Ethics in Legal Practice: A Review of Recent Ethics Opinions in 2018

Friday, December 7, 2018
12:00 p.m. – 3:00 p.m.

New York State Bar Association
Albany, NY

3.0 MCLE Credits
3.0 Ethics

Sponsored by the Committee on Continuing Legal Education of the New York State Bar Association
This program is offered for educational purposes.

The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials. Further, the statements made by the faculty during this program do not constitute legal advice.
Attorneys everywhere are under increasing scrutiny. The pressure to avoid ethical violations is high.

Many ethics opinions were issued by the New York State Bar Association Committee on Professional Ethics in 2018. The ABA, City Bar and NYCLA also issued many opinions on topics including changes in forms of practice, business development, fees and other kinds of compensation, lawyer advertising and a host of other matters touching upon client confidentiality and conflicting interests.

Featuring an esteemed panel, this program will provide you with an overview of recent ethics opinions of interest. You will hear about the opinions directly from members of the Committee. Panelists will also provide an overview of select opinions from the ABA, City Bar and NYCLA.

Ethics programs are designed to help you better understand your professional responsibilities and avoid risky situations that can jeopardize your practice.
Program Agenda

11:30 a.m.  Registration (Lunch will be provided)
12:00 p.m. – 12:10 p.m.  Welcome and Introductions
12:10 p.m. – 1:25 p.m.  Panel 1
1:25 p.m. – 1:30 p.m.  Refreshment Break
1:30 p.m. – 2:45 p.m.  Panel 2
2:45 p.m. – 3:00 p.m.  Questions & Answers
3:00 p.m.  Adjournment
Accessing the Online Course Materials

Below is the link to the online course materials. These program materials are up-to-date and include supplemental materials that were not included in your course book.

www.nysba.org/EthicsInLegalPractice2018Materials

All program materials are being distributed online, allowing you more flexibility in storing this information and allowing you to copy and paste relevant portions of the materials for specific use in your practice. WiFi access is available at this location however, we cannot guarantee connection speeds. This CLE Coursebook contains materials submitted prior to the program. Supplemental materials will be added to the online course materials link.
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New York Rules of Professional Conduct

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

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Conflicts of Interest
Opinion 1145 (3/7/2018)

Topic: Litigation financing; conflicts of interest

Digest: Neither the lawyer nor the lawyer’s firm may represent a client in litigation funded by a litigation financing company in which the lawyer is an investor.

Rules: 1.7; 1.8 (a), (e), (f) & (i), 1.10(a), (d)

FACTS

1. The inquirer is the managing partner of a law firm that represents plaintiffs in commercial litigation. The inquirer sometimes refers clients to a litigation financing company (the “Company”) that provides money to the clients in exchange for a percentage of the prospective recovery.

2. The Company is structured as a limited partnership that privately raises money from qualified investors, among whom the inquirer seeks to be a direct and substantial one. The Company invests in a variety of lawsuits, including some brought by the inquirer’s clients, and others brought by persons not represented by the inquirer. Investment decisions are made by a registered investment advisor. Neither the inquirer nor the inquirer’s firm represents clients in their negotiations with the Company on the terms of the financing arrangements.

QUESTION

3. May a lawyer or the lawyer’s firm represent a client in litigation funded by a litigation finance company in which the lawyer is an investor?

OPINION

4. The terms “alternative litigation finance” or “third-party litigation finance” refer to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer. These transactions are generally between a party to the litigation and a funding entity and involving an assignment of an interest in the proceeds from a cause of action. These activities have become increasingly prominent in recent years, leading to significant attention in the legal and popular press, scrutiny by state bar ethics committees, and scholarly commentary.

ABA Commission on Ethics 20/20, Informational Report to the House of Delegates (Dec. 2011) (“ABA Report”) at 1 (footnotes omitted); see also, e.g., Ethics Committee of the NYSBA Commercial and Federal Litigation Section, “Report on the Ethical Implications of Third-Party
5. In two previous opinions, we have considered issues arising from alternative litigation finance based on the former New York Code of Professional Responsibility (the “Code”). N.Y. State 769 (2003); N.Y. State 666 (1994). Both opinions analyzed issues of legal ethics but noted that this Committee does not opine on issues of law such as the legality of alternative litigation financing arrangements, and we repeat that caveat here. Here, we focus on the specific ethics issues presented in the inquiry; we do not revisit in any detail the ethical considerations applicable to alternative litigation financing generally.

6. In N.Y. State 666, we opined that a lawyer may ethically refer a client to a litigation financing company, while noting that the lawyer must be careful not to compromise confidentiality by disclosing information to the lending institution without the client’s informed consent. In N.Y. State 769, we added that, subject to various limitations, a lawyer may ethically represent a client in negotiations with the litigation financing company and charge an additional fee for doing so. Both opinions also stated limitations relevant to the current inquiry that are set forth in the analysis below.

7. That the inquirer seeks to be a direct and substantial investor in the Company is of consequence. We do not address other situations, such as when a lawyer’s investment occurs indirectly through intermediate entities, of which the lawyer may not even be aware.

8. The lawyer’s proposed investment in the Company implicates at least four conflict-of-interest rules. We will first discuss two provisions – Rules 1.8(a) and 1.7(a)(2) – which the requisite disclosure and consent could potentially satisfy, and will then discuss two other provisions that we think preclude the proposed conduct in all circumstances.

9. Rule 1.8(a) of the New York Rules of Professional Conduct (the “Rules”) sets forth requirements that must be met when a lawyer enters into a business transaction with a client. This specific regulation, rather than the general conflicts provisions of Rule 1.7(a), governs the lawyer’s conduct when a lawyer engages in a business transaction with a client. N.Y. State 1055 ¶ 13 (2015). Such a business transaction occurs when a client obtains funding from a source in which the lawyer has a financial interest, which funding will be used in part to pay the lawyer’s fees. See N.Y. State 769 (citing the Code’s predecessor to Rule 1.8(a) as one of bases for concluding that “the lawyer cannot own any interest in the financing institution”). The two other conditions to trigger Rule 1.8(a) are that the lawyer and client “have differing interests” in the transaction and that “the client expects the lawyer to exercise professional judgment therein for the protection of the client.” Whether those circumstances are present will depend on the facts of particular cases. Here, we assume their presence, because the Company and the client have differing interests in the terms of the financing arrangements, see Rule 1.8, Cmt. [4C] (Rule 1.8(a) applies when lawyer obtains financial interest in client’s claim except as Rules otherwise allow), and because the lawyer’s financial stake in the Company could give rise to the client’s reasonable expectation that the lawyer is exercising professional judgment on the client’s behalf, see N.Y. State 769 (“an unsophisticated client may reasonably assume that by facilitating the transaction, the lawyer is also endorsing the entering into of the proposed transaction and/or the terms thereof”); cf. N.Y. State 1055 n. 1 (2015) (client expectation likely when, for example, client has no other counsel, and the lawyer is acting for the client in the underlying matter).
10. When Rule 1.8(a) applies, then the transaction must be “fair and reasonable to the client.” This is a fact-intensive inquiry, N.Y. State 913 ¶ 11 (2012), for which we lack data to opine. Assuming the inquirer satisfies this standard, then the inquirer may meet the other requirements of Rule 1.8(a) by complying with the obligations to make full disclosure in a writing, using language the client may reasonably understand, including the lawyer’s role in the transaction; to advise the client, and to provide the client the opportunity, to seek independent legal counsel; and to obtain informed consent in a writing the client signs. Rule 1.8(a) (1) - (3).

11. If the client is not to be represented by the inquirer in the litigation, but rather by another lawyer in the inquirer’s firm, the inquirer’s financial interest would still give rise to a conflict by imputation. Rule 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.”). Thus, even if the client is represented by another lawyer in the inquirer’s firm, that representation, together with the inquirer’s investment in the Company, would trigger the restrictions of Rule 1.8(a). But the imputed restriction could, in appropriate circumstances, be satisfied by informed consent and by meeting the other requirements of Rule 1.8(a)(1) - (3).

12. If the inquirer fully complies with Rule 1.8(a), then the inquirer must still abide by Rule 1.7(a) in connection with the ongoing representation of the client. N.Y. State 1139 ¶ 15 (2017). Rule 1.7(a)(2) provides that a lawyer shall not represent a client if a reasonable lawyer would conclude that “there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests,” unless the affected client gives informed consent confirmed in writing. The inquirer’s personal and financial interest in the Company could create such a risk. For instance, the Company may have an interest in expediting (or prolonging) the litigation to enhance the value of the Company’s investment but which may not equate with the client’s interests in going to trial (or reaching an early settlement). A continuing duty exists to protect the client from this risk. Nevertheless, in our view, this conflict may be adequately disclosed and waived under Rule 1.7(b) if the other requirements of Rule 1.7(b) are fulfilled. Rule 1.10 imputes this conflict to other lawyers in the inquirer’s firm, but, like the underlying conflict, such an imputed conflict could be adequately disclosed and waived to allow the lawyer’s firm to represent the client. See Rule 1.10(d).

13. There are, however, two other applicable Rules that informed consent cannot remedy. Rule 1.8(e) provides (subject to exceptions discussed below) as follows: “While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client.” Underlying this Rule are two concerns: first, that such financial assistance “would encourage clients to pursue lawsuits that might not otherwise be brought,” and second, that “such assistance gives lawyers too great a financial stake in the litigation.” Rule 1.8, Cmt. [10].

14. The other provision (again subject to exceptions discussed below) is Rule 1.8(i): “A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.” This rule, too, “is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership
interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires.” Rule 1.8, Cmt. [16].

15. We believe that the proposed conduct would violate both of these Rules. A violation of Rule 1.8(e) arises because the payments from the Company would constitute “financial assistance to the [inquirer’s] client.” We recognize that the inquirer would not be the only investor in the Company, and that the inquirer’s client would not be the only litigant funded by the Company, but these facts do not alter the reality that money from the inquirer would be paid as financial assistance to the inquirer’s client. Nor does it matter that the money is routed first as an investment in a limited partnership and only thereafter as litigation funding. See Rule 8.4(a) (lawyer shall not violate the Rules “through the acts of another”); Phila. Op. 91-9 (“an attorney generally may not loan funds directly to a client, nor may an attorney indirectly do so through a finance company in which such attorney has an interest.”); cf. Fla. Op. 00-3 (2002) (“an attorney may not indirectly loan funds to clients in connection with pending litigation through a nonprofit corporation funded by attorney contributions.”).

16. There are three exceptions to Rule 1.8(e) that allow limited assistance to clients in certain circumstances. Rule 1.8(e) (1) (advances of “court costs and expenses of litigation”), (2) (making such payments for indigent or pro bono clients) and (3) (making such payments in contingency matters). In those cases, the benefits of helping assure access to the courts outweigh the perils of such limited assistance. See Rule 1.8, Cmt. [10]. But even then, assistance is limited to “court costs directly related to litigation,” such as “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.” Rule 1.8, Cmt. [9B]. Lawyers are never permitted to give litigation clients the more sweeping kinds of assistance – such as lawyer’s fees billed on a non-contingency basis – that, under the inquiry, would apparently be provided by the Company. See N.Y. City 2011-2 (for commercial cases such as those at issue here, if the claim appears meritorious, “the financing company will advance amounts to cover attorneys’ fees and the other costs of the litigation”).

17. This result is consistent with our prior opinions, based on the Code, which indicated that the lawyer “cannot own an interest in the lending institution, as that would indirectly constitute a loan by the lawyer to the client.” N.Y. State 666, cited in N.Y. State 769. Other jurisdictions agree. See N.J. Op. 691 (2001) (ethics rules do not prohibit lawyer from helping a client to obtain financial assistance from another “as long as the lawyer has no financial interest in the individual or entity which secures or provides that funding”); S.C. Op. 92-06 (approving attorney’s interest in a loan company given that “the company would not make loans to the attorney’s own clients”); Fla. Op. 00-3 (2002) (“The attorney shall not have any ownership interest in the funding company”); Phila. Op. 91-9 (“an attorney generally may not loan funds directly to a client, nor may an attorney indirectly do so through a finance company in which such attorney has an interest.”); ABA Report at 16, 19-20 (alternative legal financing may be subject to non-waivable conflict rule prohibiting lawyer from “providing financial assistance to a client”).

18. The proposed conduct would also violate Rule 1.8(i). By providing money to the inquirer’s client in exchange for a percentage of the prospective recovery, the Company would acquire a proprietary interest in the client’s claim. The inquirer, as a part owner of the Company, would also acquire such an interest, which the rule prohibits except in the cases of “a lien
authorized by law to secure the lawyer’s fee or expenses,” Rule 1.8(i)(1), or “a reasonable contingent fee in a civil case,” Rule 1.8(i)(2). Neither of those exceptions would apply to the inquirer’s financial stake in the Company. Even if a client is to compensate the inquirer by contingent fee, such a fee payment would be different from the percentage of a recovery that would ultimately be paid to the Company, and in part indirectly to the inquirer, in exchange for litigation financing. See also ABA Report at 16, 20 (alternative legal financing may be subject to non-waivable conflict rule prohibiting lawyer from “acquiring a proprietary interest in the client’s cause of action”).

19. As we have said, the imputation provisions of Rule 1.10(a) apply to violations of Rule 1.8. Thus, the preclusion of the proposed conduct by Rule 1.8(e) and Rule 1.8(i) would apply not only to clients whom the inquirer personally represents, but also to those represented by other lawyers associated in the inquirer’s firm.

20. These restrictions are not subject to waiver. Rule 1.10(a) applies its imputation standard to any breach of Rule 1.7, 1.8, or 1.9, “except as otherwise provided therein.” Rule 1.10(d) says that a “disqualification prescribed by this Rule [1.10(a)] may be waived by the affected client or former client under the conditions stated in Rule 1.7.” In the context of prohibited transactions under Rule 1.8(e) or Rule 1.8(i), however, there is no negatively affected client or former client. The concept of waiver makes no sense. What is imputed is not a “disqualification,” but rather an outright prohibition of the transaction in question. There are no informed-consent exceptions specific to Rules 1.8(e) and 1.8(i). Accordingly, the prohibitions of financial assistance to a client, and of acquiring a proprietary interest in the subject matter of litigation, are not subject to client waiver, and the same is true of those prohibitions as imputed.

