawyer joining with a claims recovery firm which would assemble documents necessary to file the client's claim and monitor the process of applications filed on behalf of the client); N.Y. State 992 (2013) (lawyer and nonlawyer establishing disability office to help with government benefit matters); N.Y. State 976 (2013) (lawyer and nonlawyer performing forensic mortgage analysis and legal services); N.Y. State 885 (2011) (lawyer and nonlawyer working together on property tax reductions). See also N.Y. City 2014-1. We summarize those issues below.

A. Interference with Lawyer's Independent Professional Judgment

30. Rule 5.8(a) prohibits, except in certain limited circumstances, a "contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services," (emphasis added). The exceptions provided for in Rule 5.8(a) involve relationships with firms in professions contained on a list maintained by the Appellate Divisions under Section 1205.3 of the Joint Appellate Division Rules. FMAs are not in one of those professions. Consequently, an exclusive relationship with any FMA is prohibited by Rule 5.8.

31. Under Rule 5.8(c), the provisions of Rule 5.8(a) do not apply to "relationships consisting solely of non-exclusive reciprocal referral agreements or understandings" between a lawyer and a nonlegal professional or nonlegal professional services firm. This opinion assumes that the inquirer and the FMAs with which the inquirer deals do not have an exclusive relationship. Nevertheless, since the inquiry suggests that FMAs are one of the major ways attorneys in this field obtain their clients, the inquirer must be wary of a relationship that is non-exclusive in name only. Our opinions express concern for referral relationships that are effectively exclusive. See N.Y. State 992 (2013) (lawyer may not effectively form a partnership with a nonlawyer disability office).

32. Even when Rule 5.8(a) does not apply, other Rules require complete professional independence and uncompromised loyalty of the lawyers to the client. See Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice"); Rule 5.4(a) ("Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.") Because an FMA who is entitled to fees upon closing of an investment may have an economic interest in ensuring that the closing occurs, where the FMA has a continuing role in the representation of the client, we believe there is a significant risk of interference with the lawyer's independent judgment. Cf. Matter of Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), cert. denied, 455 U.S. 1035 (1982) (lawyer may not ask a real estate broker to solicit clients for the lawyer, because the broker has a conflict of interest that may affect the recommendation). Consequently, as noted in the next paragraph, the lawyer must take steps to ensure that the lawyer's duty of loyalty will not be compromised.

B. Client Consent to Potential Conflicts of Interest

33. Rule 1.7(a)(2) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that 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 financial, business or other personal interests.

34. Here, because the lawyer may receive continuing referrals from the FMA, there is a significant risk that the lawyer's judgment on behalf of the client will be affected. The FMA has an economic interest in the client's investing in a particular Regional Center project as the basis of the visa application. If the lawyer believes the investment is not in the best interests of the client, the lawyer may nevertheless be reluctant to so advise the client, because acting contrary to the interests of the FMA may affect future referrals from the FMA. See Matter of Lefkowitz, 47 AD3d 326, 328 (1st Dep't 2007) (upholding findings of liability against an immigration lawyer on conflicts grounds, among others, when referee found that lawyer was dependent on an immigration agent for case referrals, but never informed clients of this conflict).

35. Rule 1.7(b), however, allows the lawyer to represent the client as long as the lawyer reasonably believes he or she will be able to provide competent and diligent representation and the client gives informed consent, confirmed in writing. Although some of the language of Rule 1.7(b) seems more suited to representation of two clients with differing interests, Comment [2] to Rule 1.7 explains that it also applies to a client whose representation might be adversely affected by the lawyer's personal interest. Rule 1.0(j) indicates that "informed consent" denotes that the client must agree to the proposed course of conduct after the lawyer has communicated information "adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

36. We believe that the lawyer's potential personal conflict of interest here is consentable, as long as the lawyer believes he or she will be able to provide competent and diligent representation to the client, and the representation is not prohibited by law, within the meaning of Rule 1.7(b)(2). Consequently, we believe the lawyer must make the determination that he or she will be able to provide competent and diligent representation, and, if the lawyer is able to make such determination, must obtain the client's informed consent.

37. We note that the inquiry states that the lawyer's engagement letter often provides that the EB-5 investor consents to deal with the law firm through the FMA as the investor's agent. We do not believe the lawyer may rely on that authorization until the client has provided informed consent to the lawyer's personal conflict. Nor should the lawyer rely on the FMA to explain the conflict and obtain consent.

