# 2018 ETHICS UPDATE

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# ETHICS UPDATE 2018

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## I. Threatening Ancillary Proceedings Against an Adverse Party

Rule 3.4(e) of the New York Rules of Professional Conduct states:

"A lawyer shall not…present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Comment 5 thereto states:

The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

*** * ***

In Formal Opinion 2017-3, entitled "Ethical Limitations on Seeking an Advantage for a Client in a Civil Dispute by Threatening Ancillary Non-Criminal Proceedings against an Adverse Party," the Association of the Bar of the City of New York's Committee on Professional Ethics ("ABCNY") opined that "Rule 3.4(e) the New York Rules of Professional Conduct (the "Rules") prohibits lawyers from threatening criminal charges solely to obtain an advantage in a civil matter, but does not apply to threats to instigate ancillary non-criminal proceedings against an adverse party, e.g., where a lawyer, on behalf of a client, threatens to report an adverse party's misconduct to an administrative or regulatory agency unless the adverse party agrees to the client's settlement demand."

Nonetheless, even though Rule 3.4(e) does not apply to threats to instigate ancillary non-criminal proceedings, that:

> does not mean that lawyers are free to make such threats with impunity. Such threats may violate criminal laws against extortion, and, if so, they will likely violate Rules 8.4(b) and Rule 3.4(a)(6). Where such threats do not violate criminal law, they may nonetheless violate Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. Whether such a threat violates Rule 8.4(d) will generally depend on whether the threat

> concerns matters extraneous to the parties' dispute or, conversely, would serve as an alternative means of vindicating the same alleged claim of right or of obtaining redress for the same alleged wrong. Additionally, if such a threat is made without a sufficient basis in fact and law, it may violate, inter alia, Rule 4.1 or Rule 8.4(c).

New York's Rule 3.4(e) is the same as its predecessor, New York Disciplinary Rule ("DR") 7-105(A). New York's DR 7-105(A) was identical to DR 7-105(A) of the Model Code of Professional Responsibility of the American Bar Association ("ABA"). The provision does not, however, exist in the ABA Model Rules of Professional Conduct.

ABCNY Formal Opinion 2017-3 notes:

> In 1983…the ABA Commission on Evaluation of Professional Standards decided to eliminate DR 7-105(A). The Commission's reasoning, as described in Formal Opinion 92-363 (July 6, 1992) of the ABA Standing Committee on Ethics and Professional Responsibility, was that DR 7-105 was both redundant and overbroad. The rule was redundant in that it prohibited extortionate conduct that violated criminal law and was therefore barred by other ethical rules. At the same time, the rule was overbroad because it prevented lawyers from threatening prosecution in legitimate furtherance of a client's interests.

As ABA Formal Op. 92-363 explained:

> Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." If a lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction, that conduct also violates Rule 8.4(b). It is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services." . . . .

> [A] general prohibition on threats of prosecution . . . would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to "zealously" assert the client's position under the adversary system. . . . Such a limitation on the lawyer's duty to the client is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client. When the criminal charges are well founded in fact and law, their use by a lawyer does not result in the subversion of the criminal justice system that DR 7-105 sought to prevent.

ABA Formal Op. 92-363 identified several additional provisions of the ABA Model Rules that addressed threats of criminal prosecution including: Model Rules 3.1 (assertion of frivolous claims); 4.1 (truthfulness in statements to others); 4.4(a) (conduct with no substantial purpose other than to embarrass, delay or burden a third person); 8.4(d) (conduct prejudicial to administration of justice); and 8.4(e) (stating or implying ability to improperly influence government agency or official).

Despite the ABA's actions, New York and several other jurisdictions still retained the rule. *See, e.g.*, Ala. R. Prof. Cond. 3.10; Conn. R. Prof. Cond. 3.4(7); Ga. R. Prof. Cond. 3.4(h); Haw. R. Prof. Cond. 3.4(i); Idaho R. Prof. Cond. 4.4(a)(4); La. R. Prof. Cond. 8.4(g); N.J. R. Prof. Cond. 3.4(g); S.C. R. Prof. Cond. 4.5; Tenn. R. Prof. Cond. 4.4(a)(2); Vt. R. Prof. Cond. 4.5. Some states explicitly prohibit lawyers from threatening criminal, disciplinary or administrative action. *See, e.g.*, Cal. R. Prof. Cond. 5-100 (A); California Rule 3.10, Threatening Criminal, Administrative, or Disciplinary Charges (Rule Approved by the California Supreme Court, Effective November 1, 2018); Colo. R. Prof. Cond. 4.5; Me. R. Prof. Cond. 3.1(b).

California Rule 3.10, going into effect on November 1, 2018 states:

> (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
>
> (b) As used in paragraph (a) of this rule, the term "administrative charges" means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

> (c) As used in this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

New York Rule 3.4(e), like its predecessor DR 7-105(A), is silent as to non-criminal charges. For this reason, the New York State Bar Association (“NYSBA”) Committee on Professional Ethics declined to extend DR 7-105(A) to threats to file non-criminal complaints with regulatory agencies. NYSBA Ethics Opinion 772 (Nov. 14, 2003). The inquiry raised in Opinion 772 is as follows:

> May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

The Committee concluded that:

> the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

In Nassau County Bar Association Committee on Professional Ethics Opinion 1998-12 (Oct. 28, 1998), however, a lawyer had information indicating that opposing counsel had made a misrepresentation to the court. Opinion 1998-12 concluded that the lawyer could communicate with opposing counsel about the necessity of correcting the misrepresentation, but that "an actual threat to file a [disciplinary] grievance if [opposing counsel] would not offer a better settlement would . . . violate DR 7-105." In reaching this conclusion, Opinion 1998-12 explained that "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges," citing People v. Harper, 75 N.Y.2d 313 (1990). *See also* Illinois Opinion 87-7; Maryland Opinion 86-14.