CONCLUSION

21. Neither the lawyer nor the lawyer’s firm may represent the client in a litigation funded by a company in which one of the firm’s lawyers is an investor in the litigation financing company providing the funds.
New York State Bar Association
Committee on Professional Ethics

Opinion 1148 (4/2/2018)

**Topic:** Conflicts of Interest: Former government lawyer in private practice in matters involving former government employer

**Digest:** A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in the same matter while a government employee.

**Rules:** 1.0(j), 1.6, 1.9(a) & (c), 1.11(a) & (c).

**FACTS**

1. The inquirer is a New York lawyer formerly employed by a county social services agency (the “Department”) within New York State. Among the duties of a county social services department are to assist “the state in the location of absent parents, establishment of paternity and enforcement and collection of support” obligations of legally responsible relatives to contribute for the support of their dependents. N.Y. Social Services Law §111-c(1) (outlining Departmental duties). The Department employs an enforcement unit staffed, in part, by four or five attorneys, who seek to enforce alleged obligations to support dependents. We assume for our purposes that, in doing so, the attorneys represent the Department rather than individuals to whom the support payments may be owed.

2. The inquirer recently retired as one of the Department’s enforcement unit attorneys, and has started a solo law firm in the same region. In this practice, the inquirer wishes to represent clients adverse to the Department, including opposing the Department’s enforcement actions.

**QUESTION**

3. May an attorney, formerly employed by a county department of social services, represent clients opposing the efforts of the attorney’s erstwhile government employer, including representing clients challenging support enforcement proceedings brought by that employer?

**OPINION**

4. This Committee’s charter is limited to interpretation of the New York Rules of Professional Conduct (the “Rules”) and does not extend to opining on issues of law, statutes, county ethics codes, or other regulations that may govern the duties of current or former government employees in their relations with their current or former government employers. Accordingly, here, we proceed without deciding that the inquirer’s proposed representation
5. Nothing in the Rules creates an absolute bar to a former government attorney’s representation of a client in opposition to the attorney’s former employer. Rule 1.11(a)(2) is the principal Rule governing conflicts that may be faced by a former government attorney. N.Y. State 1029 ¶ 9 (2014). Rule 1.11(a) provides in pertinent part that “a lawyer who has formerly served as a public officer or employee of the government . . . shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.” Hence, Rule 1.11(a)(2) allows a former government attorney to represent private clients on matters in which the attorney did not participate “personally and substantially” while in government service.

6. The history of Rule 1.11(a)(2) makes “clear that the disqualification must be based on the lawyer’s “personal participation to a significant extent.” N.Y. State 748 (2001). “[T]hat a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant’s case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101,” the precursor to Rule 1.11(a)(2) in the N.Y. Code of Professional Responsibility (the “Code”), “or to require disqualification under that rule.” Id. “Neither the Code, nor its goal of promoting public confidence require so limiting the practice of former government lawyers that they may not, following their return to private practice undertake work involving the types of matters in which they have gained particular expertise while in public service.” N.Y. State 453 (1976).

7. The aims of Rule 1.11(a), a rule specific to onetime government lawyers, are akin to, but significantly differ from, those of Rule 1.9(a), a rule more generally regulating a lawyer’s duty to former clients. The goals of Rule 1.9(a) include preventing a lawyer from “switching sides” and “improperly using confidential information of the former client,” Rule 1.9, Cmts. [3] &[4], whereas Rule 1.11(a) is designed not only to protect the former government client but also to “prevent a lawyer from exploiting public office for the advantage of another client,” Rule 1.11, Cmt. [3]. An additional and important concern of Rule 1.11(a), however, is to avoid an undue deterrent on lawyers serving in a public position without forever forgoing private practice in the legal area in which the lawyer served the government. Rule 1.11, Cmt. [3]; N.Y. State 1029 ¶ 10. For this reason, the test applicable to Rule 1.9 is qualitatively different from the test applicable to Rule 1.11.

8. To be sure, underlying each Rule is a protection of the former client’s confidential information. A government lawyer, like any lawyer, owes an ongoing duty to a former client to preserve the confidential information the lawyer garnered in the representation unless the former client releases the lawyer from that duty. Rule 1.11(a)(1) requires a lawyer who formerly served as a public officer or government employee to comply with Rule 1.9(c), which in turn provides that “a lawyer who has formerly represented a client in a matter” [in this case, a government or governmental agency] “shall not thereafter use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client” or reveal such information, in each case “except as these Rules would permit or require with respect to a current client.” Among the exceptions in each Rule is the former client’s “informed consent” within the meaning of Rule 1.0(j). Consistent with this proscription, Rule 1.11(a)(2) says that the government agency may consent if a former government attorney seeks to represent another party “in a matter in
which the lawyer participated personally and substantially” while a government employee, subject always to the proscription in Rule 1.11(c) against the use of confidential government information against third persons, a ban that consent may not waive (and that is not an issue we address in this opinion).

9. Absent the former client’s informed consent, the differing language of the two Rules reflects their different objectives. Rule 1.9(a) bars representation adverse to a former client “in the same or a substantially related matter” to the matter in which the lawyer previously represented a client. Rule 1.11(a) bars representation by a former government employee adverse to the former client only in the same specific matter as the matter in which the lawyer participated “personally and substantially” during the lawyer’s government employment. As a result, the application of each Rule may diverge in practical ways. Solely by way of illustration, some courts apply Rule 1.9(a)’s “substantial relationship” test to disqualify lawyers who represented clients in specific types of matters. See, e.g., Panebianco v. First Unum Life Ins. Co., 2005 U.S. Dist. LEXIS 7314 (S.D.N.Y. Apr. 27, 2005) (disqualifying law firm that represented former client in disability matters); Lott v. Morgan Stanley Dean Witter & Co., 2004 U.S. Dist. Ct. LEXIS 25682 (S.D.N.Y. Dec. 23, 2004) (disqualifying law firm that represented former client in ERISA matters); Mitchell v. Metro. Life Ins. Co., 2002 U.S. Dist. LEXIS 4675 (S.D.N.Y. Mar. 21, 2002) (disqualifying law firm that represented former client in discrimination matters). Without endorsing these decisions – disqualification to appear in court is a question of law not ethics and governed by judicial standards outside our purview – a theme running through the opinions, sometimes labeled the “playbook” approach, is not practicable in the context of former government lawyers. Many state and sub-state legal departments represent the government only in specific types of cases. To use this “playbook” approach in interpreting Rule 1.11(a) is to disregard both its purpose of encouraging public service and the different language that Rule 1.11(a) uses to assess whether a government lawyer is able to represent a client against the lawyer’s former employer.

10. Otherwise put, Rule 1.11(a) ousts the application of Rule 1.9(a) in the context of government lawyers. Rule 1.9(a)’s “substantial relationship” may extend its reach to encompass matters that Rule 1.11(a)’s requirement of “personal and substantial” involvement in the specific matters was not intended to embrace. We do not negate the possibility that the two may overlap in some instances, but neither do we believe that the two are necessarily congruent. That each Rule uses different language, that Rule 1.11(a) is specific to government lawyers in contrast to Rule 1.9(a)’s general application, and that Rule 1.11(a) serves public purposes beyond those animating Rule 1.9(a), fortify this conclusion. We note, too, that the considerations for determining whether Rule 1.11(a) applies are materially narrower than those customarily applied in analysis of a Rule 1.9(a) conflict. Compare Rule 1.11, Cmt. 10 (factors to be used in determining whether two matters are the same include “the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters”) with Rule 1.9, Cmts. [2] & [3] (setting forth additional factors to be considered in making a decision about whether a conflict exists).

11. Consequently, we conclude that a onetime government lawyer may represent clients adverse to the lawyer’s former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government’s position. This conclusion rests on the assumptions (a) that the inquiring lawyer does not possess confidential information about the specific matter obtained
during the inquirer’s government service, and (b) that the inquiring lawyer does not otherwise possess confidential information about the specific matter which, owing to the lawyer’s confidentiality obligations, the lawyer could not competently represent the client in resisting the government’s action without violating the lawyer’s ongoing duty of confidentiality, see N.Y. State 901 ¶ 10 (2011) (a lawyer possessing non-disclosable confidential information relating to existing representation must assess whether the lawyer reasonably believes that the lawyer may competently represent client). But merely knowing how the government agency usually handles such matters, untethered to personal and substantial involvement in or confidential information about the specific matter, is alone insufficient to prevent the former government lawyer from representing a private client against the lawyer’s former government employer.

CONCLUSION

12. A lawyer formerly employed by a county department to handle child support enforcement proceedings may, after termination of such employment, represent respondents in such proceedings, provided that the lawyer was not personally and substantially involved in, and possesses no confidential information acquired about, the same specific matter while a government employee.

(32-17)
Topic: Conflicts of interest: Agency shop lawyer who represents the government against union members

Digest: A lawyer who is an agency shop member of a union may represent a government employer agency in disciplinary matters against union-represented employees, unless, in a particular circumstance, a reasonable lawyer would conclude that a significant risk exists that the lawyer’s professional judgment on behalf of the government employer might be adversely affected by the lawyer’s agency shop membership. If in a particular matter, a lawyer concludes that a conflict may exist, then the lawyer may undertake the representation if the lawyer reasonably believes that the lawyer can provide competent and diligent representation and the government agency gives its informed consent, confirmed in writing.

Rules: 1.0(q), 1.7(a) & (b).

FACTS

1. The inquiring lawyer is admitted to practice in New York and an employee of the State. The inquirer at times represents an agency of New York State in disciplinary proceedings initiated against union-represented employees. The inquirer was once a member of the particular union, but subsequently resigned membership, after which the lawyer became an agency shop member. As an agency shop member, the inquirer is required to pay union dues, but is excluded from membership benefits of the union and is unable to participate in union elections.

QUESTIONS

2. Does a lawyer who is employed by a state government agency and pays union dues as an agency shop member, but is not a union member, have a conflict in representing the government agency in disciplinary cases against members of the union and, if a conflict exists, may the conflict be waived?

OPINION

3. Rule 1.7(a) of the New York Rules of Professional Conduct (the “Rules”) says in relevant part that, “[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude” that “there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” See Rule 1.7, Cmt. [10] (a lawyer’s own “financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client.”). Rule 1.0(q) defines “reasonable lawyer” to be “a lawyer acting
from the perspective of a reasonable prudent and competent lawyer who is personally disinterested in commencing or continuing the representation.”

4. In N.Y. State 578 (1986), we concluded that, under the New York State Code of Professional Responsibility (the “Code”), the predecessor of the Rules, a lawyer who was a member of a union and subject to the same collective bargaining agreement as an employee involved in a disciplinary proceeding had a conflict in undertaking the representation of the employer in that proceeding. We added, however, that, “if the lawyer is simply an agency shop member, or if the collective bargaining agreement involved is not one to which the lawyer is subject, these concerns are not present to the same degree. Therefore, such a lawyer is not specifically prohibited from representing the State in a disciplinary proceeding brought under a collective bargaining agreement, except where the lawyer finds that he or she is unable to exercise independent professional judgment.” Otherwise put, when a lawyer is not a union member, the disabling interests that might trigger Rule 1.7(a)(2) do not exist to the same extent that union membership entails Although we later modified N.Y. State 578 on other grounds (on which more below), we remain of the view that an agency shop member is in a different position than a union member for the purpose of conflicts analysis.

5. More recent opinions under the Rules presented questions in analogous situations in which we adopted similar themes. For instance, in N.Y. State 1119 ¶6 (2017), we considered whether a onetime associate district attorney could ethically represent defendants in prosecutions brought by the lawyer’s former superior. To us, the issue rested on whether a reasonable lawyer would conclude that the inquirer’s prior personal relationship with the district attorney created a “significant risk” that the lawyer’s prior relationship with district attorney would adversely affect the independent professional judgment of the inquirer in pursuing a defense. Similarly, in N.Y. State 1122 ¶8 (2017), when considering whether a foster parent could maintain a practice as an Attorney for Children in Family Court proceedings, we said the conflict posed by an inquirer’s status as a foster parent might well be “theoretical and remote,” and that, were there “no ‘significant risk’ of an adverse effect [on the lawyer’s professional judgment], objectively determined, an attorney who is a foster parent may undertake and continue representation of” parties in a Family Court proceeding without the need to obtain informed client consent.” See generally N.Y. State 968 ¶17 (2013) (discussing personal considerations giving rise to a “significant risk” that the professional judgment of a government lawyer defending claims of colleagues subject to a government furlough would be adversely affected where the furlough program was also applicable to the inquiring lawyer).

6. Accordingly, each time the lawyer is asked to represent the agency in disciplinary actions against employees represented by the union, the lawyer must determine whether a reasonable lawyer would conclude that the lawyer’s former union membership and/or current agency shop member status creates a significant risk that his representation of the State against union members would adversely affect the inquirer’s independent professional judgment on behalf of the client (the government agency). On the facts presented to us, we do not believe that a reasonable lawyer would conclude that there is such a significant risk.

7. If in a particular situation, the inquirer reasonably believes that there is a significant risk that the lawyer’s professional judgment would be adversely affected, then a curing mechanism appears in Rule 1.7(b), the exception to which Rule 1.7(a) refers. Rule 1.7(b) says that, notwithstanding a conflict under Rule 1.7(a), a lawyer may represent a client if:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

8. In N.Y. State 578, we stuck to the position, first set out in pre-Code N.Y. State 40 (1966), that a government could not give informed consent to a conflict. We abandoned that position in N.Y. State 629 (1992) – hence the foregoing reference to modification of N.Y. State 578 – and have since consistently said that a government may provide informed consent. See N.Y. State 1130 ¶ 15 (2017); N.Y. State 968 ¶ 22; N.Y. State 770 (2003). Thus, if the inquirer were to conclude that a conflict exists, the conflict is subject to waiver by the State.

CONCLUSION

9. An agency shop member of a union of State employees union may represent a State agency in disciplinary matters against union-represented employees if the lawyer reasonably believes that no significant risk exists that the lawyer’s professional judgment on behalf of the State agency will be adversely affected by the lawyer’s personal interests. If in a particular circumstance a reasonable lawyer would conclude that there is a significant risk that the lawyer’s professional judgment on behalf of the government employer might be adversely affected by the lawyer’s agency-shop membership, then the lawyer may undertake the representation if the lawyer reasonably concludes that the lawyer can provide competent and diligent representation and the agency gives its informed consent, confirmed in writing.

(39-17)
New York State Bar Association  
Committee on Professional Ethics  

Opinion 1153 (5/24/2018)  

**Topic:** Conflicts of Interest: County attorney’s service on the board of a county-sponsored community college  

**Digest:** Whether a county attorney may also serve on the board of a county-sponsored community college may raise legal issues that overtake ethical concerns. If such dual service is legally permissible, then a lawyer occupying these roles must assess, in each instance when the interests of the county and community college overlap, whether a reasonable lawyer would conclude that the two positions create a significant risk that the lawyer’s duty to one will adversely affect the lawyer’s duty to the other. If the lawyer determines that such a condition exists, then the lawyer must decide whether the conflict is subject to waiver and, if so, whether the affected client(s) may give informed consent, either for the lawyer or another lawyer in the county attorney’s office. In all events, the lawyer must assure that the affected client(s) is or are aware of the potential risk to evidentiary privileges that the lawyer’s dual roles occasion.  