C. Fee-Sharing

38. Our prior opinions have identified two concerns involving the fee paid to a nonlegal services provider—whether the lawyer is sharing legal fees with the nonlawyer and whether the lawyer is paying the nonlawyer for referring legal business.

39. Subject to exceptions not applicable here, Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer. Rule 5.4(a). The inquirer states that both the lawyer and the FMA would charge flat fees for their services. Moreover, the inquirer would pay the FMA the same fixed fee that the law firm would otherwise have to pay foreign-language speaking accounting firm or staff of the law firm speaking that language. Assuming that the fees of the FMA are not related to the amount of the fees charged by the immigration lawyer, and that the lawyer has not reduced the fees the lawyer normally charges in order to cover the fees of the nonlawyer, the inquiry would not involve a lawyer sharing legal fees with a nonlawyer. See N.Y. State 1068 (2015) (as long as the claims recovery firm provides substantial assistance in the proceedings and the compensation of the claims recovery firm is commensurate with the services it provides, then the lawyer would not be improperly sharing legal fees with a nonlawyer); N.Y. State 976 (2013) (arrangement could constitute impermissible fee sharing if the lawyer's payment to the intermediary is insufficiently related to the value of the company's services); N.Y. State 885 (2011) (finding improper fee sharing where there appeared to be no relation between the funds to be received by the nonlawyer company and the value of the services performed and stating that the lawyer may not reduce fees as part of an arrangement to accept referrals from a nonlawyer who provides services to clients).

D. Payment For Referrals

40. Rule 7.2(a) prohibits a lawyer from compensating or giving anything of value to a person to recommend or obtain employment by a client or as a reward for having made a recommendation resulting in employment by a client. As we said in N.Y. State 942 (2012), "it would violate this rule if the inquirer would be giving something of value to [the nonlawyer] in exchange for client referrals." As long as hiring the FMA is not a condition (express or implied) of the referral, and the compensation to the FMA for the services does not exceed the reasonable value of its services, the lawyer does not appear to be paying a prohibited referral fee in violation of Rule 7.2(b). On the other hand, if the lawyer chooses to hire the FMA rather than another service provider that

the lawyer believes would be better at performing the required tasks, then the choice of the FMA may reflect compensation for referring the client.

E. Supervision of Nonlawyers

41. As we noted above, the lawyer must ensure that the conduct of nonlawyers employed by or retained by the law firm is compatible with the professional obligations of the lawyer. See Rule 5.3, Comment [2].

42. Rule 5.3(b) provides that "A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer" if the lawyer "orders or directs the specific conduct or with knowledge of the specific conduct, ratifies it." The immigration lawyer here is undoubtedly ordering the work and "ratifies" that work by incorporating it into the EB-5 visa application. Accordingly, the lawyer must supervise the work of the FMA and ensure that the work of the FMA is consistent with the lawyer's professional obligations to the client and that the lawyer—not the FMA—is controlling the representation.

F. Scope of Representation

43. The inquiry indicates that the FMA is referring the EB-5 client for the purposes of preparing the EB-5 investor's immigration application. Since the EB-5 investment is an integral part of the immigration application, we believe a reasonable client would expect that the lawyer will give advice on whether the proposed investment meets the EB-5 visa criteria. If there is any disagreement between the lawyer and the FMA in this regard, the lawyer must ensure that his or her advice is transmitted accurately to the client.

CONCLUSION

44. A lawyer may enter into an arrangement with a nonlawyer foreign migration agent whereby the nonlawyer hires the lawyer on behalf of the client and assists the lawyer in communicating with the client, as well as gathering and translating documents that are required in connection with the representation, as long as (1) the relationship between the lawyer and the nonlawyer is not exclusive, (2) the nonlawyer does not interfere with the lawyer-client relationship, (3) the client consents to the potential conflict of interest resulting from the referral relationship between the lawyer and the foreign migration agent, and (4) the lawyer is not paying the foreign migration agent for referrals. The lawyer must bill the client separately for fees and expenses and must inform the client of the name and amount charged by the foreign migration agent for nonlegal services.

(26-16)

Opinion 1117 (4/4/17)

Topic: Conflict of interest; serving as lawyer and broker in same real estate transaction

Digest: A lawyer who receives a broker's commission in a real estate transaction may not also serve as the lawyer for the buyers, even if the buyers are longtime clients and friends and have requested both kinds of services

Rule: 1.7(a) & (b)

FACTS

1. The inquirer is an attorney and licensed real estate broker. A married couple, longstanding clients and friends of the inquirer, seek to buy real estate and have asked the inquirer to represent them as both broker and attorney in that real estate purchase.