NYSBA Opinion 772 rejected the reasoning of these opinions:

> in light of the specific language of DR 7-105(A), which concerns only 'criminal charges.' In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.* District of Columbia Opinion 263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

In ABCNY Formal Op. 2015-5 (June 26, 2015), the Committee agreed with NYSBA Opinion 772 and similarly concluded that such a threat would not violate Rule 3.4(e) because that rule, by its terms, applies only to threats of criminal charges. The Committee reasoned that "the plain language of Rule 3.4(e) should govern," and "declin[ed] to extend the rule by analogy to threats of disciplinary action against attorneys." The Committee also observed that "it may be appropriate to threaten disciplinary action in order to induce the other lawyer to remedy the harm caused by his misconduct, such as returning improperly withheld client funds or correcting a false statement made to the court."

In Formal Opinion 2017-3, the ABCNY Ethics Committee listed several other applicable rules and statutes that may govern such threats:

1) *Threats in Violation of Law; Extortion.*

> Whether a particular threat constitutes criminal extortion is a substantive legal issue outside the purview of this Committee. For our purposes, it is sufficient to note that under certain circumstances, threats to instigate non-

criminal proceedings in order to obtain an advantage in a civil matter may violate laws against extortion or other criminal statutes, just as certain threats to file disciplinary or criminal charges may violate such laws. See NYCBA Formal Op. 2015-5 (discussing N.Y. Penal Code § 115.05); Rule 3.4 Cmt. [5] (use of threats in negotiation may constitute crime of extortion). A threat that constitutes criminal extortion or a similar offense will likely violate Rule 3.4(a)(6), which provides that "[a] lawyer shall not . . . engage in . . . illegal conduct," and Rule 8.4(b), which provides that "[a] lawyer. . . shall not . . . engage in . . . illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer." Such a threat may also violate Rule 8.4(h), which provides that "[a] lawyer. . . shall not . . . engage in any . . . conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

2) *Threats without Sufficient Basis in Law or Fact.*

In some circumstances, a lawyer will be subject to discipline for threatening an ancillary non-criminal proceeding that the lawyer knows is legally or factually baseless. Such knowingly baseless threats, including a definitively stated threat to instigate a proceeding that the lawyer does not in fact intend to instigate, may violate Rule 4.1or Rule 8.4(c). Rule 4.1 provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person," while Rule 8.4(c) provides that "[a] lawyer . . . shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." See District of Columbia Ethics Op. 339 (April 2007) (threat to report debtor to criminal authorities if debt is not paid may be impermissibly misleading if a selective and inaccurate reference is made to the applicable law).

This is not to say that all legally or factually unsupported threats are impermissibly misleading. Especially in the course of negotiations with another lawyer, a threat may not rise to the level of an express or implied assertion of fact or law or of the lawyer's intended future conduct. See Rule 4.1, cmt. [2] ("Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact."). But if a lawyer makes a threat that is baseless either because the lawyer has unequivocally stated an intention that does not exist or because the threatened proceeding would lack a sufficient legal or factual basis under Rule 3.1, it may be knowingly false or misleading to seek an

advantage by making such a threat. This is especially so if the lawyer is making the threat to a non-lawyer who might reasonably be expected to rely to his detriment on the lawyer's express or implied assertion that there is a legitimate basis for the threat.

3) *Threats for No Substantial Purpose Other Than Harassment or Harm*

Rule 4.4(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person." Rule 3.1(b)(2) similarly provides that a lawyer's conduct is "frivolous" for purposes of Rule 3.1 if it "serves merely to harass or maliciously injure another." There could be circumstances where a threat to instigate a non-criminal proceeding against an adverse party is largely or entirely the result of a client's desire to embarrass, harm, harass or maliciously injure an adverse party, in which event these rules would be implicated. In most cases, however, a substantial purpose of the threat will be to gain advantage in the underlying civil dispute by causing the adverse party to settle or drop his claims. Where that is so, the threat would not appear to "serve[] merely to harass or maliciously injure another" or "have no substantial purpose" other than to cause embarrassment or harm.

4) *Threats Prejudicial to Administration of Justice.*

A threat that is adequately grounded in law and fact, has a substantial purpose other than harassment or harm, and is not extortionate under criminal law may nonetheless violate Rule 8.4(d), which provides: "A lawyer . . . shall not . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d), which addresses conduct that may or may not be addressed by other ethical rules, seeks to prevent substantial harm to the justice system:

> The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. . . . The conduct must be seriously inconsistent with a lawyer's responsibility as an officer of the court."

Rule 8.4, Cmt. 3.