**Rules:** 1.0(f), (h), (j), (q) & (r); 1.6(a) & (b); 1.7(a) & (b); 1.10(a) & (d).  

**FACTS**  

1. A county legislature in New York appointed the inquiring lawyer, who is admitted in New York, as county attorney. In this particular county, the county attorney is a full-time position overseeing a staff of assistant county attorneys. Section 501 of the County Law provides that a county attorney “shall be the legal advisor to the board of supervisors [or legislature] and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature. The county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors [or legislature] and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law.” These duties engage the county attorney in representing the county, its officials, its agencies, and its personnel in litigated matters and administrative proceedings; preparing contracts between the county and others; drafting legislation; and generally acting as legal advisor to the county, its officers, its legislature, and its agencies. The county legislature sets the compensation of the county attorney.  

2. The inquiring attorney also serves as a member of the board of trustees of the county-sponsored community college and currently chairs that board. Section 6306.1 of the Education Law says that a community college “shall be administered by a board of trustees” consisting, with exceptions not applicable here, of nine members serving seven-year terms, five of whom the legislature names, which may include one member of that body; and four of whom the governor names from among county residents. (A tenth member must be a student, elected by the student
body for a one-year term.) Trustees receive no compensation for their service as such. Community college personnel are paid, at least in part, out of county funds.

3. Section 6306.2 of the Education Law directs the community college board to appoint a college president and to adopt curricula, in each case “subject to approval by the state university trustees.” The board must also prepare an annual budget, which must be submitted to the local legislative body for adoption, and must discharge such other duties as may be appropriate under the “general supervision of the state university trustees.” Section 6306.4 of the Education Law authorizes the community college board, among other things, to acquire by deed or lease any real or personal property to carry out the purposes of the college, subject to county legislative appropriation, and apply any proceeds to college purposes subject to the regulations of the state university trustees. Under the same section, title to personal property thus acquired vests in the board of trustees, while title to any real property vests in the sponsoring county. The county and the community college may be parties to other college-related contracts, either between each other or, together or separately, with third parties. The county legislature has the right to audit the community college’s expenditures.

4. As the statutory arrangement evinces, the governance of a community college is triangular. Although a county (or, in less-populated areas, a group of counties) sponsors a community college, the county does so in coordination with and only upon approval of the state university system. Section 355 of the Education Law prescribes that the state university trustees shall provide standards and regulations for the organization and operation of community colleges, which the state university trustees have done (see 8 N.Y.C.R.R. §600 et seq.). Sections 202 and 207 of the New York State Education Law repose ultimate authority over state and community college programs in the New York Board of Regents. By law, then, the county, the community college, and the state university system each plays a role in running the community college.

5. We are told that, in any litigation involving the community college, its board, or its staff, the county attorney’s office represents the community college and its constituents, either through the office’s own staff attorneys or by selecting outside counsel. The county attorney’s office supplies other legal services to the community college as well.

6. The inquirer’s appointment as county attorney post-dated the inquirer’s appointment to the community college board and election as its chair. The inquirer wishes to know whether ethical issues arise from remaining on the community college’s board of trustees while acting as county attorney.

QUESTIONS PRESENTED

7. Does a conflict of interest arise when an attorney simultaneously serves as a county attorney and as a member of the board of trustees of a county-sponsored community college and, if so, is the conflict subject to waiver by informed consent? What other considerations must a lawyer in these two roles take into account in discharging the lawyer’s ethical obligations to each?
OPINION

Introduction

8. The jurisdiction of this Committee is limited to interpreting the New York Rules of Professional Conduct (the “Rules”). We do not opine on issues of law. The current inquiry potentially raises legal issues under, among others, the County Law, the Education Law, the Public Officers Law, the Rules and Regulations of the New York State University Trustees, the Governance Rules of the Board of Regents, the County Ethics Code, and any ethics regulations of the community college. We note, too, that the so-called “doctrine of incompatibility” – in brief summary, disallowing dual public offices when the holder of one government position has a right to interfere with or subject to audit and review the holder of another government position – is embedded not only in specific statutes, see, e.g., N.Y. County Law §411 (elected county officer may not serve in any other elected county or municipal office or as county supervisor); N.Y. General City Law § 3 (member of common council may not hold appointed city office), and but also more generally in the common law, see, e.g., People ex rel. Ryan v. Green, 58 N.Y. 295, 304-05 (1874) (state legislator could not serve as court clerk); Dupras v. County of Clinton, 213 A.D.2d 952, 953 (3d Dep’t 1995) (county legislator could not serve as senior clerk on board of elections); Held v. Hall, 191 Misc.2d 427, 432 (Supreme Ct., Westchester Co. 2002) (county legislator could not serve as police chief); Informal Op. 1039, 1999 N.Y. AG 45 (1999) (under common law, Town Supervisor could not serve as Town Librarian). Questions concerning the effect of any of these or other legal issues on the proposed conduct is best directed to persons with the statutory authority to render advice on such matters, such as the Attorney General of New York or the New York Joint Commission on Public Ethics. If the inquirer’s proposed action does not comply with an applicable law or regulation, then the question to this Committee is moot because applicable laws or regulations take precedence over the Rules. See Rule 1.7(b)(2) (disallowing a representation prohibited by law when a concurrent conflict of interest is present). Here, we address solely whether the inquirer’s proposed action gives rise to a conflict of interest or other concerns under the Rules.

9. Considerable literature exists on the wisdom of lawyers serving simultaneously as counsel for a corporate entity and as a member of the entity’s governing board. See, e.g., Okray, Lawyers as Corporate Board Members: A Paradigm Shift, Fed.Lwy. 12 (Mar 2013); Litov, Sepe & Whitehead, Lawyers and Fools: Lawyer-Directors in Public Corporations, (Feb. 25, 2013) (available at ssrn.com/abstract=2218855); Frievogel, An Ethics Primer for Business Lawyers 8-9 (June 2009) (available at apps.americanbar.org/buslaw/newsletter/0085/materials/ethics.pdf); C. Wolfram, Modern Legal Ethics 738-40 (1986). Although debate on the wisdom of such service is robust, nothing in the Rules, in the ABA Model Rules of Professional Conduct (the “Model Rules”), or, as best we can determine, in any state ethics rules, prohibits the practice. See Restatement (Third) of the Law Governing Lawyers §135, Cmts. d and e (Am. Law. Inst. 1998). Nevertheless, common to all analyses is an acknowledgement that conflicts and confidentiality issues inhere in the occupation of two roles that implicate the lawyer/director’s duties of care and loyalty to the organization.

10. In N.Y. State 589 (1988), we examined these issues under the predecessor of the Rules, the New York Code of Professional Responsibility (the “Code”). There, consistent with opinions from other jurisdictions we cited, this Committee said that no per se bar exists to
concurrent service as a lawyer for an organization and service as a member of its board. We then
identified three principal concerns, one of which – that a lawyer may not use board membership
improperly to solicit matters for the lawyer’s firm – is inapposite here in the context of a full-
time government lawyer heading an office the purpose of which is to represent the organization.
The other two concerns are applicable here, namely, the risk to the lawyer’s exercise of
independent professional judgment arising out of the lawyer’s role as a director, a risk
heightened, we said, when the lawyer serves as board chair; and the risk of loss of evidentiary
privileges, in particular the attorney-client privilege. See ABA 98-410 (1998) (stating similar
concerns under the Model Rules).

Conflicts of Interest

11. N.Y. State 589 was decided under DR 5-105 of the Code, which is the forerunner of Rule
1.7(a). The language of DR 5-105 differs somewhat from Rule 1.7(a), but we do not regard the
differences as meaningful to our analysis. Rule 1.7(a) says in part that, subject to Rule 1.7(b), “a
lawyer shall not represent a client if a reasonable lawyer would conclude either” that the
representation “involves the lawyer in representing differing interests” or that the representation
poses a “significant risk” that the “lawyer’s professional judgment on behalf of a client will be
adversely affected by the lawyer’s own financial, business, property or other personal interests.”
Rule 1.0(f) defines “differing interests” to include “every interest that will adversely affect either
the judgment or the loyalty of a lawyer a client, whether it be a conflicting, inconsistent, diverse,
or other interest.” Here, the inquirer’s position on the community college board, acting solely in
the capacity as trustee, is a personal interest that may differ from or adversely affect the
inquirer’s legal representation of the county and the county’s constituents.

12. A Comment accompanying Rule 1.7 describes the potential conflicts arising from the
dual roles of lawyer and director:

A lawyer for a corporation or other organization who is also a
member of its board of directors should determine whether the
responsibilities of the two roles may conflict. The lawyer may be
called on to advise the corporation in matters involving actions of
the trustees. Consideration should be given to the frequency with
which such situations may arise, the potential intensity of the
conflict, the effect of the lawyer’s resignation from the board, and
the possibility of the corporation’s obtaining legal advice from
another lawyer in such situations.

Rule 1.7, Cmt. [35].

13. We can envision a variety of circumstances when a reasonable lawyer (on which more
below) would conclude that “differing interests” may be involved in the lawyer’s dual roles or
that a “significant risk” may exist that the county attorney’s obligations to the county, its board,
and its officials will be adversely affected by the inquirer’s personal interests as a member of the
community college board. By way of illustration, the community college board must submit any
proposed acquisition or leasing of real property to the county board. As a fiduciary of
the community college, the inquirer owes a duty to the community college to promote the real estate
plan as adopted by the community college board the inquirer chairs, while at the same time
owing the county a fiduciary duty to exercise professional judgment in advising the county on that same matter. Whether the terms of any real estate transaction, in which the community college board chair presumably plays an active part in negotiating, accords with the county’s interests, with title being vested in the county, is an issue on which the county is entitled to uncompromised independent judgment. The circumstances become more problematic if, as a board member, the inquirer opposed the transaction, yet as board chair must defend a decision to the county board which the inquirer personally disfavors. We have no difficulty determining that, in circumstances like these, a reasonable lawyer would conclude that a significant risk is present that the lawyer’s interests as a community college board member imperils the lawyer’s independence as attorney for the county.

14. The inquirer must make this determination in each instance in which the interests of the county and the community college intersect. The exercise is necessarily a case-by-case analysis, including, but not limited to, budget matters, audits, contract matters in which the two entities are co-parties or counter-parties, state-directed mandates, or in the event that the inquirer is personally named in any litigation or other proceeding against the community college trustees. This last event may create special tension: When the subject is the potential liability of the college board or one or more of its members, the lawyer must assure that the lawyer can render independent professional judgment, free of overt or subtle influences that the lawyer’s own potential exposure or the lawyer’s collegial relationships with other board members may incite.

15. In any circumstance, if the lawyer determines that the conditions of Rule 1.7(a) appear, then the lawyer must decide whether, in the particular instance involved, the conflict is subject to waiver by informed consent under Rule 1.7(b), which says that, notwithstanding “the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent represent to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Waiver of Conflicts

16. “The requirements of informed consent are set forth in Rule 1.0(j).” N.Y. State 1055 ¶ 12 (2015). We have previously opined that a lawyer may accept “consent by a government entity if he or she is reasonably certain that the entity is legally authorized to waive a conflict of interest and the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.” Id.; N.Y. State 629 (1992). The inquirer should not participate in the decision whether to consent or advise the county or community college on this issue of consent. See N.Y. City 1988-5 (1988) (an attorney who is a member of a cooperative apartment board may not participate in “any decision of the [board] that will reasonably affect the lawyer’s own personal” interests as counsel to the board).
17. There remain the other three elements of Rule 1.7(b). As we have said, if the law prohibits the representation under Rule 1.7(b)(2), then no ethics issue need be considered, for the law transcends the Rules. If no law erects a barrier to the representation, then, under Rule 1.7(b)(1), the lawyer must reasonably believe, that is, both subjectively and objectively, that the lawyer is able “to provide competent and diligent representation to each affected client.” See Rule 1.0(r) (defining reasonable belief); Rule 1.0(q) (“When used in the context of conflict of interest determinations, ‘reasonable lawyer’ denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation”); N.Y. State 1048 ¶ 20 (2015) (Rule 1.7(b)(1) “has both a subjective and an objective component”). Situations may occur in which, despite the existence of a disqualifying “significant risk” under Rule 1.7(a), a disinterested lawyer could well conclude that the lawyer is able to provide the representation that Rule 1.7(b)(1) requires. In other instances, the facts may preclude such a conclusion, in which event the remedy of informed consent is unavailable.

18. In the latter instance, the question arises whether a lawyer in the county attorney’s office other than the county attorney may represent the county or community college in the matter in which a conflict prevents involvement of the county attorney. Rule 1.0(h) includes a “government law office” as a “law firm” within the meaning of the Rules. Rule 1.10(a) says that, while lawyers are associated in a law firm, “none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so” by, among other things, Rule 1.7. Thus, if Rule 1.7 disqualifies the county attorney based on a conflict, then the conflict is imputed to all other lawyers in the county attorney’s office who are aware of the conflict. Rule 1.10(d), however, says that a “disqualification prescribed by this Rule [1.10(a)] may be waived by the affected client” under the conditions set forth in Rule 1.7. This means that, though the disqualification of the county attorney is imputed to the entire county attorney’s office, the applicable entity (whether the county, the community college, or, more likely, both) may consent to representation by another attorney in that office notwithstanding that attorney’s knowledge of the conflict. N.Y. State 968 ¶ 25 (2013). Otherwise put, if that other attorney reasonably believes that the attorney may “provide competent and diligent representation to each affected client,” then the attorney may proceed with the informed consent of the affected client(s), confirmed in writing.

19. One situation may not allow informed consent no matter the foregoing. Rule 1.7(b)(3) forbids a lawyer to represent a client in “the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal.” A county and a community college may find themselves in litigation opposed to each other. We leave for a later resolution, on concrete facts, whether circumstances may exist in which the county attorney or a member of the county attorney’s may appear with informed consent in such a dispute or whether the parties would have no recourse but to retain separate independent counsel. See N.Y. State 968 ¶ 28 (leaving open the question whether consent is possible in comparable circumstances).