2. The inquirer proposes to serve in both of those capacities in the real estate transaction. As broker, the inquirer would receive a brokerage commission from the seller (which we assume would be a percentage of the sale price of the real estate). As attorney, however, the inquirer would provide the requested legal services pro bono, because the buyers have limited resources.

QUESTION

3. May a lawyer who is serving as a broker in a real estate transaction also provide pro bono legal services to the buyers in that transaction?

OPINION

4. The general provisions on conflicts of interest are set forth in Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). A lawyer with a conflict of interest under Rule 1.7(a) may not represent a client unless the conflict is waivable and is properly waived by the client under Rule 1.7(b). One kind of conflict, a "personal interest" conflict, arises when a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7(a)(2).

5. Such personal interest conflicts are generally present when a lawyer provides brokerage services as well as legal services in the same real estate transaction. We have opined on numerous occasions that a lawyer may not act as an attorney on behalf of any party to a real estate transaction in which the lawyer is also acting as a broker. See, e.g. N.Y. State 1013 ¶ 1 (2014); N.Y. State 933 ¶ 7 (2012); N.Y. State 919 ¶ 3 (2012). In N.Y. State 753 (2002), we explained our reasoning:

The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer.

See also N.Y. State 1015 (2014) (quoting N.Y. State 753 and citing later opinions).

6. Moreover, while many conflicts may be waived by the client, that is not the case when a lawyer serves as both broker and attorney. "[T]he personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer's responsibility to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client." N.Y. State 933 ¶7 (2012).

7. This per se rule that serving as both broker and attorney in a real estate transaction creates a non-consentable conflict does not apply in certain situations involving non-standard arrangements for broker compensation. For example, the per se rule does not apply when the broker is to be compensated by a flat fee not dependent on the closing of the transaction,[1] or when the broker credits the full amount of the brokerage commission to the client.[2] But here, as we understand the inquiry, the broker compensation would be the usual kind of commission and would be retained by the inquirer. Accordingly, this matter is subject to our longstanding per se rule, and the conflict is non-consentable.

8. The fact that the inquirer would provide the legal services pro bono does not change this conclusion. See N.Y. State 916 (2012) ("A lawyer may not offer free legal services as an add-on bonus to a party to a real estate transaction in which the lawyer is acting as broker"). Indeed, underlying the per se rule is the materiality of a standard brokerage commission. See N.Y. State 1015 ¶7 (2014) ("The risk that legal judgment would be adversely affected is heightened by the common circumstance that the broker's contingent fee will be substantially greater than the fee of the lawyer representing the seller."). When the amount of the legal fee is zero, the relative importance of the brokerage fee becomes even greater, and so does the risk it poses to the lawyer's independent legal judgment, because the only way the lawyer can make money in this scenario is to close the real estate transaction and obtain the broker's commission.

9. Seeking to avoid application of the per se rule discussed above, the inquirer asserts certain distinctions from the facts of our prior opinions. The inquirer points out that the provision of both kinds of services would result from a request by the clients, who are longtime clients and friends of the inquirer, rather than from the attorney's suggestion. The inquirer also notes that the brokerage commission would be paid by the seller and would result in no financial burden to the inquirer's clients.

10. We do not think that these distinctions change the result. The lawyer's interest in the commission is the same no matter who suggested the provision of brokerage services and no matter who pays that commission. The fact that the broker's commission will be paid by the seller rather than by the lawyer's client (the buyer) does not diminish the risk of an adverse impact on the lawyer's independent professional judgment. A large commission is a large commission.

11. In N.Y. State 1043 (2015), we rejected the argument that the benefit to the client from receiving free legal services eliminates the conflict. There, the inquirer represented an estate in the sale of real property through a real estate broker the lawyer had recommended to the executors. The broker later offered to pay the lawyer a referral fee (25% of the broker's commission), which the lawyer proposed to accept in lieu of charging legal fees to the estate for services rendered in the real estate transaction. We disapproved, saying:

> The disabling conflict that [our prior] opinions identify is a lawyer's pecuniary interest in the broker's . . . . commission . . . . , which irredeemably interferes with the lawyer's distinct obligation to exercise independent professional judgment on the client's behalf. That the estate beneficiaries may benefit from the arrangement does not remedy this circumstance, any more than a lawyer/broker's waiving a legal fee, which is also of benefit to the client, can do so.