> Clearly, a baseless threat may be prejudicial to the administration of justice where it would tend to undermine the truth-seeking process or otherwise distort the adjudicative proceeding. See, e.g., NYCBA Formal Op. 2015-5 (opining that a threat to file disciplinary charges against opposing counsel, if not supported by a good faith belief that opposing counsel is engaged in unethical conduct, would violate Rule 8.4(d)); In re Smith, 848 P.2d 612 (Or. 1993) (finding that it was prejudicial to the administration of justice for a lawyer to baselessly threaten to sue a doctor if the doctor did not render a helpful expert opinion).
>
> The question, then, is whether a threat that does have a sufficient basis may nonetheless violate Rule 8.4(d). Two ABA opinions, ABA Formal Op. 92-363 (July 6, 1992) and ABA Formal Op. 94-383 (July 5, 1994), recognize that it may be improper to threaten to take otherwise lawful action, such as filing criminal or disciplinary charges for which there is an adequate legal and factual basis, in order to pressure an opposing party to settle a civil case on favorable terms. These opinions suggest that the propriety of such a threat turns on whether the threatened proceeding provides an alternative means of vindicating the rights at issue in the civil case or whether the lawyer is threatening unrelated harm in order to obtain leverage or a bargaining chip for settlement.

The duty to report professional misconduct under ABA Model Rule 8.3 can also have an impact here. That rule provides:

> Rule 8.3 Reporting Professional Misconduct
>
> (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 in other respects, shall inform the appropriate professional authority.
>
> (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

**Comment**

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a)

> and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

## II. Ethics Issues in Social Media and Electronic Disclosure

### A. NYCLA Ethics Opinion 745 (2013)

In Formal Opinion 745, the New York County Lawyers Ethics Committee concluded that attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including Rule 3.1(“Non-Meritorious Claims and Contentions”), 3.3 (“Conduct Before a Tribunal”), and 3.4 (“Fairness to Opposing Party and Counsel”).

The opinion noted that:

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

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

The Committee opined that:

> There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client’s social media

> pages, requiring adverse counsel to request access through formal discovery channels.

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

There are issues of substantive law in this realm, also noted in the opinion, but these are beyond the jurisdiction of an ethics committee. For example, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 N.Y.3d 543 (2015) (Court of Appeals essentially adopted the standards set forth by the First Department in its *VOOM* decision); *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dep't 2012); 2012-13 Supplementary Practice Commentaries, CPLR 3126, C3126:8A ("Sanction for Spoliation of Evidence"). The ethics opinion also notes that "a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client's lawyer must take prompt remedial action in the case of any known material false testimony on this subject." *See* Rule 3.3(a) (3); 22 N.Y.C.R.R. Part 130 ("Costs and Sanctions").

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

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

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

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

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

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

> A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

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

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

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

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

**C. Forman v. Henkin, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018)**

**Court of Appeals Applies CPLR Article 31's "Well-Established" Rules to Resolve Dispute Regarding Disclosure of Information on Facebook**

In *Forman v. Henkin*, 30 N.Y.3d 656, 70 N.Y.S.3d 157, 93 N.E.3d 882 (2018), the Court applied longstanding principles under CPLR Article 31 to resolve the issue of disclosure of information on a Facebook page.

As the *Forman* Court notes, CPLR 3101 grants certain categories of relevant information an immunity from disclosure. CPLR 3101(b) grants absolute immunity to any information that is protected by any of the recognized evidentiary privileges, while CPLR 3101(c) grants a similar immunity to the "work product of an attorney," which has been accorded a very narrow scope by the courts. *See* Siegel & Connors, New York Practice, §§ 346-47. CPLR 3101(d)(2) grants a conditional immunity to "materials. . . prepared in anticipation of litigation," commonly known as work product. *Id.*, § 348.

In *Forman*, plaintiff's alleged injuries were extensive, and included claims that she could "no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, … [and] that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." *Forman*, 30 N.Y.3d at 659-60.

Many courts faced with motions to compel the production of materials posted by a plaintiff on a private social media site required the seeking party to demonstrate that information on the site contradicted the plaintiff's claims. *See, e.g., Kregg v. Maldonado*, 98 A.D.3d 1289, 1290, 951 N.Y.S.2d 301 (4th Dep't 2012); *McCann v. Harleysville Ins. Co. of New York*, 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010). This hurdle could be satisfied if there was material on a "public" portion of the plaintiff's site, which could be accessed by most anyone, that conflicted with the alleged injuries. If so, the courts deemed it likely that the private portion of the site contained similarly relevant information. *See Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 430 (Sup. Ct., Suffolk County 2010)(discussed in notes 30-31 and accompanying text). If, however, the defendant simply claimed that information on plaintiff's private social media site "may" contradict the alleged injuries, the disclosure request was deemed a mere "fishing expedition" and the motion was denied. *See, e.g., Tapp v. New York State Urban Dev. Corp.*,

102 A.D.3d 620 (1st Dep't 2013); *McCann*, 78 A.D. 3d at 1525, 910 N.Y.S.2d at 615.

The plaintiff sought to invoke the above precedent in *Forman*, but the Court of Appeals rejected the argument, noting that it permits a party to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion of the account." *Forman*, 30 N.Y.3d at 664, 70 N.Y.S.3d at _, 93 N.E.3d at 889. Moreover, the Court noted that "New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the party seeks actually exist; rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information." *Id.* In sum, the standard for obtaining disclosure remains one of relevance, regardless of whether the material is in a traditional print form or posted in an electronic format on a "private" Facebook page.

With the *Forman* decision on the books, disclosure of materials on social media websites should be easier to obtain. In the last paragraph to this section, we discuss CPLR 3101(i), which expressly allows disclosure of any picture, film or audiotape of a party, is another tool that can be used to secure materials posted on a social media site. The Court declined to address this subdivision in *Forman* because neither party cited it to the supreme court and, therefore, it was unpreserved. It should be noted, however, that the Court of Appeals previously observed that CPLR 3101(i) does not contain any limitation as to relevancy or subject matter, although a party is still free to seek a protective order to restrict disclosure under the subdivision. *See Tran v. New Rochelle Hosp. Medical Center*, 99 N.Y.2d 383, 756 N.Y.S.2d 509, 786 N.E.2d 444 (2003), 99 N.Y.2d at 388 n.2.