Protection of Confidential Information

20. The other major risk identified in N.Y. State 589 is the preservation of a client’s evidentiary privileges, especially the attorney-client privilege. The county attorney acts as counsel to the county and to the community college, but does not represent the community
college merely by reason of membership on the college board. Although evidentiary privileges are questions of law beyond our purview, N.Y. State 789 ¶ 4 (2005), Rule 1.6(a) forbids a lawyer to reveal “confidential information” – the definition of which in that Rule includes information “protected by the attorney-client privilege” – unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted by Rule 1.6(b), the elements of which need not detain us here. Our concern – one resonant in the literature to which we alluded at the outset – is that the multiple roles may create confusion about, and threaten the ability to assert, the attorney-client privilege.

21. The Comment to Rule 1.7 is again instructive:

The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of trustee might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer’s recusal as a trustee or might require the lawyer and the lawyer’s firm to decline representation of the corporation in a matter.

Rule 1.7, Cmt. [35].

22. We do not trespass the limits of our jurisdiction to recognize that, ordinarily, an attorney’s confidential communications with a client in pursuit of legal advice are subject to a claim of attorney-client privilege, whereas communications by one board member with fellow board members on matters of corporate policy are not. When the board member communicating on matters of organizational policy is also the lawyer for that organization, the communication is pregnant with potentially perplexing privilege problems – that is, whether the lawyer is communicating as a lawyer to a client or to fellow policymakers as a board member. The consequence is that, when the attorney is also serving as a board member, a danger exists that the attorney-client privilege may not protect the lawyer’s communications with the board on legal matters. This may be so even if the lawyer is explicit in distinguishing between the lawyer’s provision of legal advice and business advice as a board member, because others (such as courts) may disagree.

23. Juggling the competing responsibilities and overlapping roles of government lawyer and board member thus demands acute alertness to the capacity in which the lawyer is acting in a particular setting and to the audience’s understanding of the lawyer’s communications. Among other things, the lawyer should advise the other members of the community college board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity as trustee might not be protected by the attorney-client privilege, and a parallel disclosure is required when the lawyer is acting as county attorney before county officials in matters involving the community college. At every meeting and during every discussion, clarity is essential on whether the lawyer is participating as counsel or as a board member. That the inquirer is chair of the board enhances this need. As we said in N.Y. State 589, owing to “the chair’s more extensive involvement in decision-making concerning the management of the organization,” it is possible “if not, indeed, more likely that the responsibilities of the two roles will conflict more frequently than in the case of a mere director.” Hence, when the lawyer is participating as counsel, the lawyer must assure that precautions are taken to protect the client’s
privilege, including safeguards against public disclosure of privileged communications in board minutes or the presence of third parties whose knowledge of the communication might endanger the privilege.

CONCLUSION

24. If no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney’s office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would conclude that the dual roles do not involve a significant risk that the lawyer’s interests as a board member would adversely affect the discharge of the lawyer’s independent professional judgment on behalf of the county. If the lawyer cannot so conclude, then the lawyer may seek a waiver of the conflict from each the county and the community college if the lawyer reasonably believes that the lawyer may provide competent and diligent representation to the county and the lawyer obtains informed consent, confirmed in writing. Absent such a reasonable belief and accompanying informed consent, another lawyer in the county attorney’s office may generally act for the affected client upon informed consent confirmed in writing that the other attorney in the office may provide the requisite representation. In all events, the county attorney must take special precautions to assure the protection of evidentiary privileges that the lawyer’s dual roles might imperil.

(6-18)
New York State Bar Association  
Committee on Professional Ethics  

Opinion 1150 (4/30/2018)  

**Topic:** Solicitations and Referrals: Spouses in Related Businesses  

**Digest:** A lawyer’s spouse engaged in a non-legal business related to the lawyer’s practice area may for ethics purposes be equated to the lawyer in certain circumstances. Thus, a real estate lawyer whose spouse is a real estate broker may receive referrals from the broker/spouse only if the broker/spouse is not involved in the real estate transaction and the broker/spouse fully complies with the rules governing lawyer solicitations. A real estate lawyer may refer clients to a broker spouse only if the lawyer is not involved in the real estate transaction and may be required, in some instances, to obtain informed consent from the referred client, confirmed in writing.  

**Rules:** 1.7(a)(2); 1.7(b), 1.8(e), 1.8(i), 7.3(a)(1); 7.3(b), 8.4(a).  

**FACTS:**  
1. The inquirer is a transactional real estate attorney whose spouse is a real estate broker. The couple wishes to refer matters to each other. In some circumstances, the inquirer would refer clients to the spouse as a broker; in others, the broker/spouse would recommend the inquirer to represent a party in the closing of a real estate transaction. The inquirer understands that the inquirer and broker/spouse may not participate in their respective roles in the same real estate transaction.  

**QUESTIONS:**  
2. The inquirer poses three questions:  
   
   (a) May a real estate attorney accept referrals from a broker/spouse who has no personal involvement in the real estate transaction?  
   
   (b) May a real estate attorney refer business to a broker/spouse if the attorney does not represent any party in the real estate transaction?  
   
   (c) May a real estate attorney representing a client in the sale of property refer the selling client to the broker/spouse in connection with the client’s rental of an apartment in which the real estate attorney does not represent the selling client?  

**OPINION**  
3. The inquirer recognizes that a lawyer may not represent a party to a real estate transaction if the attorney’s spouse is involved in the transaction. This is consistent with a view
we have long held. See N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 244 (1972), *modified on other grounds* in N.Y. State 340. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the “Rules”) provides that a lawyer may not represent a client if a reasonable lawyer would conclude that “there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” The reach of a “lawyer’s own financial, business, property or other personal interests” extends to the “financial, business, property or other personal interests” of the lawyer’s spouse.

4. Such is the teaching of N.Y. State 855 (2011). There, the issue was whether a personal injury lawyer could permissibly refer a client to a litigation financing company in which the lawyer’s spouse owned a controlling financial interest. We concluded that a lawyer could not ethically do so. We reasoned that a lawyer is not allowed (with exceptions inapplicable there) to subsidize a client’s litigation, Rule 1.8(e), nor permitted to acquire a proprietary interest in a litigation, Rule 1.8(i). *Id.* ¶¶ 4-7. Thus, we said, under the Rules, the lawyer could not personally own an interest in the litigation financing company to which the lawyer referred clients for funding. *Id.* ¶ 5; see N.Y. State 1145 ¶¶ 13-20 (2018) (a lawyer may not refer clients to a litigation funding firm in which the lawyer is a direct and substantial investor). The unifying interest that marriage entails persuaded us that, if the lawyer could not directly violate Rules 1.8(e) and 1.8(i), then the lawyer could do not so indirectly with a an entity owned by a spouse. Accordingly, in interpreting Rule 1.7(a)(2), we consider any referral relationship between a lawyer and a lawyer’s spouse to implicate the lawyer’s own “financial, business, property or other personal interests.” See N.Y. State 855 ¶¶ 11-12.

5. N.Y. State 855 relied, as we do here, on Rule 8.4(a), which forbids a lawyer a lawyer “to violate or attempt to violate” a Rule “through the acts of another.” N.Y. State 855 ¶ 12. Rule 8.4(a) is of particular importance on the subject of the inquirer’s first question -- the proposed broker/spouse’s referral of parties to the inquiring lawyer.

6. Rule 7.3 regulates solicitation and recommendation of professional employment. Rule 7.3(b) defines “solicitation” to mean, in part, “any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients,” the “primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.” Rule 7.3(a)(1) specifically forbids a solicitation “by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.” In any outreach by the broker/spouse initiated by or on behalf of the lawyer/spouse, the broker/spouse recommending the inquirer as a lawyer in a real estate transaction stands in the shoes of the inquirer as if the inquirer were personally making the outreach. Thus, for instance, the exception for persons who may be contacted in person or in real time – such as former or existing clients – refers to the inquirer’s former or existing clients, not those of the broker/spouse. Likewise, Rule 7.3 sets forth other provisions on solicitations – such as recordkeeping and filing – for which the lawyer/spouse must assure compliance. By reason of Rules 1.7(a) and 8.4(a), these regulations apply to the actions of the broker/spouse as if done by the lawyer/spouse.

7. Whether a particular advertisement is a regulated solicitation “initiated by or on behalf of a lawyer” turns on the facts and circumstances of the communication. Rule 7.3(b) “makes an important distinction between communications initiated by the lawyer and those initiated by a
potential client.” N.Y. State 1049 ¶ 8 (2015); see Rule 7.3, Cmt. [2] (“A ‘solicitation’ means any advertisement” that is “initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client”) ). A spectrum exists, on one end, between an unprompted question by a person on whether the broker/spouse knows any real estate lawyers, and, on the other, the broker/spouse’s unprompted recommendation of the lawyer/spouse as a lawyer to handle a real estate transaction. See N.Y. State 1049 ¶ 17 (a web posting “directed to, or intended to be of interest only to, individuals” referring to a particular incident “would constitute a solicitation under the Rules”); N.Y. State 1014 ¶¶ 8, 10 (2014) (a current client’s recommendation of a lawyer to a person in need of legal services, made without the lawyer’s participation or knowledge, is not a solicitation “initiated by or on behalf of the lawyer”).

8. The inquirer’s second and third questions are really the same: May a lawyer refer a client to the lawyer’s broker/spouse to act in a real estate transaction in which the lawyer is not representing the referred client? The Rules set forth no categorical ban on the lawyer making such a referral. Nevertheless, the lawyer owes ongoing duties of care and loyalty to an existing client, including the duty to exercise independent professional judgment on the client’s behalf. Not every client request for a referral, no matter how unrelated to the subject of the lawyer’s representation of the client, invariably occasions these duties of care and loyalty. Rather, in our view, whether a lawyer’s referral of an existing client to a non-lawyer service provider implicates these duties depends on the circumstances. If, for example, a meaningful relationship is present between the subject matter of the lawyer’s representation of the client in a particular matter and the nature of the referral the client seeks, then we believe that the client has a reasonable right to expect that, in making the referral, the lawyer will exercise independent professional judgment on the client’s behalf. It follows that the duty to exercise independent professional judgment requires an assessment whether any conflict of interest may burden that judgment.

9. In the current inquiry, we believe that the client could reasonably believe that the subject matter of the lawyer’s representation of the client and the client’s referral request are not so attenuated as to release the lawyer from the duties of care and loyalty to the client. In our view, a reasonable lawyer could well conclude that referring a client to a broker/spouse creates a significant risk that the lawyer’s own “financial, business, property or other personal interests” will adversely affect the exercise of professional judgment in making the referral. We believe, however, that this conflict is subject to waiver by the referred client upon informed consent, confirmed in writing, pursuant to Rule 1.7(b). The requirement of consent is not onerous. The lawyer needs to disclose, at a minimum, the marital relationship with the broker/spouse, and the possibility that, if retained, any commission the broker/spouse earns in the matter could benefit the referring lawyer. This disclosure may be oral. The requirement that consent be “confirmed in writing” – which may be written by either the lawyer or the client, by email or other form of written communication – need acknowledge only that, pursuant to the requisite disclosures, the client agrees to waive any conflict.

CONCLUSION

10. A lawyer who is engaged in a transactional real estate practice and whose spouse is a real estate broker may receive client referrals from the lawyer’s spouse provided that the broker/spouse is not involved in the real estate transaction and the lawyer assures that the
broker/spouse fully complies with rules governing solicitation by lawyers. A real estate lawyer may refer a client to a broker/spouse provided that the lawyer does not represent the client in the real estate transaction and, if the circumstances suggest a conflict, the lawyer obtains the informed consent of the referred client, confirmed in writing.

(40-17)
New York State Bar Association  
Committee on Professional Ethics  

Opinion 1155 (08/27/18)  

Topic: Dual practice as lawyer and financial planner  

Digest: Whether a lawyer may provide both legal services and nonlegal services to a single client depends on whether the lawyer’s professional judgment on behalf of the client will be adversely affected by the lawyer’s financial interest in the nonlegal services. If there is no significant risk that it will, then the lawyer may provide both. Whether the nonlegal services will be subject to the provisions of the Rules depends on whether the nonlegal services are distinct from the legal services, which turns on the nature of the legal and nonlegal services and how integrated they are. But receiving brokerage commissions with respect to nonlegal products would constitute a nonconsentable conflict of interest.  

Rules: 1.7(a) & (b), 1.8(a) & (f), 5.4(a) & (b), 5.7(a), 5.8, 7.1, 7.4(a) & (c), 8.4(b).  

FACTS  
1. The inquirer is a family/matrimonial lawyer. In that connection, the inquirer may prepare Statements of Net Worth and value assets for settlement purposes. The inquirer recently received certification from a non-governmental entity as a “Certified Financial Planner,” and would like to provide stand-alone financial planning services to new and existing clients. The services would include recommendations for investments and insurance as well as education and retirement planning. The inquirer asks a number of questions about whether the provision of such services is permitted by the New York Rules of Professional Conduct (the “Rules”).  

QUESTIONS  
2. A. May a lawyer provide stand-alone financial services under a financial planning agreement to clients of the law firm and also to persons who do not receive legal services from the lawyer?  
   B. May the lawyer provide legal and financial services to the same client simultaneously?  
   C. May the lawyer include information about financial planning services in the lawyer’s newsletter and website, as long as the lawyer makes clear that these are non-legal services and do not create a lawyer-client relationship?  
   D. May the lawyer refer financial planning clients to an asset management or insurance firm (an “investment firm”) that pays the lawyer a referral fee for products purchased
from the company, as long as the referral relationship is non-exclusive and the company or the
lawyer discloses to the client that the lawyer will receive a commission? Must the disclosure be
in writing?

E. Is the relationship between the lawyer and the investment firm subject to Rule 5.8?

**OPINION**

3. Lawyers have traditionally provided both legal and nonlegal services to their clients. See
N.Y. State 206 (1971) (conditions under which dual practice is permissible). Two issues are
raised by that practice: (1) the potential conflict of interest under Rule 1.7 if the lawyer’s interest
in the nonlegal services will have an adverse effect on his or her independent professional legal
judgment on behalf of the client, and (2) whether the Rules of Professional Conduct apply to the
nonlegal services as well as the legal services.

The Potential Conflict of Interest

4. Before a lawyer may provide both legal and nonlegal services to the same client, the
lawyer must determine whether doing so would violate Rule 1.7(a), which prohibits a lawyer
from representing a client if a reasonable lawyer would conclude that a significant risk exists that
the lawyer’s professional judgment on behalf of the client will be adversely affected by the
lawyer’s own financial or business interests (unless client consent is possible and the client gives
informed consent). See N.Y. State 784 (2005) (if an entertainment management company in
which a lawyer has an interest will provide non-legal services to a client of the lawyer’s firm, the
law firm may continue to represent the client only if a disinterested lawyer would believe that the
representation of the client will not be adversely affected thereby and the client consents to the
representation after full disclosure of the implications of the lawyer’s interest in the management
company).