12. Conceivably the friendship between the lawyer and the clients could be so strong as to serve as an adequate counterweight to the lawyer's interest in the commission, but the test in the Rules does not turn on so subjective an assessment. Rather, it turns on these objective standards: whether "a reasonable lawyer" would find a significant risk that personal interests would compromise professional judgment, and whether the actual lawyer "reasonably" believes there will be competent and diligent representation. We continue to believe that application of these objective standards supports the per se rule set forth in our prior opinions that renders a conflict such as this one non-consentable.

CONCLUSION

13. In a real estate transaction, even when a lawyer provides pro bono legal services at the request of clients who have long been clients and friends of the lawyer, the lawyer may not also serve in that transaction as a broker compensated by commission. The con-

flict cannot be cured by the client's consent because it is non-consentable.

(5-17)

Endnotes

1. The per se rule of a nonconsentable conflict applies whenever the brokerage services are compensated in the usual way, as a commission contingent on the transaction being closed. We have also considered the context of an alternative fee arrangement in which when brokerage services are compensated by a fixed and non-refundable fee, not contingent on closing. We found that such a fee arrangement did not give rise to a conflict, and while there could be other foreseeable conflicts in such a situation, those other conflicts could be subject to waiver by informed consent. N.Y. State 1015 ¶¶ 8-10 (2014).
2. When a lawyer who is also acting as a real estate broker remits or credits the entire brokerage fee to the client, then the brokerage fee typically would not give rise to the kind of personal-interest conflict described above. See N.Y. State 845 part C (2010) (a lawyer who will be compensated as a broker may share part of her brokerage commission with a referring lawyer who represents a buyer or seller in the transaction if the referring lawyer remits or credits the referral fee to the client).

Opinion 1118 (4/4/17)

Topic: Confidential information; disclosure to collect a fee

Digest: A lawyer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures to limit the disclosure to information that is objectively necessary for that purpose.

Rules: 1.6(a) & (b)

FACTS

1. The inquirer represented a client in a court action that ended in a settlement before trial. Shortly before the settlement, the client advised the lawyer of certain facts that, if disclosed, would be detrimental or embarrassing to the client. The settlement was ultimately disbursed to successor counsel, and a litigated fee dispute arose among the client, the inquirer and other lawyers who had been engaged on the matter. In connection with the fee dispute, the inquirer believes that disclosure of some of confidential information may be necessary to show the work he did in order to support a quantum meruit recovery.

QUESTION

2. May a lawyer disclose confidential information reflected in time sheets by providing the time sheets to support a quantum meruit recovery?

OPINION

3. Rule 1.6(a) of the New York Rules of Professional Conduct (the "Rules") imposes a general duty on a lawyer not to knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer, but Rule 1.6(b) provides several exceptions to that general duty. Rule 1.6(b)(5)(ii) provides: "A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee . . . ."

4. Comment [14] to Rule 1.6 emphasizes that "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Initially, the lawyer must determine how much disclosure the lawyer believes "necessary" to collect the fee, but the lawyer's determination must be reasonable. Rule 1.0(r) specifies that a lawyer "reasonably believes" something when "the lawyer believes the matter in question and . . . the circumstances are such that the belief is reasonable." While Comment [6A] to Rule 1.6 notes that the lawyer's "exercise of discretion" conferred by other exceptions in Rule 1.6(b)[1] "requires consideration of a wide range of factors and therefore should be given great weight," the Comments contain no such exhortation to defer to the lawyer's judgment in the case of disclosures to collect a fee. Recognizing the lawyer's self-interest in collecting the fee, and the potential of threatened disclosure as a bludgeon to coerce payment, the lawyer should be particularly careful to ensure that disclosure is truly "necessary" – and objectively so – to collecting the fee. See also In re Starbrite Properties Corp., 2012 WL 2050745, at *11 (E.D.N.Y. Bankr. June 5, 2012) (court referred to Disciplinary Committee a lawyer who unnecessarily disclosed client's fraudulent conduct in seeking to enforce a subpoena to support application for fee that client had refused to pay); In re Gonzalez, 773 A.2d 1026 (D.C. 2001) (lawyer admonished for disclosing, in connection with withdrawal motion, not only that fees were owed but also extraneous and embarrassing client information).

5. In N.Y. State 980 (2013), we noted that "[t]he Rules do not define 'necessary,' but WEBSTER'S UNABRIDGED DICTIONARY at 1200 (2nd ed. 1983) says that the word means 'unavoidable, essential, indispensable, needful.'" N.Y. State 980 n.1. In that opinion, which addressed the disclosure of confidential information to collect a fee in a bankruptcy proceeding, we distilled several principles that are helpful in making that determination:

> First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances. Second, the lawyer should try to avoid the need for disclosure. Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee. Fourth,

> disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client.