The *Forman* Court noted that a social media account holder, like any party to litigation, can seek to prevent the disclosure of sensitive or embarrassing material of minimal relevance through a motion under CPLR 3103(a). *See* Siegel & Connors, New York Practice § 352. In *Forman*, for example, the supreme court exempted from disclosure any photographs of plaintiff on the Facebook site depicting nudity or romantic encounters. (Just how "private" was this site?).

Moving forward, lawyers might consider requesting that their clients deactivate a social media site, as the plaintiff did in *Forman*, or remove certain postings from the site. Is such conduct ethical? In New York County Lawyers Association Ethics Opinion 745 (2013), the ethics committee concluded, among other things, that a lawyer is permitted to advise a client to use the highest level of privacy settings available on a social media site to prevent others, such as adverse counsel, from

having direct access to the contents of the site. From an ethics standpoint, an attorney is permitted to advise a client to remove postings from a social media site, but cannot advise the client to destroy such information. In this regard, Rule 3.4 (a)(1) of the New York Rules of Professional Conduct provides that a lawyer "shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce." Furthermore, under Rule 3.4 (a)(3), a lawyer may not "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

While not addressed in *Forman*, lawyers advising clients regarding the contents of a social media site must be aware of potential disclosure obligations and the duty of preservation, which begins at the moment litigation is reasonably anticipated. *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33 (1st Dep't 2012); Siegel & Connors, New York Practice §§ 362, 367 (discussing litigation holds and penalties for spoliation); McKinney's CPLR 3126 Practice Commentaries, C3126:8A ("Sanction for Spoliation of Evidence"). Once litigation is reasonably anticipated, anything of potential relevance that is removed from a site must be preserved so a party can comply with any future obligations to produce the materials in disclosure.

**D. The Ethical Implications of Attorney Profiles on LinkedIn**

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

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

The current version of LinkedIn allows:

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

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

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

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

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

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

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

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

Applying the above Rules, the Committee concluded that:

> a LinkedIn profile that contains only biographical information, such as a lawyer's education and work history, does not constitute an attorney advertisement. An attorney with certain experience such as a Supreme Court clerkship or government service may attract clients simply because the

> experience is impressive, or knowledge gained during that position may be useful for a particular matter. As the comments to the New York Rules of Professional Conduct make clear, however, not all communications, including communications that may have the ultimate purpose of attracting clients, constitute attorney advertising. Thus, the Committee concludes that a LinkedIn profile containing only one's education and a list of one's current and past employment falls within this exclusion and does not constitute attorney advertising.

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

The Committee noted that:

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

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

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

Association; and (2) the name of the certifying organization is clearly identified in the communication.").

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

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

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

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

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

The Committee provided certain examples:

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

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

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

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

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

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

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

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

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

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

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

Furthermore, the City Bar also:

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

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

## III. Communicating With Represented and Unrepresented Parties and Persons

### New York Rule 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

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

### Comment

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

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

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

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

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused. The fact that a communication does not violate a state or federal right is insufficient to establish that the communication is permissible under this Rule. This Rule is not intended to effect any change in the scope of the anti-contact rule in criminal cases.

[6] [Reserved.]

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

constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rules 1.13, 4.4.

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

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

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

**Client-to-Client Communications**

[11] Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

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

with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4.

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

*** * ***

## New York RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

### Comment

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

[2] The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation,

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

## IV. ABA Formal Opinion 479: The "Generally Known" Exception to Former-Client Confidentiality (December 17, 2017)

**Digest:** A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

*** * ***

Rule 1.6(a) of the New York Rules of Professional Conduct provides:

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

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

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

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

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

*** * ***

Comment 4A thereto provides:

Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not "generally known" simply because it is in the public domain or available in a public file.

Rule 1.8(b) of the New York Rules of Professional Conduct provides:

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Rule 1.9(c) of the New York Rules of Professional Conduct provides:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.
>
> *** * ***

In *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 684 N.Y.S.2d 459,707 N.E.2d 414 (N.Y. 1998), the New York Court of Appeals applied former DR 5-108(a)(2), the predecessor provision to Rule 1.9(c), and held:

> Unlike the confidentiality protections afforded a current client (see, Code of Professional Responsibility DR 4–101 [22 NYCRR 1200.19] ), however, DR 5–108(A)(2) recognizes that an attorney may divulge "generally known" information about a former client. Here, we are satisfied that Samaan's first affidavit comfortably falls within that exception. Plaintiff correctly notes, and defendant does not controvert, that information regarding the interrelationship of AIG and its member companies was readily available in such public materials as trade periodicals and filings with State and Federal regulators. It was thus "generally known."

ABA Formal Opinion 479 quoted the following passage:

> [T]he phrase "generally known" means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . . .[O]nly if an event gained considerable public notoriety should information about it ordinarily be considered "generally known."

ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017)

The Opinion also noted that:

> under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect "confidential information relating to the representation of a client." MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2017). Confidential information, however, does not ordinarily include information that is generally known in the local community or in the trade, field or profession to which the information relates." *Id.* at cmt. 3A.

Finally, Formal Opinion 479 provided what it called "A Workable Definition of Generally Known under Model Rule 1.9(c)(1)":

> Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes. Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known

within the meaning of Model Rule 1.9(c)(1).