5. In many circumstances, whether there is a significant risk that the lawyer’s professional
judgment will be adversely affected will depend on the size of the lawyer’s financial interest in
the nonlegal services, and whether the lawyer’s actions in the legal matter may affect the
lawyer’s ability to receive the nonlegal fees. If there is a significant risk that the lawyer’s
professional judgment will be adversely affected by the non-legal financial interests, the lawyer
must disclose that possibility to the client and obtain informed consent, confirmed in writing.

6. Some conflicts are deemed to be so serious that client consent is not possible. In a series
of opinions, we have found that, in certain cases, the conflict between the legal and nonlegal
services is so severe that it cannot be cured by consent. Most of these opinions involve acting as
a lawyer and a real estate broker in the same transaction. See N.Y. State 752 (2002) (after
adoption of the predecessor to Rule 5.7, the conflict provisions of the Code of Professional
Responsibility still prohibited a lawyer from acting as a lawyer and a real estate broker in the
same transaction, even with the consent of the client); N.Y. State 208 (1971); N.Y. State 919 ¶ 3
(2012); N.Y. State 933 ¶ 7 (2012); N.Y. State 1013 ¶ 5 (2014); N.Y. State 1015 ¶ 7 (2014). The
nonconsentable conflict identified in these opinions is that the broker’s personal financial interest
in losing the brokerage transaction interferes with the lawyer’s ability to render independent
advice with respect to the transaction. See also N.Y. State 595 (1988); N.Y. State 621 (1991);

7. We have reached similar conclusions with respect to brokers of financial products. In N.Y. State 536 (1981), we were asked whether the members of a law firm could conduct a financial planning business from the same office in which they practiced law, and whether they could provide both legal and financial planning services to the same clients. We concluded that engaging in such dual practice would not be unethical, as long as the financial planning corporation did not offer any products (e.g. securities, real estate or insurance) for which it would receive a commission or other form of compensation or act as legal counsel and broker in the same transaction. We reached a similar conclusion in N.Y. State 619 (1991). There, a lawyer engaged in estate planning wanted to recommend to the lawyer’s clients the purchase of life insurance products that were an appropriate means to achieve the client’s financial or estate planning goals, but the lawyer had a financial interest in the sale of the products recommended. We concluded that this situation presented a nonconsentable conflict of interest:

A frequent topic in trust and estate planning is whether and to what extent life insurance products should be used to satisfy some of the client’s financial objectives and, is so, which ones. Where a lawyer has a financial interest or affiliation with a particular life insurance agency or company, the lawyer’s independent professional judgment would unavoidably be affected in considering the appropriateness of or recommending, life insurance products for a particular client. . . . Given the wide array of life insurance products sold by various companies at differing prices, not to mention the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client’s needs, however, we do not believe that there could be meaningful consent by the client to the lawyer having a separate business interest of this kind.

8. Consequently, we believe the inquirer could conclude that a lawyer may provide both legal and financial planning advice to clients, but could not also receive brokerage commissions with respect to financial products purchased by clients receiving the lawyer’s legal advice.

Application of the Rules of Professional Conduct to Lawyer’s Nonlegal Services

9. The remainder of this opinion assumes that the lawyer will not receive commissions for recommending particular financial products to a client who also receives legal services and that a reasonable lawyer would not conclude that there is a significant risk that the inquirer’s professional judgment on behalf of a client would be adversely affected by the lawyer’s own financial or business interests in the financial planning fees. As noted above, lawyers have long provided both legal and nonlegal services to their clients. A lawyer who does so, however, must take care that the clients are not confused about whether the lawyer is acting as a lawyer and must determine whether the provisions of the Rules apply to the nonlegal services as well as to the legal services. The issues are set forth in Comment [1] to Rule 5.7:

Whenever a lawyer directly provides nonlegal services, the lawyer must avoid confusion on the part of the client as to the nature of the lawyer’s role, so that the person for whom the nonlegal services are performed understands that the services may not carry with them the legal and ethical protections that ordinarily accompany a client-lawyer relationship.
relationship. The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter.

10. Rule 5.7(a) sets forth the lawyer’s responsibilities when the lawyer or her law firm provides nonlegal services to clients or other persons:

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

11. Paragraph (a)(1) of Rule 5.7 governs nonlegal services that are not distinct from legal services. Those nonlegal services are always subject to the Rules, no matter what disclaimer a lawyer may provide about the nonlegal services. Although the comment quoted above points to the protection of client confidences and secrets, the prohibition against representation of persons with conflicting interests, and the obligations of the lawyer to maintain professional independence, those are not the only Rule provisions that would apply to the provision of nonlegal services that are not distinct. See, e.g., N.Y. State 1135 ¶¶ 8-9 (2017) (CPA services are not distinct from legal services; consequently, under Rule 7.3, the lawyer who provides CPA services may not engage in in-person or telephone solicitation for clients).

12. Rule 5.7(a)(2) governs nonlegal services that are distinct from legal services. Those nonlegal services are still subject to the Rules if the recipient could reasonably believe that they are the subject of a client-lawyer relationship, unless the lawyer has advised the recipient in writing that the protection of the client-lawyer relationship does not apply to the nonlegal
services. Paragraph (a)(3) applies where the lawyer is the owner or agent of any entity that provides nonlegal services to a recipient. Those nonlegal services are still subject to the Rules if the recipient could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, unless the lawyer has advised the recipient that the protection of the client-lawyer relationship does not apply to the nonlegal services.

13. Because a disclaimer by the lawyer that the Rules apply to nonlegal services applies only if the legal and nonlegal services are distinct, it is important to determine whether the services are distinct. The inquirer here is a family and matrimonial lawyer. The proposed nonlegal services are those that might be provided by a financial planner, including recommendations for investments, insurance, and education and retirement planning.

**Are the services distinct?**

14. In NY State 1135 ¶ 7, noting that the Rules do not define “distinct,” we used the dictionary meaning: To be “distinct” is to be “not alike, different, not the same, separate, clearly marked off.” *Webster’s Unabridged Dictionary* 534 (2d ed. 1979). Rule 5.7(a) identifies the subjects to compare -- the service provider (the lawyer), the substance of the service to be provided (legal or nonlegal), the proposed recipient of the service (the potential client), and the manner or means by which the lawyer offers the services (that is, the degree of integration of the two services). When the lawyer provides both the legal and nonlegal services, the most important factor in determining distinctness is the degree of integration of the services. See N.Y. State 1135 ¶ 8 (state and local tax services involving tax law and accounting, including tax audit defense and certain administrative matters before tax authorities, are integrated “not distinct” services); N.Y. State 1026 ¶ 10 (2014) (services are “not distinct” when a lawyer offered nonlegal mediation services in domestic relations matters in which the retainer agreement offered to “represent the parties in drafting and filing the court papers to obtain a divorce if the mediation results in a settlement; thus the legal and nonlegal services were “intimately bound up with each other”); N.Y. State 1015 ¶ 14 (legal and nonlegal real estate services provided in the very same matter are not distinct).

15. When a patron of the nonlegal services business uses only that service and not legal services, there is no integrated whole and the nonlegal services are by definition distinct. When, however, the patron of nonlegal financial planning services is also using or has received related legal services of the lawyer, whether the legal and nonlegal services are distinct will depend on the nature of the legal and nonlegal services. When the legal services involve estate planning and the financial planning services include planning investments that would affect the size and composition of the estate or the educational or retirement plan, even if the nonlegal services are provided from a separate entity and at times are not overlapping, we believe the services would be nondistinct. Therefore, the provisions of the Rules will apply to the nonlegal services.

**Information about Investment Services in the Lawyer’s Newsletters and Website**

16. In N.Y. State 1135 (2017), we noted that, where the nonlegal services are not distinct from legal services, and thus the Rules would apply to the nonlegal services, the advertising and solicitation rules would apply to the nonlegal services. Thus, the link and the related text here would be “advertisements” and would have to comply with Rule 7.1 governing advertisements.
The same would be true if the information were not in a link but in the lawyer’s actual website or newsletter.

17. Under Rule 7.1, a lawyer may use the phrase “Certified Financial Planner” on a website, newsletter, and other advertisements subject to the Rules. In N.Y. State 1100 ¶ 3 (2016), the inquirer wanted to use the designation “Accredited Estate Planner” on a website and on business cards. We opined that such use would be a claim of specialization in violation of Rule 7.4(a), which prohibits a lawyer or law firm from identifying one or more areas of the law in which the lawyer or law firm practices, and from stating that the lawyer is a specialist in a particular field, except as provided in Rule 7.4(c). We noted that the term “certified” implied expertise. By contrast, we do not regard “financial planning” as an area of law practice, even when that service is not distinct from other services provided by the lawyer. Accordingly, we believe that a lawyer could use the designation “certified financial planner” in the firm newsletter and on its website without running afoul of Rule 7.4, as long as the advertising makes clear that financial planning is not a legal service and that the service does not involve an attorney-client relationship.

Referring Financial Planning Clients to a Third-Party Investment Firm

18. The inquirer asks whether a lawyer may refer financial planning clients to an asset management or insurance firm that pays the lawyer a referral fee for products purchased from the company, as long as the referral relationship is non-exclusive and the company or the lawyer discloses to the client that the lawyer will receive a commission. We assume that the investment firm may legally pay the attorney a fee or commission and that such payment is not otherwise illegal, because, if the fee is illegal and reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer, receipt of the payment would violate Rule 8.4(b).

19. The answer to this question is controlled by N.Y. State 1086 (2016), discussing whether a lawyer may accept a fee or commission from an investment firm for referring a client to that firm. In N.Y. State 1086, we pointed out that the question of whether a lawyer may accept a referral fee from a third-party service provider generally involves analysis of Rules 1.7(a)(2) and 1.8(f). Id. ¶ 6. As we noted above, Rule 1.7(a)(2) governs conflicts involving a lawyer’s personal interest and generally prohibits a representation where a reasonable lawyer would conclude that the representation would involve the lawyer in representing differing interests or that there is a significant risk that the lawyer’s professional judgment on behalf of the client will be adversely affected by the lawyer’s own financial, business, property or other personal interests – in either case, unless the conflict can be and is waived under Rule 1.7(b).

20. We noted in N.Y. State 1086 that a number of our prior opinions have permitted a lawyer to accept a referral fee or commission from a third-party service provider in a few restricted instances, but that other prior opinions have prohibited a lawyer from accepting such a referral fee or commission, often because the lawyer’s personal conflict of interest is so great that disclosure to and consent from the client will not cure the conflict.

21. Our opinions permit such a payment in very limited circumstances. See, e.g., N.Y. State 981 (2013) (referral fee not prohibited by Rule 1.7 where the service is not related to the lawyer’s legal services and the lawyer makes no recommendation to use the service); N.Y. State 667 (1994) (lawyer may accept referral fee from mortgage broker notwithstanding predecessors to Rules 1.7(a) and 1.8(f) as long as client consents and all proceeds are credited to client if client...
so requests); N.Y. State 626 (1992) (lawyer for lender may retain fees from a title insurance company as long as client consents and amount of the fee is disclosed to the borrower who will pay the cost of the insurance and the total amount of the lawyer’s fee is not excessive); N.Y. State 576 (1986) (lawyer may act as agent for title insurance company and also represent the buyer, seller or mortgagee in a real estate transaction consistent with the predecessors to Rules 1.7(a) and 1.8(f) as long as lawyer credits client with amount received from title insurer or the client expressly consents to the lawyer retaining the fee paid by the insurer); N.Y. State 576 (1986) (lawyer may act as agent for title insurance company and also represent the buyer, seller or mortgagee in a real estate transaction consistent with the predecessors to Rules 1.7(a) and 1.8(f) as long as lawyer credits client with amount received from title insurer or the client expressly consents to the lawyer retaining the fee paid by the insurer); N.Y. State 461 (1977) (lawyer may accept part of a fire adjuster's commission consistent with predecessor to Rule 1.7(a) if client consents and all proceeds thereof are credited to client); and N.Y. State 107 (1969) and N.Y. State 107(a) (1970) (both permitting lawyer to accept a referral fee from a financial company where the lawyer invests the client's funds in certificates of deposit, if client consents after disclosure and lawyer remits the fee to client if client so requests).

22. When these narrow circumstances do not exist, we have opined that receipt of a commission creates a nonconsentable conflict. See, e.g., N.Y. State 682 (1996) (lawyer may not accept a fee from an investment adviser for referring a client under predecessor to Rule 1.7 because disclosure and consent would not cure the lawyer’s direct and substantial conflict); N.Y. State 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y. State 619 (1991) (where estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) [business transaction with client] because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

23. In particular, N.Y. State 682 identifies two factors that determine whether the lawyer’s financial interest in a referral fee is so great that disclosure and client consent will be ineffective. A client may give informed consent for a referral fee when (1) the transaction at issue involves a product or service that is fairly uniform among providers and is required in an objectively determinable quantity, or (2) when the product or service is fairly uniform among providers and is unconnected to any particular legal services.

24. In this case, we understand that a variety of financial products could meet the financial planning objectives of the clients (i.e. the products are not fairly uniform) and that the products are not required in an objectively determinable quantity. See N.Y. State 1086 (“In N.Y. State 682 (1996) we determined that an attorney may not accept a fee from an investment advisor for referring a client to the advisor, because the services of advisors vary substantially among differing providers and the amount of funds that should ideally be entrusted to any particular adviser is not objectively determinable.”) Moreover, where the recipient also is a legal services client, the products are likely connected to the inquirer’s legal services. For these reasons, we believe the receipt of referral fees or commissions would be ethically prohibited.

25. Rule 1.8(f) provides that:

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

As we explained in N.Y. State 1086 ¶ 16 (2016), when a non-waivable conflict exists under Rule 1.7(b), we need not reach the issue whether the lawyer could meet the requirements of Rule 1.8(f).

Does it Matter that the Referral Relationship Would be Non-Exclusive?

26. The inquirer notes that the referral relationship with financial services providers would be non-exclusive. Non-exclusivity is relevant under Rule 5.8, which prohibits contractual relationships between lawyers and providers of nonlegal services, except in very limited circumstances. Rule 5.8(c) states that the restrictions of Rule 5.8 do not apply to “relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or a law firm and a nonlegal professional or nonlegal professional service firm.” The issue here, however, is not whether Rule 5.8 applies, but rather whether the lawyer has a nonconsentable financial interest. Consequently, the fact that the lawyer would have a non-exclusive relationship with the financial products provider that pays the commissions is irrelevant.

Is the Relationship Between the Lawyer and the Investment Firm Subject to Rule 5.8?