N.Y. State 980 ¶ 6.[2]

6. Applying these principles here, the inquirer should take all reasonable measures to limit the disclosure of confidential information to information that is objectively needed to prove entitlement to the fee (assuming that the claim to the fee is also objectively reasonable). For example, it may be that the fact that work was done at a particular time could be shown by revealing only redacted time entries or redacted communications with the client. If disclosure to the Court would not itself be harmful to the client, or would be less harmful, the inquirer should consider approaching the Court for guidance.[3] See, e.g., ABA Formal Op. 476 (2016) (noting availability of redaction and in camera submission to preserve confidentiality of information in making motion to withdraw for nonpayment of fees) (citing In re Gonzalez, 773 A.2d at 1032).

CONCLUSION

7. The inquirer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures, such as redaction or seeking Court guidance, to limit the disclosure of confidential information to information that is objectively reasonable to prove his entitlement to his fee.

(8-17)

Endnotes

1. Comment [6A] refers to the lawyer's exercise of discretion under subparagraphs (1) to (3) of Rule 1.6(b), which deal with disclosures to prevent bodily harm or to prevent the commission of a crime or potential injury to third persons arising out of a lawyer's prior representations.
2. N.Y. State 980 ¶ 9 also cautioned that the attorney should consider whether the information from the client was not only confidential under the rules of ethics, but also subject to the attorney-client privilege. We do not opine on the rules of privilege, but Opinion 980 noted authority for the proposition that an exception to the privilege may apply to information reasonably necessary to collect a fee. Id. n.8, citing Alexander, CPLR §4503 PRACTICE COMMENTARIES, C4503:5(b) (McKinney) (discussing, as an exception to the privilege, "the rule that permits a lawyer to reveal confidences in order to collect a fee from the client"), and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §83(1) (2000) ("attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding … to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer").
3. Comment [14] to Rule 1.6 advises:

> If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.
>
> If the Court should affirmatively order disclosure, the inquirer would be permitted under Rule 1.6(b)(6) to disclose the confidential information to the extent necessary to comply with the Court's order.

Opinion 1119 (4/7/17)

Topic: Former partner or associate of district attorney; criminal law; conflict of interest

Digest: A lawyer who is a former associate of the newly elected district attorney may represent criminal clients being prosecuted by the district attorney, provided that (i) the district attorney has severed all ties with the firm and (ii) a reasonable lawyer would not conclude that there is a significant risk that the lawyer's professional judgment on behalf of the clients will be adversely affected by the lawyer's former relationship with the district attorney (or the lawyer's personal interest conflict is consentable and the client has consented, confirmed in writing).

Rules: 1.0(c), 1.7(a) & (b), 1.11(d), 8.3

FACTS

1. The inquirer is an attorney who works in the law firm where the newly elected district attorney of the county was once a partner. The inquirer seeks to represent defendants in criminal matters in the county.

2. The office of district attorney is a full-time position and the district attorney no longer works at the firm.

QUESTION

3. May a lawyer who practices in the law firm where the newly elected district attorney of the county was formerly a partner represent defendants in criminal matters in that county?

OPINION

4. The New York Rules of Professional Conduct (the "Rules") regulate the conduct of the inquirer as well as the district attorney. We answer questions only if they concern the conduct of the inquirer and do not give opinions about the conduct of third parties such as the district attorney here. Nevertheless, in representing defendants in criminal matters, the inquirer should be familiar with the rules applicable to the prosecutor.

Rules Governing the Inquirer's Conduct

5. Rule 1.7(a)(2) prohibits a lawyer from representing a client if "a reasonable lawyer would conclude that . . . there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's . . . personal interests," unless, under

Rule 1.7(b), the conflict is consentable and the lawyer has obtained client consent, confirmed in writing. Thus, the inquirer must determine whether a reasonable lawyer would conclude that the inquirer's personal relationship with the district attorney (by virtue of being a former associate of the district attorney) would adversely affect the representation of clients in criminal matters for which the district attorney's office is responsible.

6. If the inquirer reasonably believes that a reasonable lawyer would *not* reach such a conclusion, then there is no conflict under Rule 1.7 and the inquirer may proceed without seeking consent from any client. If the inquirer believes that a reasonable lawyer *would* conclude that the inquirer's prior personal relationship with the district attorney creates a "significant risk" that the inquirer's professional judgment on behalf of a criminal defendant in the county where the former partner is now the district attorney will be adversely affected, then a conflict exists under Rule 1.7(a)(2).