## V. ABA Formal Opinion 480: Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

**Digest:** Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.

ABA Formal Opinion 480 observed that:

> Lawyers comment on legal topics in various formats. The newest format is onlinepublications such as blogs, listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").
>
> Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer's public commentary may also implicate the lawyer's duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

As to the lawyer's confidentiality obligations, the opinion notes:

> Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6. Rule 1.6(b) provides other exceptions to Rule 1.6(a). However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to

> a lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.
>
> Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is not exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.
>
> A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical. Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.
>
> The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record." Accordingly, if a lawyer wants to publicly reveal client information, the lawyer15 must comply with Rule 1.6(a).

As for "First Amendment Considerations," Formal Opinion 480 notes:

> While it is beyond the scope of the Committee's jurisdiction to opine on legal issues in formal opinions, often the application of the ethics rules interacts with a legal issue. Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals' right to free speech, this right is not without bounds. Lawyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer's free speech rights are limited.

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

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

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

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

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

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

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

*** * ***

### B. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016)

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

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

Siegel, New York Practice § 362. The privilege log provides bare bones information regarding the document that is withheld so the party seeking it can at least mount an argument that the privilege does not apply.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*., 27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016), the discovery dispute centered on whether defendant Bank of America was required to produce approximately 400 documents that were withheld on attorney-client privilege grounds. The documents contained communications between Bank of America and codefendant Countrywide that transpired while they were contemplating a merger. The privilege log claimed that the documents were immune from disclosure by the attorney-client privilege because they pertained to various legal issues the two companies needed to resolve together to successfully complete the merger closing. Plaintiff made a motion to compel production of the documents under CPLR 3124, arguing that Bank of America waived the privilege by sharing the information with Countrywide before the merger.

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

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

In response to plaintiff's argument of waiver, Bank of America contended that it communicated with counsel for Countrywide under the common interest doctrine of the attorney-client privilege. That doctrine generally allows two or more clients who have retained separate counsel to represent them "to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest." The common interest doctrine has been applied by New York courts for over twenty years, but only in situations when the attorney-client communications took place while the clients faced "pending or reasonably anticipated litigation."

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

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

### C. Amendments to Rule 1.6 Effective January 1, 2017

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

Comments 16 and 17 to Rule 1.6 now provide:

> **Duty to Preserve Confidentiality**
>
> [16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of

disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

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

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**ABA Formal Opinion 477R: Securing Communication of Protected Client Information**

**Digest:** A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client

information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

## VII. New York State Adopts Rules Governing Multijurisdictional Practice

### A. Background of Multijurisdictional Practice Issues

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

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

When the New York law firm sought to enforce its written fee agreement in California state court, the court held that the fee agreement violated public policy and that the firm had engaged in the unauthorized practice of law. In *Birbrower*, the California Supreme Court "decline[d] ... to craft an arbitration exception to [the California] prohibition of the unlicensed practice of law in this state." *Birbrower*, 949 P2d at 9. The court held that the unauthorized practice of law in California "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state." A lawyer could be deemed to be engaged in the unauthorized practice of law in California "by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."

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

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

**Law Firms And Associations**

**Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

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

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

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

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

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

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

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

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when

performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

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

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

*** * ***

**Comment**

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

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

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

jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

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

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

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

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

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer

licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

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

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

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

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer,

however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

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

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

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

practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

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

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

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

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

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

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

*** * ***

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

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

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

**Arizona –** see below

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

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

(4) Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

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

(1)A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;

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

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

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

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

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

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

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

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

**Delaware –** Rule 5.5(d) states:

> A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or
>
> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

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

**Florida**

**Georgia**

**Idaho**

**Kansas**

**Kentucky**

**Louisiana**

**Maine**

**Michigan**

**Minnesota**

**Missouri**

**Nevada**

**New Jersey**

**New Mexico**

**New York**

**North Carolina**

**North Dakota**

**Ohio**

**Oklahoma**

**Oregon**

**Pennsylvania**

**South Carolina**

**North Carolina**

**Tennessee**

**Utah**

**Virginia**

**Wisconsin**

**Wyoming**

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

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

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

*** * ***

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

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

The opinion also observes:

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

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

### Maintaining The Integrity Of The Profession

### Rule 8.5 Disciplinary Authority; Choice Of Law

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

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

> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

*** * ***

### Comment

### Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22,

ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

**Choice of Law**

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

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

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

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

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

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

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

The unauthorized practice of law is a crime in New York. *See* Judiciary Law § 485-a (making certain violations of Judiciary Law §§ 478, 474, 486 and 495 a class E felony); Judiciary Law § 495 (No corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law § 478 (unlawful for any natural person (i) to practice or appear as an attorney-at-law in a court of record in this state, (ii) to furnish attorneys or to render legal services, or (iii) to hold himself out in such manner as to convey the impression that he or she either alone or together with any other persons maintains a law office); § 484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

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

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

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

**§ 523.1 General regulation as to lawyers admitted in another jurisdiction**

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

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

**§ 523.2 Scope of temporary practice**

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

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

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

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

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

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

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

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

*** * ***

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

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

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

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

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

**Reciprocity**

There is no reciprocity requirement in section 523.

**Malpractice**

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

*** * ***

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

**§ 523.3 Disciplinary authority**

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

**§ 523.4 Annual report**

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

*** * ***

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

*** * ***

## E. Licensing of In-House Counsel in New York

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

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

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

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

> (1)(i) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (ii) is a member in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority;
>
> (2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction, within or outside the United States, which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; and
>
> (3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

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

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

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

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

(c) an affidavit certifying that the applicant:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (1) the attorney ceases to be an active member in another jurisdiction, as required in section 522.1(b)(2) of this Part; or
>
> (2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in

this State solely and exclusively as permitted in section 522.4 of this Part. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) of this Part and shall file an amended statement within said 30-day period with the Office of Court Administration.