27. The inquirer asks whether the relationship between the lawyer and the investment firm would be subject to Rule 5.8, thus requiring her to give the client the “Statement of Client’s Rights In Cooperative Business Arrangements” under section 1205.4 of the Joint Appellate Division Rules. Rule 5.8 governs a contractual relationship between a lawyer and certain designated nonlegal professionals “for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services . . . .” The designated nonlegal professionals are set forth on a list jointly established and maintained by the Appellate Division in Section 1205.5 of the Joint Appellate Division Rules. That list currently includes only architecture, certified public accountancy, professional engineering, land surveying and certified social work. It does not include financial planning. A lawyer therefore could not enter into a contractual relationship with an investment firm to provide, on a systematic and continuing basis, financial planning and legal services.

28. By the terms of Rule 5.8(c), Rule 5.8 does not apply to a relationship consisting solely of nonexclusive reciprocal referral agreements or understanding between a lawyer or law firm and a nonlegal professional. Consequently, since the relationship proposed here is only a nonexclusive referral arrangement, Rule 5.8 does not apply.

CONCLUSION

29. Whether a lawyer may provide both legal services and nonlegal services consisting of financial planning to a single client depends on whether the lawyer’s professional judgment on behalf of the client will be adversely affected by the lawyer’s financial interest in the financial
planning services. If there is no significant risk that the lawyer’s professional judgment will be adversely affected, then the lawyer may provide both, but may not also receive brokerage commissions with respect to financial products purchased by clients because that would constitute a nonconsentable conflict of interest. Whether the nonlegal services will be subject to the provisions of the Rules depends on whether the nonlegal services are distinct from the legal services, which depends on the nature of the legal and nonlegal services and how integrated they are. The lawyer may advertise the legal and nonlegal services on the lawyer’s website and newsletter as long as the advertising complies with the advertising rules and the advertisements make clear that the nonlegal services are not legal services and are not protected by a client-lawyer relationship. The lawyer may not refer financial planning clients to an asset management firm that pays the lawyer a referral fee for products purchased from the company.

(10-18)
Attorney-Client
New York State Bar Association
Committee on Professional Ethics

Opinion 1142 (1/5/2018)

Topic: Delivering client file to client, maintenance of client files in electronic form

Digest: Where a lawyer keeps client files received in electronic form in that form and a former
client requests a copy of the file in paper form, the lawyer must take reasonable measures to
deliver the electronic documents in a form in which the client can access them, but the lawyer
may charge the client the reasonable fees and expenses incurred in printing out and delivering a
paper copy.

Rules: 1.15.

FACTS

1. The inquirer has a litigation practice in which most documents, such as discovery
materials and transcripts, are received or generated in electronic form. The inquirer stores such
documents in electronic form. In those instances in which the inquirer receives documents in
hard-copy form, such as documents received from clients, he scans the documents and either
returns the originals to the client or keeps them separate from the electronic file.

2. Generally, when a former client requests a copy of his or her file, the firm provides a link
to a secure, password-protected cloud storage facility containing the client’s file. One former
client, who retained the firm to represent him in a criminal matter and who is now incarcerated,
has requested that the firm send a printed copy of his electronic file to the former client’s spouse.
The inquirer states that it would be expensive to print out the electronic documents and send the
printed copy to the client. The firm has no hard-copy documents for this client.

QUESTION

3. To what extent must a lawyer provide a former client with the client file in the form in
which the client requests it?

4. Where a law firm maintains its client files in electronic form, can the lawyer charge the
former client for the costs of printing and mailing a copy of the client file to the client?

OPINION

5. The principles that largely govern the answers to these questions have been set forth in a
number of court and ethics opinions. First, except where original documents have particular
evidentiary or similar value, a lawyer is not required to maintain the client file in any particular
form. N.Y. State 940 ¶ 12 (2012) (except for “documents such as wills, deeds, contracts, and
promissory notes” or other documents whose legal effect or evidentiary value may be impaired
by destroying originals, “the Rules permit electronic copies to be kept in lieu of paper
originals”); N.Y. County 725 (1998) (“[I]n some circumstances it may be appropriate for an attorney to record the contents of a client’s file electronically or on microfilm instead of retaining the physical file, so long as the evidentiary value of such documents will not be unduly impaired by the method of storage.”). See also N.Y. State 1020 ¶ 8 (2014) (a lawyer may use cloud-based data storage and sharing tools as long as the lawyer “takes reasonable steps to ensure that confidential information is not breached”).

6. Second, it is well-established that, with some exceptions not relevant here, a former client is entitled to his or her client file. Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 91 N.Y.2d 30, 37 (1997) (holding that a former client was presumptively entitled to both “end-product” documents and “work product materials, for the creation of which they paid during the course of the firm’s representation”); N.Y. State 766 (2003) (overturning prior opinion in light of Sage Realty and concluding that “a former client is entitled to any document related to the representation unless substantial grounds exist to refuse access”). The lawyer’s ethical obligation to deliver to the client the client file upon request derives from Rule 1.15(c)(4) of the New York Rules of Professional Conduct (the “Rules”), which requires a lawyer to “promptly . . . deliver to the client . . . the funds, securities or other properties in the possession of the lawyer that the client . . . is entitled to receive.” See N.Y. State 766.

7. Third, it is likewise well-established that a lawyer can generally charge a former client the reasonable fees and expenses of assembling and delivering to the former client those documents that the client is entitled to receive. Sage Realty, 91 N.Y.2d at 38 (“as a general proposition, unless a law firm has already been paid for assemblage and delivery of documents to the client, performing that function is properly chargeable to the client under customary fee schedules of the firm, or pursuant to the terms of any governing retainer agreement”). Where a lawyer gives a client the documents to which the client is entitled, the lawyer is generally entitled to retain a copy, but because the copy is for the lawyer’s own protection and not to advance the client’s interests, the lawyer must bear the costs of making that copy. N.Y. State 780 (2004) (finding that a lawyer generally has a “right to retain copies of the file in order to collect a fee or to defend against an accusation of wrongful conduct,” but that the lawyer must pay for that copy).

8. Thus, it is clear that the inquirer must provide the client with a copy of his file, but we have not previously considered whether the lawyer must print out electronic documents if the client so requests. We conclude that where the client is unable to read electronic documents, the lawyer should make reasonable efforts to transmit the file in a form in which the client can access the documents. This conclusion is based on the premise that the property to which the client is entitled is not merely the physical medium on which the documents reside but the information contained thereon. Where a client is incarcerated, the client may not be permitted to receive a computer disk or drive containing the client file, or may not have the equipment to read the documents so they are usable in any further proceedings.

9. However, the lawyer is not obligated to pay the costs of printing out the documents. Rather, as the Court of Appeals concluded in Sage Realty, the costs of “assemblage and delivery of documents to the client” are properly chargeable to the client. 91 N.Y.2d at 38. The costs of preparing electronic documents for delivery to the client are analogous to the costs of assemblage of paper documents that were at issue in that case. See N.Y. City 2008-1 (“Although the Court of Appeals’ Sage Realty decision principally related to paper documents, we do not see any principled reason why a lawyer’s fees may not reflect the reasonable costs of retrieving
electronic documents from their storage media and reviewing those documents to determine the client’s right of access.

As in Sage Realty, however, a different answer on who pays for the printing might obtain where “the law firm has already been paid for” printing a copy of documents, as when a lawyer receives a transcript in hard copy form at a per-page fee that was charged to the client. Here, the inquirer states that there are no such hard copy documents for this client, so they are not the subject of his inquiry. Similarly, because the inquirer was retained by a paying client, we have no occasion to consider whether a different result might obtain where the lawyer was appointed by a court to represent an indigent client.

CONCLUSION

10. Where a lawyer keeps client files received in electronic form in that form and a former client requests a copy of the file in paper form, the lawyer must take reasonable measures to deliver the electronic documents in a form in which the client can access them. The lawyer may charge the client the reasonable fees and expenses incurred in printing out and delivering a paper copy.

(34-17)
New York State Bar Association
Committee on Professional Ethics

Opinion 1144 (1/29/2018)

**Topic:** Communications with Client; Withdrawal from Representation of Difficult Client

**Digest:** A lawyer may place time and manner limitations on communications with a client provided the lawyer promptly informs and consults with the client on matters within the lawyer’s duty of communication. If a breakdown occurs in communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client subject to any applicable rule of court.

**Rules:** Rules 1.2(a), 1.4, 1.16, 1.14.

**FACTS**

1. A court assigned the inquirer to represent an individual who has been charged with several criminal offenses. Prior to the inquirer’s assignment, the client had been represented by a number of other lawyers. The client has unsuccessfully moved to have the inquirer relieved as counsel.

2. The client has ongoing mental health issues for which the client receives treatment. According to the inquirer, the client is physically intimidating, verbally abusive, and often non-responsive. The inquirer wishes to impose some restrictions on the time and manner in which the client may communicate with the lawyer, including limiting communications to scheduled appointments and written communications. If the client does not abide by these limits, or otherwise continues to disrupt communications, then the lawyer wishes to consider withdrawing from the representation.

**QUESTIONS**

3. May a lawyer place reasonable restrictions on the time and manner of communications between the lawyer and client? Under what circumstances may a lawyer withdraw from representation of a difficult client?

**OPINION**

4. The New York Rules of Professional Conduct (the “Rules”), in Rule 1.4, entitled “Communication,” sets out a lawyer’s obligations concerning communicating with clients. The Rule says:

   (a) A lawyer shall:
(1) promptly inform the client of:

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

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

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

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

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

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

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

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

5. Three core principles can be drawn from this Rule. First, a lawyer must keep the client apprised of material circumstances and developments in the matter. Second, a lawyer must comply with a client’s reasonable requests for information. Third, a lawyer must reasonably consult with a client both about the means of accomplishing the client’s objectives and about other decisions regarding the representation, some of which are within the client’s province to decide. See Rule 1.2(a). On the first two of these – on developments in the matter and requests for information from the client – the lawyer must communicate promptly. Although a lawyer’s obligations under this Rule are thus robust, neither Rule 1.4 nor other Rules prescribe a specific manner of communication, except when a Rule requires written instruments in specific circumstances, see, e.g., Rule 1.5(b), (c), (d)(5) (governing legal fees); Rule 1.7(b) (governing informed consent to conflicts); Rule 1.8(a) (governing business transactions with clients).

6. Rule 1.4’s obligation that a lawyer keep the client “reasonably informed about the status of the matter” can be fairly read to require a lawyer to use methods of communication that are effective, timely, and not unduly burdensome to the client, but the Rule does not prevent a lawyer from selecting the manner of communication. Rule 1.4(a)(4) specifically indicates that a lawyer need comply only with reasonable requests for information, thereby allowing lawyers the flexibility to curtail conversations or meetings that stray beyond the relevant substance of the representation. This provision expresses the Rule’s recognition that some clients may thrust upon their lawyers burdensome, immaterial requests for information and that lawyers need not meet such unreasonable demands.
7. Similarly, Rule 1.4 does not prohibit a lawyer from controlling the timing of client communications. Other than the general requirement that developments in the case and responses to reasonable requests for information be “promptly” communicated, the Rule does not curtail a lawyer’s discretion to schedule the specific timing of lawyer-client communications. Notably, Comment [4] to Rule 1.4 provides that when a prompt response to a client’s reasonable request for information is not feasible, the lawyer (or a member of the lawyer’s staff) should “acknowledge receipt of the request and advise the client when a response may be expected.” That Comment is consistent with the notion that a lawyer – often balancing competing obligations – needs to have reasonable latitude to schedule the timing of client communications.

8. Consistent with the foregoing, we believe that the Rules do not prohibit a lawyer from responding to a challenging client by limiting the time and manner of communications with the client as long as the lawyer fulfills the substantive communicative requirements contained in Rule 1.4. Cf. N.Y. State 1124 (2017) (noting that no provision in the Rules mandates how lawyers must communicate with each other and that lawyers should work out between themselves the methods of communication that will best facilitate resolution of the matter at hand). Hence, a lawyer may limit communications to scheduled appointments or to some form of written transmission readily accessible to the client.

9. Whether and when a lawyer may seek to withdraw from representing a difficult client is controlled by Rule 1.16, which governs “declining or terminating representation.” Rule 1.16(c) provides, in relevant part, that “except as stated in paragraph (d), a lawyer may withdraw from representing when, among other reasons, the “withdrawal can be accomplished without material adverse effects on the interests of the client,” Rule 1.16(c)(1), “the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out the representation effectively, Rule 1.16(c)(7), or “the lawyer believes in good faith, in a matter before a tribunal, that the tribunal will find the existence of other good cause for withdrawal” Rule 1.16(c)(12). Rule 1.16(d), in turn, provides that “if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”

10. Because the inquirer has already appeared as counsel for the client in the pending matter, the inquirer may withdraw only with the permission of the tribunal. The reasons for permissive withdrawal in Rule 1.16(c) are disjunctive, so any one of the reasons set forth there may suffice. The most obvious candidate emerging from the facts – and thus the most apparent reason why the inquirer may seek permission for withdrawal from the tribunal – is whether the client’s conduct will prevent the inquirer from “carry[ing] out the representation effectively” under Rule 1.16(c)(7). In most representations, and certainly in defending against a criminal prosecution, effective representation requires meaningful communication between a lawyer and client. If the client’s verbal abuse and non-responsiveness result in a collapse of meaningful communication, then effective representation is almost certainly not possible. See Roy D. Simon & Nicole Hyland, Simon’s New York Rules of Professional Conduct Annotated, 959 (2017) (noting, as examples of client conduct that make it unreasonably difficult to carry out representation effectively, “a client’s constant calls to talk about the case or request information beyond what is fruitful or reasonable” and “a client’s abusive or threatening communications to the lawyer”); see also Cahill v. Donahoe, 2014 WL 3339787 (W.D.N.Y. 2014) (granting motion to withdraw
where “the attorney-client relationship is no longer productive and . . . the discord that has characterized their relationship over many months appears irreparable.”). If an irreparable disintegration in communication has occurred, the inquirer may ask the court for permission to withdraw.

11. That the client here has mental health issues for which the client is receiving ongoing treatments makes it appropriate to mention Rule 1.14, which governs a lawyer’s responsibilities to clients with diminished capacity. See N.Y. State 949 ¶ 20 (2012). Under Rule 1.14, a lawyer must “as far as reasonably possible” maintain a normal lawyer-client relationship. That a client suffers from mental illness does not diminish the lawyer’s responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2]. Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. “Any condition that renders a client incapable of communicating or making a considered judgment on the client’s own behalf casts additional responsibilities on the lawyer.” Rule 1.14, Cmt. [1]. “Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances.” N.Y. State 986 ¶ 12 (2013). In N.Y. State 986, we added (at ¶ 13):

Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client’s interests.