7. If a conflict exists under Rule 1.7(a)(2), then the inquirer make not undertake the representation unless the inquirer determines, under Rule 1.7(b)(1), that the conflict is consentable, because:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; [and]
>
> (2) the representation is not prohibited by law.

8. If the inquirer determines that the conflict is consentable, then the inquirer may proceed with the representation, as long as the inquirer obtains the consent of each affected client and the consent is "confirmed in writing" within the meaning of Rule 1.0(c).

Rules Governing the District Attorney's Conduct

9. Rule 1.11(d)(1) addresses the conduct of the district attorney as a public official. It provides:

> Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter....

10. If the inquirer knows that the district attorney participated personally and substantially in a matter while in private practice, the inquirer may wish to explore the provisions of applicable law and may have an obligation or discretion under the Rules to report such knowledge to the tribunal. *See* Rule 8.3(a). However, since the inquiry does not state that the newly elected district attorney, while at the firm, was involved in any of the matters on which the inquirer proposes to work, we assume that the matters that are the subject of this inquiry do not include any matters on which the district attorney "participated personally and substantially" while at the firm. *See* N.Y. State 638 (1992) (proper for newly elected district attorney to prosecute a client of the prosecutor's former law firm in the same case if the prosecutor had no personal and substantial participation in the firm's representation and did not otherwise obtain confidential client information relevant to the matter; whether the district attorney's staff is disqualified depends upon application of the rule of necessity and on the source of the district attorney's disqualification).

11. This inquiry is distinguishable from our prior opinions concerning part-time government lawyers with prosecutorial responsibility, which are based on the rules against representing differing interests in governmental and private practice (currently found in Rule 1.7(a)). We have consistently held that a part-time prosecutor who is also engaged in private practice is barred from representing defendants in criminal matters anywhere in New York State. *See, e.g.*, N.Y. State 1073 (2015), N.Y. State 859 (2011); N.Y. State 544 (1982). We also have extended that disqualification to a partner or associate of the part-time prosecutor. *See* N.Y. State 859 (2011), N.Y. State 40 (1966) (applying the former Canons). But those opinions do not apply here because the district attorney here is not part-time and has severed all ties with the inquirer's law firm.

CONCLUSION

12. A lawyer may represent criminal defense clients being prosecuted by the district attorney who was once a partner at the lawyer's firm, provided that the district attorney has severed all ties with the firm and that a reasonable lawyer would not conclude there is a significant risk that the lawyer's professional judgment on behalf of the clients will be adversely affected by the former relationship with the district attorney (or the lawyer's personal interest conflict is consentable and the client has consented, confirmed in writing).

(3-17)

Opinion 1120 (4/12/17)

Topic: Reporting Misconduct

Digest: If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer's conduct raises a substantial question as to the wrongdoer's honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government agency's ethics office is a "tribunal" or "other authority empowered to investigate or act upon such violation." If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an "arguable question of professional duty" and the decision of the ethics office not to report is a reasonable resolution.

Rules: 1.0(w), 1.6, 5.2, 8.3(a) & (b)

FACTS

1. The inquirer represents a government agency (the "Agency") in federal administrative and court proceedings. The inquirer has come to know of a violation of the New York Rules of Professional Conduct (the "Rules") by another lawyer at the Agency that the inquirer believes raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer.

2. The Agency has an internal process by which violations of the Rules must be reported first to an internal ethics office for review. The inquirer reported the facts to the internal ethics office but, although a reasonable period of time has elapsed, the internal ethics office has not responded to the inquirer's inquiries as to the status of its review of the report.

QUESTION

3. If a lawyer for a government agency reports misconduct by another agency lawyer that meets the reporting requirements of Rule 8.3(a) to an internal ethics office of the lawyer's employer, has the lawyer satisfied the requirements of Rule 8.3(a)?

OPINION

4. Rule 8.3(a) provides:

> (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

However, under Rule 8.3(c), this reporting obligation does not require the disclosure of "confidential information" otherwise protected by Rule 1.6, *i.e.*, information gained from any source during or relating to the representation of a client (a) that is protected by the attorney-client privilege, (b) that is likely to be embarrassing or detrimental to the client if disclosed, or (c) that the client has requested to be kept confidential.

5. Thus, in determining whether the inquirer has a reporting obligation under Rule 8.3, the following elements must be satisfied:

> (i) There must be a violation of the Rules by the wrongdoer,
>
> (ii) The inquirer must know of the violation,[1]
>
> (iii) The wrongdoer's conduct must raise a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law, and
>
> (iv) Disclosure of the wrongdoer's conduct must not reveal client confidential information, unless the client consents to such disclosure.