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

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

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

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

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

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

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

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

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 N.Y.C.R.R. 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal

services in New York under the following terms and conditions. An attorney providing pro bono legal services under this section:

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

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

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

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

*** * ***

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

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

Recent amendments to Part 522 allow registration as in-house counsel not just by lawyers admitted to practice in other states and the District of Columbia, but also to those who are "member[s] in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective

regulation by a duly constituted professional body or public authority." 22 N.Y.C.R.R. § 522.1(b)(ii). This change was consistent with a recommendation by the Conference of Chief Justices, as well as with 15 other U.S. jurisdictions that have similarly expansive in-house counsel registration rules. See NYSBA Comments on Proposed Changes to the Rules of the Court of Appeals, Nov. 9, 2015 (NYSBA Comments) at 15. The language used was the same as that used to define those who can apply to be foreign legal consultants in New York. *Id.*

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

## VIII. Judiciary Law Section 470

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

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

Citing to CPLR 2103(b), the Court of Appeals acknowledged that "the State does have an interest in ensuring that personal service can be accomplished on nonresident attorneys admitted to practice here." It noted, however, that the logistical difficulties present during the Civil War, when the statute was first

enacted, are diminished today. Rejecting a narrow interpretation of the statute, which may have avoided some constitutional problems, the Court interpreted Judiciary Law section 470 to require nonresident attorneys to maintain a physical law office within the State.

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

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

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

The April 17, 2017 edition of the NYLJ reported:

> Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.
>
> *** * ***
>
> The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.
>
> "The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital

> communication are standard throughout the business community, the bar and the public at large," president Thomas Prol said in a statement. "Indeed, the bona fide office rule, which New Jersey did away with in 2013, seems oblivious to modern attorneys who are increasingly mobile, some of whom may spend no time at the office because they have no need for one, at least not the traditional version contemplated by the rule."

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

The *Arrowhead* court concluded that:

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

The court dismissed the complaint without prejudice. The First Department affirmed. 154 A.D.3d 523, 62 N.Y.S.3d 339 (1st Dep't 2017). The Court of Appeals has granted leave to appeal. 30 N.Y.3d 909 (2018).

## IX. Michael Cohen, President Trump, Stormy Daniels & Rule 1.8(e)

Rule 1.8(e) of the New York Rules of Professional Conduct provides:

(e) 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.

*** * ***

New York Rules of Professional Conduct, Comments 9B and 10 provide:

**Financial Assistance**

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, like the former New York rule, paragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses,

including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

*** * ***

## X. Issuing Subpoena to Current Client

### Serving a Subpoena on Behalf of Client #1 on Current Client #2 Results in Conflict of Interest

In Formal Opinion 2017-6 (2017), the New York City Bar Association Committee on Professional Ethics concluded that it is generally a conflict of interest when a party's lawyer in a civil lawsuit needs to issue a subpoena to another current client. The conflict, which arises under Rule 1.7(a) of the New York Rules of Professional Conduct, will ordinarily require the attorney to obtain informed written consent under Rule 1.7(b) from both clients before serving the subpoena. *See* Rule 1.0(j)(defining "informed consent"). As comment 6 to Rule 1.7 notes, "absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." The committee acknowledged that there may be "exceptional cases where subpoenaing a current client will likely not give rise to a conflict of interest," but cautioned that "as a matter of prudence, a lawyer would be well advised to regard all of these situations as involving a conflict of interest."

The committee recommended that an attorney run a conflict check prior to preparing and issuing a subpoena to avoid any conflicts. *See* Rule 1.10(e) (requiring law firms to maintain conflicts checking system to perform conflict checks when: (1) the firm represents a new client; (2) the firm represents an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter). As the opinion notes, it may also be advisable to run a conflicts check at the outset of the representation "not just for any adverse parties in a litigation, but also for any non-parties from whom it is anticipated that discovery will be sought."

If the need to subpoena a current client arises during the course of the representation of another current client, the lawyer may have to withdraw from the representation under Rule 1.16 or make arrangements for the retention of "conflicts counsel" to conduct the discovery. The opinion also noted that "an attorney may seek advance conflict waivers from a client or prospective client to waive future conflicts," which "may include an agreement in advance to consent to be subpoenaed as a non-party witness by the lawyer or law firm in its representation of other clients in unrelated lawsuits." *See* Rule 1.7, cmts. 22, 22A (discussing client consent to future conflict).

## XI. Fee Agreements

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

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

> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
>
> **(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
>
> **(3) the fee customarily charged in the locality for similar legal services;**
>
> **(4) the amount involved and the results obtained;**
>
> **(5) the time limitations imposed by the client or by circumstances;**
>
> **(6) the nature and length of the professional relationship with the client;**
>
> **(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and**

**(8) whether the fee is fixed or contingent.**

*** * ***

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

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

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

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

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

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

*** * ***

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

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

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

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

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

**(3) a fee based on fraudulent billing;**

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

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

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

**(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or**
**(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.**

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

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

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

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

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

**(3) the total fee is not excessive.**

*** * ***

## Lawyer Who Refers Matter to Another Lawyer Undertakes Representation of Client

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

## Court of Appeals Resolves Disputes Over Fee Splitting Agreements

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

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

division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing").