12. If the inquirer remains on the case, the inquirer will need to maintain a normal lawyer-client relationship “as far as reasonably possible,” but, in evaluating the situation, the inquirer may conclude that protective actions are available to facilitate communication with the client so that the lawyer may enhance the prospect of effective representation.

CONCLUSION

13. A lawyer may place reasonable limitations on the timing and manner of client communications. When there is a breakdown of communications between a lawyer and client such that representation cannot be carried out effectively, the lawyer may seek to withdraw from representing the client.

(36-17)
New York State Bar Association  
Committee on Professional Ethics  

Opinion 1154 (6/5/18)  

**Topic:** Third-Party Payor: Duty to communicate with client of insurance-assigned counsel  

**Digest:** An attorney assigned by insurance carrier to represent an insured owes a duty of loyalty to the insured, and may not restrict or limit communications to the insured concerning the representation, notwithstanding attorney’s concerns that insured may use such information adversely to financial interests of insurance carrier.  

**Rules:** 1.2(a), 1.4; 1.6; 1.7(a)(2); Rule 1.7(b), Rule 1.8(f).  

**FACTS**  

1. The inquirer is a New York attorney whom an insurance carrier chose to defend an indemnification counterclaim stemming from a fatal car collision.  

2. The automobile accident killed the driver husband and passenger wife. The Surrogate’s Court appointed one of the couple’s children as Executor of the Husband’s Estate and the Wife’s Estate. The Executor retained both an Estate Counsel and a Litigation Counsel. The Litigation Counsel commenced a wrongful death action on behalf of the Executor, acting for the Estates, as well as the Executor and the couple’s other children in their individual capacities and as Beneficiaries of the Estates. Defendants in the wrongful death action are the owner and driver of the other vehicle involved in the collision. The wrongful death action seeks compensatory damages on behalf of the Beneficiaries, comprising lost monetary support, and survival damages on behalf of the Estates, consisting of physical and emotional pain and suffering of the decedents prior to death. The Beneficiaries of both Estates are the same.  

3. In answer to the wrongful death complaint, defendants have asserted an affirmative defense of comparative fault that the husband’s negligence in operating the vehicle was the sole, or at least a contributing, cause of the accident. Defendants have also asserted a counterclaim solely against the Husband’s Estate for indemnification. Neither the affirmative defense nor the counterclaim would reduce the recoveries by the other plaintiffs in the wrongful death action, but a successful affirmative defense could reduce any damages awarded to the Husband’s Estate and a successful indemnification claim could result in the Husband’s Estate reducing the exposure of defendants to damages awarded plaintiffs. Litigation Counsel represents the Executor of each Estate and the Beneficiaries in opposing the comparative fault affirmative defense. The Wife’s Estate and the Beneficiaries have interposed no direct claim against the Husband’s Estate.  

4. The inquirer is the attorney assigned by the husband’s insurance carrier to defend the Husband’s Estate against the indemnification counterclaim. The inquirer believes that the insurance coverage may not be adequate to satisfy an award entered on the counterclaim.
Although limiting the husband’s culpability for the accident is in the interest of all plaintiffs in the wrongful death action, the inquirer believes that tension exists between the interests of the Husband’s Estate, on the one hand, and the Wife’s Estate and the Beneficiaries, on the other hand, with respect to the wrongful death damages each allegedly sustained. On the inquirer’s view, the Executor, acting on behalf of the Husband’s Estate in defense of the counterclaim, should seek to minimize the wrongful death damages to reduce the exposure of the Husband’s Estate to indemnify defendants, but, acting on behalf of the Wife’s Estate and the Beneficiaries, the Executor should seek to maximize the wrongful death damages allegedly due them.

5. The Executor has directed the inquirer to communicate solely with Estate Counsel about the defense of the indemnification counterclaim. The inquirer is concerned, however, that confidential information received by the Estate Counsel from the inquirer will be shared by the Estate Counsel or by the Executor with Litigation Counsel. That confidential information would ordinarily concern, among other things, the inquirer’s strategy for addressing the husband’s allegedly culpable conduct and the compensatory wrongful death damages sustained by the Wife’s Estate and the survival damages sustained by the Beneficiaries. For this reason, the inquirer wishes to circumscribe the communications to the Estate Counsel, because the inquirer believes that unrestricted communications may adversely affect the insurance company’s exposure on the indemnification counterclaim.

QUESTION

6. May an insurer-assigned counsel for an insured limit communications to the counsel’s client based on a belief that the client may use the communications to the financial detriment of the insurance company?

OPINION

7. The answer is no. Our opinions address solely the ethics issues that an inquirer poses about the inquirer’s own prospective conduct; we do not opine on the conduct of others. Thus, we offer no opinion here on whether Litigation Counsel has a conflict of interest in representing all plaintiffs in the wrongful death action. Our focus is confined to the inquirer’s duties to the inquirer’s client, the Executor of the Husband’s Estate, under the New York Rules of Professional Conduct (the “Rules”). The Rules make clear that the inquirer’s obligations are to serve the interests of the Executor as the Executor defines them.

8. Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless:

   (1) the client gives informed consent;
   (2) there is no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship; and
   (3) the client’s confidential information is protected as required by Rule 1.6.

9. Rule 1.8(f) makes clear that, no matter the source of the lawyer’s compensation for representing a client, the lawyer’s duty is to the client, not to the one paying the lawyer’s fees.

10. Comment 11 to Rule 1.8(f) elaborates:
Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company).... Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer’s professional judgment and there is informed consent from the client.

Rule 1.8, Cmt. [11]; see Feliberty v. Damon, 72 N.Y.2d 112, 120 (1988) (“[T]he paramount interest independent counsel represents is that of the insured, not the insurer.”); N.Y. State 1102, ¶ 3 (2016) (“When the insurance company designates counsel for the assured, whether the designated counsel is inside or outside counsel, the lawyer’s client is the insured and not the insurance company.”); N.Y. State 716 (1999) (the lawyer’s primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client).

11. An insurer-compensated lawyer thus owes the same duties to a client as if the client were paying the lawyer’s fees. Rule 1.2(a) provides that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”

12. Rule 1.4 imposes obligations on attorneys, among other things, promptly to inform the client of material developments in the matter, Rule 1.4(a)(1)(iii); reasonably to consult about the means by which the client’s objectives are to be achieved, Rule 1.4(a)(2); to keep the client reasonably informed about the matter, Rule 1.4(a)(3); promptly to comply with the client’s reasonable requests for information, Rule 1.4(a)(4); and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, Rule 1.4(b).

13. It may be that the inquirer’s counterclaim defense litigation strategy, if freely reviewed and discussed with the Executor or Estate Counsel in conformance with inquirer’s obligations under Rules 1.2(a) and 1.4, and subsequently disclosed to Litigation Counsel, might harm the interests of the insurance carrier, but consideration of the insurer’s interests in discharging the lawyer’s obligations under Rules 1.2(a) and 1.4 would constitute interference with the inquirer’s attorney-client relationship with the client Executor that Rule 1.8(f) forbids. See Feliberty, 72 N.Y.2d at 120 (“[t]he insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client”) (citations omitted). Any strategy for opposing and defeating the comparative fault affirmative defense and the indemnification counterclaim is just one element of the larger picture that the Executor must consider, a picture which also presumably takes account of the limited coverage that the insurance carrier provides for the counterclaim. Accordingly, the inquirer’s communications with the Executor, or with the Estate Counsel at the direction of the Executor, should be free and unrestricted, guided by the requirements of Rules 1.2(a) and 1.4. The use to which the Executor or Estate Counsel choose to make of those communications, in what they determine to be the overall best interests of the Estates and the Beneficiaries, is for the Executor or Estate Counsel to decide, not the inquirer.
14. The inquirer should take one other consideration into account, an issue we raise owing solely to the inquirer’s desire to limit communications to the inquirer’s client based on the inquirer’s concern about the Husband’s Estate’s insurer.

15. The inquirer may rely on repeat business from the insurance carrier, whether through a longstanding business relationship between the carrier and the inquirer’s law firm, personal relationships with claims agents or other carrier employees, or otherwise. We are mindful, for example, that insurance companies often maintain lists of approved counsel to represent their insureds in particular types of matters. Being so listed is obviously in the financial and business interests of the law firm. We recognize, too, that the interests of the insurer and the insured are not always perfectly aligned. Although each has an interest in minimizing a claimant’s recovery, an insured may have other interests in seeking a resolution of a matter that the insurer regards as excessive in light of the insurer’s more narrow interests – a situation that this inquiry potentially poses.

16. If a lawyer depends on an insurance carrier for a regular flow of business, and the lawyer believes that the lawyer’s insured client is pursuing a course of action that the lawyer considers potentially injurious to the insurance carrier, then the lawyer must determine whether, under Rule 1.7(a), a reasonable lawyer would conclude that a “significant risk” exists “that the lawyer’s professional judgment on behalf” of the insured client “will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” If the lawyer determines that such a “significant risk” is present, then, consistent with Rule 1.7(b), the lawyer must assess whether the lawyer nevertheless reasonably believes that the lawyer “will be able to provide competent and diligent representation” to the insured client and obtain the insured client’s informed consent, confirmed in writing, to continuing the representation. In that circumstance, the inquirer should disclose the inquirer’s relationship with the insurer and, if able to provide the requisite representation, obtain the Executor’s consent to continuing the representation.

CONCLUSION

17. An insurer-assigned lawyer may not limit or restrict communications to the lawyer’s client even if the possibility exists that the client may share the communications with others whose interests may be in conflict with those of the insurer.

(5-18)
Formal Opinion 2018-1: Protective Action, and Disclosures of Confidential Information, to Benefit a Prospective Client with Diminished Capacity.

Topic: Implied authority to take action, and to disclose confidential information, for the protection of a prospective client with diminished capacity.

Digest: A lawyer may take reasonably necessary protective action when a prospective client has seriously diminished capacity, cannot adequately act in his or her own interest, and is at risk of substantial physical, financial or other harm unless action is taken. When taking protective action, the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the prospective client to the extent reasonably necessary to protect the prospective client’s interests. In interacting with the court or others in the course of taking protective action, the lawyer must clarify that the lawyer is not the prospective client’s representative and that no client-lawyer relationship exists with the prospective client.

Rules: Rules 1.6, 1.14, 1.18, 3.3, 4.1 & 8.4.

Question: Under what circumstances may a lawyer take protective action for the benefit of a prospective client who, because of seriously diminished capacity, appears to be unable to form a client-lawyer relationship?

Opinion:

I. Introduction

Rule 1.14 of the New York Rules of Professional Conduct (collectively, the “New York Rules” or “Rules”) addresses the representation of a client whose capacity to make adequately considered decisions in the representation is diminished. Rule 1.14(b) describes the action that a lawyer may take to protect an incapacitated client from substantial harm, and Rule 1.14(c) recognizes that the lawyer in this situation is “impliedly authorized” to disclose the client’s confidential information to the extent reasonably necessary to protect the client’s interests. This Opinion addresses whether a lawyer may make comparable disclosures to benefit one who is not a current client but a prospective client who, because of incapacity, cannot retain the lawyer. The following scenario illustrates the problem that we address.

A tenant is brought to a legal services lawyer by a neighbor who is concerned that the tenant faces eviction from her apartment in the very near future for failing to pay rent. The lawyer would be willing and able to represent the tenant and defend the tenant in an upcoming hearing in housing court if it were ethically and legally permissible to do so. But while meeting with the tenant, the lawyer becomes concerned that the tenant is so seriously mentally incapacitated that she cannot retain the lawyer. The lawyer would nevertheless like to help, even in the absence of a client-lawyer relationship. This could include contacting a government protective-services agency or disclosing the tenant’s diminished capacity to the housing court, which may then contact the protective services agency and stay proceedings. To do so, however, the lawyer would disclose information learned in the course of the meeting concerning the tenant’s incapacity and her legal problem.
II. Analysis

The threshold question in the above scenario is whether the tenant is a “prospective client,” in which case, the lawyer would have a duty of confidentiality to the tenant under Rule 1.18, even if no client-lawyer relationship was ever established. Under Rule 1.18(a), “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.” Rule 1.18(b) provides that: “Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”

If the tenant is not a prospective client (or current or past client) to whom confidentiality is owed, the legal services lawyer may try to help her using whatever information the lawyer learned from meeting with her or from other sources. Although the lawyer cannot act as the tenant’s agent in negotiating or contracting with the landlord or in filing a motion or answer in the litigation, because the lawyer does not represent her, the lawyer is not foreclosed from drawing on his legal knowledge, training and expertise to provide the kinds of help that a knowledgeable and concerned friend or neighbor who is not in a fiduciary relationship with the tenant might provide. See NYSBA Ethics Op. 486 (1978) (discussing permissible actions when lawyer learns, unrelated to the course of the representation, of a client’s intention to commit suicide).

Where the law permits, efforts to assist an incapacitated non-client may include (1) notifying a social services agency or a government adult-protective agency of the person’s condition and need for assistance, (2) acting as a witness, intervenor or “friend of the court” to apprise a court of the person’s incapacity and suggest that the court stay the proceedings or take other appropriate measures, or (3) requesting to be appointed the person’s attorney by the court, or moving for the appointment of another to serve as the person’s legal guardian or guardian ad litem. In dealing with a court, a government or social services agency, or another third party, the lawyer must be mindful of the duty of candor. See Rules 3.3(a)(1), 4.1, 8.4(c). The lawyer may not deceptively convey that the person is a client. When seeking protective action for the benefit of someone who is not a client, the lawyer must be clear that he is not acting as the person’s legal representative or agent, since otherwise a court or third party may assume that a client-lawyer relationship exists.

If, however, the tenant has “consult[ed] with a lawyer about the possibility of forming a client-lawyer relationship with respect to” the eviction matter, the tenant is a “prospective client” and the lawyer will have a confidentiality duty that may limit the protective action that the lawyer may take. Under Rule 1.18(a), the person’s capacity is irrelevant to the question of whether she is a prospective client. Even if, in hindsight, a person lacks the capacity to retain the lawyer, the person becomes a “prospective client” once she consults with the lawyer about forming a client-lawyer relationship in a matter.

In the scenario described above, where the tenant is brought to the legal services lawyer’s office by a neighbor, the tenant is likely to be a “prospective client” under Rule 1.18(a). The tenant will not be a “prospective client” if she is entirely uncommunicative, if she never
expresses interest (either herself or though her neighbor) in possibly retaining the lawyer and never otherwise communicates about this possibility, or if the lawyer, out of concern about the tenant’s capacity, ends the meeting before such a discussion takes place. She will be a prospective client, however, if she consults the lawyer about the possibility of securing the lawyer’s assistance, no matter how briefly.