6. Here, the inquirer advises that the first three elements have been satisfied. That leaves the fourth element, which raises two issues: (1) whether the facts known by the inquirer constitute confidential information of the client, and, if not (2) whether the inquirer's report to the government agency's internal ethics office satisfies the requirement of the Rule that the lawyer report knowledge of another lawyer's misconduct to a "tribunal or other authority empowered to investigate or act upon such violation."

Client Confidential Information

7. Our opinions make clear that a lawyer's obligation to report misconduct is limited by the lawyer's obligation to protect client confidential information, unless the lawyer has obtained the informed consent of the client to disclosure of otherwise confidential information. *See, e.g.,* N.Y. State 649 (1993) (where one lawyer knows that another lawyer who is executor for an estate proposes to engage or has engaged in wrongdoing, whether the first lawyer must disclose the wrongdoing depends on whether the information is legally privileged or whether applicable law requires disclosure of an otherwise protect-

ed "secret"), N.Y. State 635 (1992) (before reporting misconduct, lawyer must consider whether any knowledge that would be included in the report is a client confidence or secret). *See also* N.Y. City 2017-2 (reporting duty is limited by the lawyer's duty not to reveal client confidences without the client's informed consent after full disclosure, including disclosure that, once a report of misconduct is made to the disciplinary agency, the disciplinary agency may unilaterally decide to release the client's information without the client's knowledge or further consent).

8. Under Rule 1.6, information constitutes "confidential information" of the client if it was gained from any source (whether from the client or elsewhere) during or relating to the representation of the client and (a) the information is protected by the attorney-client privilege, (b) it is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested that it be kept confidential. Here, the client is the Agency. If disclosure of the wrongdoing would be embarrassing or detrimental to the Agency, or if the Agency has requested that the information not be disclosed, then there is an apparent tension between the goals of Rule 1.6 and 8.3: (1) the obligation of all lawyers to assist courts and disciplinary authorities in policing members of the bar, and (2) the obligation to maintain the confidentiality of client information. In addition, government lawyers (such as the inquirer here) also have a duty to seek justice. *See* Rule 3.8, Cmt. [6B]. However, since Rule 8.3 specifically exempts information protected as confidential, the Rules themselves resolve the tension in favor of confidentiality. *See* Rule 1.6, Cmt. [2] ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. . . . The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.").

9. The definition of "confidential information" allows the client to ask the lawyer to treat information as "confidential information" for any reason. However, it is not always clear in an organizational context who speaks for the client. Here, the inquirer must determine whether the ethics office has the authority to speak for the client in asking that the information be kept confidential. If the ethics office does have that authority, that determination will be binding on the inquirer. While the Agency is not required to provide the inquirer with reasons for a determination that its information should be treated as "confidential information," there are many benign reasons why the Agency might do so, at least at this point. For example, the information may be protected by law as private information, or the Agency may have referred the matter to a prosecutor whose investigation is confidential and protected by law.

Tribunal or Other Authority Empowered to Investigate or Act on Violations

10. Under Rule 8.3(a), if a report of misconduct is required, it must be made to a tribunal or to "other authority empowered to investigate or act upon such violation."

11. The term "tribunal" is defined in Rule 1.0(w) as follows:

> (w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an *adjudicative capacity*. A legislative body, *administrative agency* or other body acts in an adjudicative capacity when a *neutral* official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. [Emphasis added.]

The Agency here may act in an adjudicative capacity when determining litigated matters before the Agency. That would probably be the case, for example, if an administrative law judge or similar "neutral" quasi-judicial officer in the Agency hears a matter. If so, then a report to the administrative law judge about a lawyer for a party would satisfy Rule 8.3's requirement to report to a "tribunal." However, the inquiry here does not state that the Agency's ethics office meets the definition of a tribunal, and it seems more likely that it does not constitute a tribunal within the meaning of Rule 1.0(w). However, this is a factual question that the inquirer must determine.

12. In N.Y. State 822 (2008), we discussed what might constitute "other authority" to which a report might be made, in the context of DR 1-103(A), the predecessor to Rule 8.3(a). We noted that the phrase "investigate or act" in that disciplinary rule suggested that the tribunal or authority must be a court of competent jurisdiction or a body having enforceable subpoena powers. This would include a grievance or disciplinary committee operating under the powers granted by the Appellate Division of the State Supreme Court under Section 90 of the New York Judiciary Law and related court rules. We therefore said the report could be filed with the grievance committee in the Appellate Department in which litigation is pending or with the grievance committee in the Department where the wrongdoer is admitted or where the prohibited conduct occurred. *See also* Nassau County 98-12 (if reporting is required, the lawyer may report to the court or to a grievance committee); N.Y. City 1995-5 (a lawyer should report misconduct to the appropriate disciplinary or grievance committee).