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

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

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

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

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

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

* * *

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

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

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

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

**Basis or Rate of Fee**

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

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

**Terms of Payment**

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

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that

more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. See Rule 1.16(d). It is proper, however, to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

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

**Prohibited Contingent Fees**

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

**Division of Fee**

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

lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

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

**Disputes over Fees**

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

*** * ***

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

**Section 1215.1. Requirements**

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

(1) if otherwise impractible; or

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

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

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

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

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

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

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

**Section 1215.2. Exceptions**

This section shall not apply to:

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

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

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

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

*** * ***

**C. Appellate Division Rules**

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

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

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

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

SCHEDULE A

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

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

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

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

SCHEDULE B

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

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

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

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

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

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

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

## XII. New York State Bar Exam Replaced by Uniform Bar Exam

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

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

Enrollments in New York Civil Procedure courses have dropped dramatically since the change in the Bar Exam and are now less than 20% of what they were before the change.

## XIII. Misconduct Under Rule 8.4

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

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

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

**Rule 8.4 Misconduct – Comment**

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

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

interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

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

[4] **Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.** Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations. (emphasis added)

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

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

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

* * *

New York's Rule 8.4(g) provides:

> A lawyer or law firm shall not:
>
> (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

* * *

ABA Model Rule 8.4(g)'s reach is more expansive, as noted in Comment 4 thereto. An ABA report noted evidence of sexual harassment at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law."

On April 23, 2018, the Tennessee Supreme Court rejected a proposed revision to their rules of professional conduct that would have incorporated Rule 8.4(g) of the ABA Model Rules of Professional Conduct. This is the second time in five years the Tennessee Supreme Court has rejected similar proposals. It was reported that the proposal generated numerous comments from law professors, practitioners, and religious groups. "Many commenters didn't see the need for such a rule and opposed 'big brother' looking over a lawyer's shoulder." ABA/BNA Lawyers'

Manual on Professional Conduct, Current Reports, May 02, 2018. The ABA/BNA Article also notes:

> South Texas College of Law constitutional law professor Josh Blackman told Bloomberg Law that lawyers "don't forsake all of [their] free speech rights by becoming an attorney." And the bar doesn't have the same interest in disciplining lawyers for conduct at a bar association dinner or at continuing legal education classes, as it does in disciplining lawyer conduct in a courtroom, deposition or mediation, Blackman said. The rule is a tool "to silence and chill people."
>
> Blackman was recently protested and heckled by students at CUNY Law School for speaking about free speech. Blackman said those kids will be enforcing 8.4(g) in a few years and "if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like."
>
> But Rule 8.4(g) has vocal proponents as well. New York University School of Law professional responsibility professor Stephen Gillers advocated for the ABA's adoption of 8.4(g) and said that "[n]o lawyer has a First Amendment right to demean another lawyer (or anyone involved in the legal process)."
>
> …To date, only Vermont has adopted the Model Rule's version of 8.4(g). Many other states have anti-discrimination provisions, but they have been described as being more narrow than 8.4(g).

The South Carolina Supreme Court and Montana legislature have also rejected a proposal based on ABA Model Rule 8.4(g). The South Carolina Supreme Court received comments from 29 individual attorneys and three groups, and it was reported that a majority of the comments were in opposition to the rule.

It has been reported that 24 states already adopted an anti-discrimination provision in their rules of professional conduct before the ABA adopted 8.4(g) as part of the Model Rules in August of 2016.

Illinois Rule of Professional Conduct 8.4(j) provides that it is professional misconduct for a lawyer to "violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer."

Indiana's Rule of Professional Conduct 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status or similar factors."

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

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

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

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

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

The opinion states:

> On February 18, 2014, Bond filed a report with the Chardon Police Department alleging that he had received a phone call earlier that month from Patrick Paul Heald, who stated that he had been referred to Bond to discuss his personal-injury case. Bond reported that when he met Heald at a

> diner in Willoughby, Ohio, on February 3, 2014, Heald's right arm was bandaged and he was limping. Heald claimed that he had been badly burned in an industrial accident and requested financial assistance to pay for medication and living expenses until he received his next paycheck. Later that day, Bond entered into a contingent-fee agreement to represent Heald in his personal-injury matter. He also had Heald sign a photocopy of seven $100 bills with the notation, "Temporary loan of $700.00 cash advanced 2/3/14 by Daniel E. Bond to Patrick Paul Heald" and then gave him the cash and a check for $1,300. Heald did not repay the loan as agreed and made excuses for his failure to do so.

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

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

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

## C. "The ABA Overrules the First Amendment"

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

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

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

**Topic:** Client representation; discrimination

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

**Rules:** 8.4(g)

### FACTS

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

### QUESTIONS

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

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

**OPINION**

Lawyer's Freedom to Decide Which Clients to Represent

4. It has long been a principle of the practice of law that a "lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client . . ." EC 2-35 [formerly EC 2-26] of the former Code of Professional Responsibility (the "Code"). Although this language was not carried over to the current Rules of Professional Conduct (the "Rules"), the principle remains sound. The principle that lawyers have discretion to determine whether to accept a client has been "espoused so repeatedly and over such a long period of time that it has virtually reached the level of dogma." Robert T. Begg, *Revoking the Lawyer's License to Discriminate in New York*, 7 Geo. J. Legal Ethics 280, 280-81 (1993). *See also Restatement (Third), The Law Governing Lawyers* § 14 cmt. b (Am. Law Inst. 2000) ("The client-lawyer relationship ordinarily is a consensual one. Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination"); Henry S. Drinker, Legal Ethics 139 (1953) ("[T]he lawyer may choose his own cases and for any reason or without reason may decline any employment which he does not fancy"); Canon 31, ABA Canons of Professional Ethics (1908) ("No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his client. He has the right to decline employment."); George Sharswood, *An Essay on Professional Ethics* 84 (5th ed. 1884) (stating, in one of the earliest American works on legal ethics, that a lawyer "has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion").