13. Here, as with the question whether the Agency's internal ethics office is a tribunal, the question whether the Agency's ethics office qualifies as "other authority empowered to investigate or act upon" a violation

of the Rules is a factual question that the inquirer must determine.

Timing of Report

14. If a report under Rule 8.3 is required, the Rule does not specify the timing of the required report. In N.Y. State 822 (2008), we said: "The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer's client than some alternative course of action." *See U.S. v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) ("DR 1-103 must be read to require reporting ... within a reasonable time under the circumstances"); N.Y. City 1990-3 ("While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, we reiterate our caution that 'once a lawyer decides that he or she must disclose under DR 1-103(A), any substantial delay in reporting would be improper'"). Evaluation of the timing of a required report will entail considering the facts and circumstances of the underlying misconduct, whether there is ongoing harm to any affected person, and whether the misconduct can be remedied or mitigated, among other factors.

15. Thus, we believe that the inquirer's initial reporting to the ethics office is consistent with Rule 8.3. However, making a report to the internal ethics office does not automatically relieve the inquirer of the responsibility for making the report required by Rule 8.3 or ensuring that the Agency's ethics office makes such a report when the requirements of the Rules are met.

16. Rule 5.2(b) provides that a subordinate lawyer "does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." The inquirer believes that a violation of the Rules that meets the requirements of Rule 8.3(a) has occurred, and the Agency apparently has not stated that the facts surrounding the wrongdoer's conduct constitute confidential information. Nevertheless, it is possible that the ethics office, after investigation, may conclude that the wrongdoer's conduct need not be reported to a tribunal or other authority, or may decide that the information necessary to make a report is "confidential information" within the meaning of Rule 1.6(a). In order for the inquirer to rely on the decision of the Agency's ethics office in matters of professional responsibility, the question of a duty to report must be "arguable" and the resolution by the ethics office not to report must be "reasonable."

CONCLUSION

17. If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer's conduct raises a substantial question as to the wrongdoer's honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government agency's ethics office is a "tribunal" or "other authority empowered to investigate or act upon such violation." If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an "arguable question of professional duty" and the decision of the ethics office is a reasonable resolution.

(1-17)

Endnote

1. As we said in N.Y. State 635 (1992) and N.Y. State 480 (1978), the lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct. A mere suspicion of misconduct is not sufficient.

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NEW YORK STATE BAR ASSOCIATION

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

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_____

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The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

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Law school _____

Graduation date _____

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General Practice Section Committees

Continuing our philosophy of drawing from the best of all NYSBA Sections, the General Practice Section is looking for members to build its substantive committees. Please join one or more committees of your choice from the list below. If you have any questions regarding committee involvement, please contact GeneralPractice@nysba.org:

_____ Arbitration (GEN3800)
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_____ Membership and Member Service Issues (GEN1040)
_____ Mentoring Blog - GP Law Connect (GEN4500)
_____ Publications (GEN2800)
_____ Real Estate Issues (GEN2900)
_____ Regulation of the Profession (GEN2700)
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_____ Traffic Violations Bureau (GEN3700)
_____ Trusts and Estates Law (GEN1900)

Please return this application to:

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Richard A. Klass, past GP Section Chair, with President-Elect Designee Michael Miller and Angel Castro III.

Richard A. Klass, past GP Section Chair, with Top Hops' owner Ted Kenny.

Sections Host Beer Tasting Event

On April 20, the General Practice and Young Lawyers Sections cosponsored a fun event—Beer Tasting of New York State Beers at Top Hops Beer Shop on the Lower East Side of Manhattan. About 60 attorneys showed up for an enlightening and enjoyable evening of informational beer tasting from five New York breweries, along with food and good company.

Above, past GP Section Chair Richard A. Klass and John Owens, Jr., current GP Section Chair. At right, John Owens, Jr., General Practice Section Chair, with Emil Flynn, Young Lawyers Section Chair. Bottom right, NYSBA President-Elect Sharon Stern Gerstman. Below, Richard A. Klass, past GP Section Chair, with Daniel Gorman and the brewmaster.

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GENERAL PRACTICE SECTION

Check out the Section Community at www.nysba.org/gpcommunity.