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

Prohibition Against Unlawful Discrimination

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

7. For example, N.Y. Exec. Law § 296(2)(a) provides: "It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation ... because of the race, creed, color, national origin, sexual orientation, military

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

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

CONCLUSION

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

## E. Kellyanne Conway Complaint, February 20, 2017

GEORGETOWN LAW

Abbe Smith
Professor of Law

February 20, 2017

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

To the Office of Disciplinary Counsel:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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Northern Kentucky University

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

*Per Curiam.*

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

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

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

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

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

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

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

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

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

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

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

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

The petitioner has moved this court to sustain the charges preferred on default, or, in the alternative to grant additional time for the petitioner to conduct hearings before the Referee. As we have noted, the respondent has defaulted in appearance before the Referee after due notice. Furthermore, the Referee has permitted a motion to be made before this court for default judgment, which we hereby grant to the extent hereinafter set forth. The further services of the Referee previously appointed by this court are dispensed with, and the documents submitted in support of this motion are considered by this court in the manner of an inquest. Upon such inquest, we find that the conclusions of fact pleaded as specifications in the petition have been supported by those documents. We have accordingly sustained all of the charges preferred against the respondent.

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

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

Kupferman, J.

(Dissenting in part).

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

The respondent attempted to resign while under investigation. His resignation was rejected because he did not submit the affidavit required by the rules governing the conduct of attorneys, which in section 603.11, entitled 'Resignation of attorneys under investigation or the subject of disciplinary proceedings,' requires an acknowledgment that 'he could not successfully defend himself on the merits against such charges.' (22 NYCRR 603.11.) The purpose of the affidavit requirement is well set forth in the Report of the New York Committee on Disciplinary Enforcement (Eighteenth Annual Report of NY Judicial Conference, 1973, pp 234, 275 [Problem 12]). That report suggested for codification the specific language of this court's section 603.11. To every extent possible, matters were not to be left in limbo, but charges were either to be acknowledged or properly proffered with the opportunity to defend, and prosecuted to a conclusion. We now have a situation where, on the basis of alleged inability to make personal service, we proceed forthwith to judgment, no matter how justified it may seem to some. If this procedure is satisfactory, then a resignation in the face of the charges would have been at least as acceptable.

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

The above-named attorney, formerly the President of the United States, who was admitted to the practice of law in the State of New York on December 5, 1963 at a term of the Appellate Division of the Supreme Court, First Judicial Department, has submitted his resignation from the Bar of this State after the filing of a complaint with the Joint Bar Association Grievance Committee for the Ninth

Judicial District (the Committee) by its Chief Counsel. In that complaint Mr. Nixon is charged with professional misconduct as a consequence of his refusal to co-operate with the Committee in its investigation of the conduct of an attorney who was allegedly involved with other individuals in certain monetary transactions which came to light during the "Watergate" inquiry. Specifically, Mr. Nixon declined to furnish certain affidavits requested of him indicating whether he would answer any written interrogatory concerning the attorney under investigation and certain other named individuals, and, if not, indicating his grounds for refusal to answer.

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

However, on February 4, 1976, when the matter of Mr. Nixon's resignation came up for consideration by this court, it was learned that (a) since 1974, Mr. Nixon had been the subject of an investigation into allegations of misconduct by the Committee on Grievances of the Association of the Bar of the City of New York, the Departmental Disciplinary Committee for the First Judicial Department and (b) a petition, dated January 15, 1976, containing charges of professional misconduct, and a notice of petition, dated January 16, 1976, had been prepared and mailed to Mr. Nixon's attorney during the week of January 19, 1976. Predicated thereon, this court, in keeping with established principles of comity, deferred action on Mr. Nixon's attempted resignation pending the conclusion of the proceedings stemming from the foregoing investigation and action by the Departmental Disciplinary Committee for the First Judicial Department.

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

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

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

*AGREED ORDER OF DISCIPLINE*

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

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

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

On April 1, 1998, Judge Wright granted summary judgment to Mr. Clinton, but she subsequently found him in Civil contempt in a 32-page Memorandum Opinion and Order (the "Order") issued on April 12, 1999, ruling that he had "deliberately violated this Court's discovery orders and thereby undermined the integrity of the judicial system." Order, at 31. Judge Wright found that Mr. Clinton had "responded to plaintiff's questions by giving false, misleading and evasive answers that were designed to obstruct the judicial process .... [concerning] whether he and Ms. [Monica] Lewinsky had ever been alone together and whether he had ever engaged in sexual relations with Ms. Lewinsky." Order, at 16 (footnote omitted). Judge Wright offered Mr. Clinton a hearing, which he declined by a letter from his counsel, dated May 7, 1999. Mr. Clinton was subsequently ordered to pay, and did pay, over $90,000, pursuant to the Court's contempt findings. Judge Wright also referred the matter to the Committee "for review and any action it deems appropriate." Order, at 32.

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

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

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

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

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

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

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

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

and causing the court to issue a thirty-two page Order civilly sanctioning Mr. Clinton.

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

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

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

IT IS SO ORDERED.