Assuming the tenant not only discusses the possibility of enlisting the legal services lawyer’s help but affirmatively requests or consents to the lawyer’s help, and assuming the lawyer is willing to provide legal assistance, the next question is whether the lawyer may enter into a client-lawyer relationship with the tenant. A client-lawyer relationship may be established by court appointment even absent an agreement between the client and the lawyer, but the relationship “ordinarily is a consensual one.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, Cmt. b (2000); see also NYSBA Ethics Op. 746 (2001) (a client-lawyer relationship is “ordinarily created by express or implied agreement between the lawyer and the client”). Where a prospective client’s capacity is in doubt, the lawyer must make a threshold determination of whether she has the capacity to consent to the lawyer’s representation. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, supra, § 14, Cmt. d.

If a lawyer proposes to enter into an enforceable client-lawyer contract – for example, one including a provision to pay legal fees – the lawyer must ascertain whether the prospective client has the legal capacity to enter into such a contract. However, the standard governing whether a person has the capacity to form a client-lawyer relationship under the Rules is not necessarily as stringent as the standard governing a person’s legal capacity to enter into a fee agreement or the standard governing a person’s legal capacity to retain a lawyer to act as an agent on her behalf. Forming a client-lawyer relationship under the Rules for certain purposes, such as for purposes of obtaining legal advice or the lawyer’s help in communicating with others, may require no more than the ability to consent to, or to express a desire for, the lawyer’s help.

1 See Kentucky Bar Association, Op. KBA E-440 (Nov. 18, 2016) (“[A]t the initial state of the representation the lawyer’s first duty is to determine whether the client suffers from diminished capacity to the extent the client cannot legally consent to an attorney-client contract.”); Colorado Bar Association (“CBA”), Op. 126 (May 6, 2015) (“The lawyer’s assessment of a client’s capacity also is important when the lawyer initiates representation of the client. A client-lawyer relationship is a matter of contract, and the client’s capacity to contract is a legal issue.”); see also ABA Commission on Law and Aging, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 1 (2005) (“[T]he lawyer must determine whether or not a prospective client has sufficient legal capacity to enter into a contract for the lawyer’s services. Failing this, representation cannot proceed.”).

2 Even if an individual lacks capacity to enter into an enforceable contract, the individual may have capacity to express a desire for a lawyer’s assistance and thereby enter into a client-lawyer relationship. For example, children may be able to retain lawyers even if, because of their minority, any fee agreement between the child and the lawyer would be unenforceable. See, e.g., In re Anonymous, 333 N.Y.S.2d 897, 899 (Fam. Ct. Rockland Cnty. 1972) (“It would therefore clearly appear that the intention of the Legislature in enacting sections 241 and 249 of the Family Court Act was to provide for representation of a minor in a Family Court proceeding by a Law Guardian or counsel of his own choosing and not by a guardian ad litem pursuant to CPLR. In this case, the respondent was very ably represented throughout the entire proceeding by ‘counsel of his own choosing’ and therefore there was no necessity for the appointment of a Law Guardian in this matter.”).
Rule 1.14 presupposes that, in many cases, individuals with diminished capacity are capable of maintaining a client-lawyer relationship. Comment [1] to Rule 1.14 recognizes that a lawyer may represent someone who is incapable of making certain considered judgments on her own behalf, although this condition “casts additional responsibilities upon the lawyer.” The Comment further recognizes that a lawyer may be able to represent someone who is severely incapacitated and unable to make legally binding decisions. Comment [6] to Rule 1.14 provides guidance regarding how to determine whether an existing client has decision-making capacity but not regarding whether an individual has the capacity to retain a lawyer in the first place.

If the tenant discusses the possibility of enlisting the legal services lawyer’s help but the lawyer does not agree to represent her because the lawyer has not yet been able to determine whether the tenant has the requisite capacity to enter into a client-lawyer relationship, has concluded that she lacks capacity to form such a relationship, or has serious doubts about her capacity, the lawyer nonetheless has a confidentiality duty to the tenant as a “prospective client.” Rule 1.18(b) provides that the scope of the confidentiality duty owed to a prospective client is the same as that owed under Rule 1.9 to a former client. Rule 1.9 in turn provides that as a general matter, a lawyer owes the same confidentiality duty to a former client as to a current client under Rule 1.6. In other words, under the New York Rules, a lawyer owes essentially the same confidentiality duty to a prospective client as to a current or former client.

Rule 1.6, which establishes the scope of the duty of confidentiality, allows a lawyer to disclose or use a current client’s “confidential information” not only when the client explicitly

3 For example, Comment [6] states that in making this determination, the lawyer:

should consider and balance such factors as: (i) the client’s ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

See also Nancy M. Maurer, Ethical Issues in Representing Clients with Diminished Capacity, ALBANY LAW SCHOOL RESEARCH PAPER NO. 24, 1-16 (citing Paul Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 3 UTAH L. REV. 515, 537 (1987)) (“It is not enough to consider whether the client’s decisions are unwise but, rather, whether the client can give reasons for specific decisions and understand the consequences. The lawyer should not ‘confuse eccentric with incapacity.’”).

4 Under Rule 1.18(c) and (d), the lawyer may also have a responsibility to detect and resolve potential conflicts of interest between the prospective client and the lawyer’s existing or future clients, which would be triggered by this duty of confidentiality to the prospective client. The issue of conflicts of interest involving prospective clients is beyond the scope of this Opinion.

5 Rule 1.9(c)(2) provides: “A lawyer who has formerly represented a client . . . shall not thereafter . . . 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.”

6 Rule 1.6 defines “confidential information” to include “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.” See generally NYCBA Formal Op. 2017-2 (2017). The confidentiality duty would not apply if the particular information that the lawyer intends to disclose to the social services agency or to the housing court does not fit within this
gives “informed consent” but also when the lawyer is “impliedly authorized” to reveal or use client confidences. Specifically, Rule 1.6(a)(2) provides that a lawyer may reveal confidential information if “the disclosure is impliedly authorized to advance the best interests of the client and is otherwise reasonable under the circumstances or customary in the professional community.” Ordinarily, the lawyer’s implied authority to disclose a client’s confidential information arises out of the lawyer’s “general authority [as an agent] to take steps reasonably calculated to further the client’s objectives in the representation.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, supra, § 61, Cmt. b.

Even though a lawyer is not the former or prospective client’s agent, the concept of “implied authorization” applies to former and prospective clients no less than to current clients, because Rules 1.18 and 1.9 generally incorporate the same confidentiality duty as is applied to current clients under Rule 1.6. Some of the circumstances where a lawyer may disclose a former client’s confidential information to advance the former client’s best interests have been identified in past opinions.7

When a current client is incapacitated, a lawyer is “impliedly authorized” to disclose client confidences in limited circumstances to protect the client from imminent harm. This ethical authority is explicitly recognized by Rule 1.14(c) and in Comments to the Rules. Rule 1.14 provides in full as follows:

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

definition. Ordinarily, the lawyer’s opinion that a client or prospective client is mentally incapacitated will be, in the very least, “embarrassing . . . if disclosed.” We assume in our hypothetical situation that disclosure of this information would in fact be embarrassing and that this information is therefore “confidential information” as defined by Rule 1.6.

7 See NYSBA Ethics Op. 1084 (2016) (concluding that under Rule 1.6(a)(2) a lawyer may reveal confidential information learned from a deceased former client to a co-defendant based on the former client’s desire to exonerate the co-defendant); NYSBA Ethics Op. 1078 (2015) (advising that, pursuant to Rule 1.6(a)(2), a lawyer for a deceased former client may disclose to former client’s son that he never drafted the former client’s will, did not refer the former client to another law firm and did not have an original copy of the will); NYSBA Ethics Op. 970 (2013) (concluding that a lawyer for a deceased former client may have authority to disclose a client’s file to executor of former client’s estate under Rule 1.6(a)(2)).
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

See also Rule 1.14, Cmt. [8] (“When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.”); Rule 1.6, Cmt. [5] (“Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client’s interests.”). 8

Although Rule 1.14(c), by its terms, applies only to incapacitated current clients, the same underlying principle applies with regard to incapacitated former and prospective clients. Prior authorities recognize that a lawyer has implied authorization to disclose confidences to protect an incapacitated former client, where the termination of the client-lawyer relationship is occasioned by the client’s incapacity. 9 Likewise, a lawyer has implied authority to make reasonably necessary disclosures in emergency circumstances to protect a prospective client who is unable to form a client-lawyer relationship due to incapacity. This is especially true where protective action would advance the very objective for which the prospective client discussed the possibility of forming a client-lawyer relationship.

Therefore, in the scenario with which this Opinion began, if the lawyer reasonably concludes that the tenant lacks capacity to retain the lawyer and is at risk of substantial harm because she will imminently be evicted from her apartment, the lawyer may take protective action, which may include limited action in the eviction proceeding reasonably necessary to preserve the status quo or otherwise avoid imminent and irreparable harm. 10 In taking protective

8 As the above cited Comments recognize, Rule 1.14(c) is simply a special application of Rule 1.6(a)(2) in the case of a client under Rule 1.14(a) whose “capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason.” Even in the absence of Rule 1.14(c), a lawyer would be impliedly authorized under the confidentiality rule to make disclosures where reasonably necessary to protect the incapacitated client from imminent harm, as this Committee and others recognized before New York adopted Rule 1.14 in 2009. See NYCBA Formal Op. 1987-7 (1987) (finding that a lawyer may disclose client’s mental disability in conservatorship proceeding even absent client’s consent); NYSBA Ethics Op. 746 (advising that an incapacitated client’s attorney may petition for appointment of a guardian).

9 See Restatement (Third) of the Law Governing Lawyers, supra, § 31, Cmt. e (recognizing that, despite the general rule that an agent’s authority ends when the principal is incapacitated, a lawyer may continue to act to protect the rights of an incapacitated client, but must act consistently with the provisions governing the representation of clients with diminished capacity); see also NYSBA Ethics Op. 746 (“Under agency principles, a lawyer’s authority to act for the client would ordinarily terminate upon the client’s permanent, total incapacity as it would upon the client’s death, but this is not invariably true. In court proceedings, for example, it may be appropriate for a lawyer to continue to represent the totally incapacitated client in order to protect his or her interests.”) (internal citation omitted).

10 This Opinion does not attempt to address the full range of actions that a legal services lawyer may take to advance the interests of an incapacitated prospective client. In some scenarios, the lawyer may simply communicate concerns to a social worker who is in a position to help the prospective client; in others, the lawyer may explore
measures, the lawyer is impliedly authorized to reveal confidential information about the prospective client to a court, a social services agency or another, but only to the extent reasonably necessary to protect the prospective client’s interests. Because disclosing the prospective client’s diminished capacity could potentially prejudice the prospective client, the lawyer must ascertain whether the court or third party will act adversely to the prospective client and, even if satisfied that disclosure will be helpful, disclose only as little confidential information as is necessary for the prospective client’s protection. See Rule 1.14, Cmt. [8]. If the lawyer is uncertain whether proposed action will benefit or prejudice the prospective client, the lawyer should seek guidance from a professional with greater knowledge and experience. Ordinarily, there will be no reasonable necessity to disclose confidential information to protect the person when adequate assistance is already available – for example, when the incapacitated individual already has a lawyer, agent or other representative who can protect the individual. See ABA Model Rule 1.14, Cmt. [9].

Our interpretation of the Rules is consistent with, but does not depend on, the ABA’s Comments on Emergency Legal Assistance to Rule 1.14 of the ABA Model Rules of Professional Conduct which many states other than New York have adopted. Comments [9] and [10] provide guidance to lawyers assisting individuals with seriously diminished capacity on an emergency basis in the absence of a client-lawyer relationship. Comment [9] to Model Rule 1.14 provides in part:

In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person’s behalf has consulted with the lawyer.

Comment [10] states in part:

more significant action. See, e.g., CBA Op. 126 (“If the lawyer becomes aware during the first meeting with a prospective client that the prospective client may not have the capacity to enter into an agreement to form the client-lawyer relationship, the lawyer may consider other alternatives, including speaking to other appropriate persons.”). If a lawyer undertakes legal protective action for an incapacitated party who is not a current client, such as an emergency motion to stay an incapacitated tenant’s eviction, the lawyer must be candid with the court, as previously discussed. Unless appointed to serve as the tenant’s lawyer or to serve the tenant in another fiduciary capacity, the lawyer must be clear that he is acting in his individual capacity and not as the tenant’s lawyer, although the tenant may have discussed the possibility of securing the lawyer’s help.

11 As noted at the outset, this Opinion focuses on the ethical considerations applicable when a lawyer responds to an emergency facing someone with seriously diminished capacity who is a “prospective client” – that is, someone who “who consults with a lawyer about the possibility of forming a client-lawyer relationship.” The principles discussed here may apply differently when helping an incapacitated person who is threatened with imminent and irreparable harm but who has never been a client or prospective client – e.g., when the tenant’s friend acting in good faith seeks the lawyer’s help for a tenant with seriously diminished capacity with whom the lawyer cannot speak because of time constraints or because of the seriousness of the tenant’s incapacity. In this scenario, the lawyer would not be subject to a confidentiality duty to the tenant under Rule 1.18. In communicating with the court or others, however, the lawyer would have to be candid about the lawyer’s lack of any direct relationship or interaction with the tenant. The lawyer would also have to consider whether the tenant’s friend was a client or prospective client and, if so, what ethical obligations follow. We leave fuller discussion of this scenario to another day.
A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person.

We caution that these Comments to the ABA Model Rules do not imply that a lawyer has legal authority, comparable to that of a lawyer for a current client, to act on behalf of an incapacitated non-client in an emergency. Rather, they recognize that there is meaningful assistance that a lawyer can offer to a person with diminished capacity in an emergency situation even when the person is not a current client.12

III. Conclusion

We conclude that a lawyer may take reasonably necessary protective action when a prospective client has seriously diminished capacity, cannot adequately act in his or her own interest, and is at risk of substantial physical, financial or other harm unless action is taken. When taking protective action, the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the prospective client to the extent reasonably necessary to protect the prospective client’s interests. In interacting with the court or others in the course of taking protective action, the lawyer must clarify that the lawyer is not the prospective client’s representative and that no client-lawyer relationship exists with the prospective client.

12 It appears that the NYSBA’s drafting committee decided not to recommend the adoption of Comments [9] and [10] out of concern that they may be read to “authorize a lawyer to act [as a lawyer] on behalf of one who has not sought to employ the lawyer and with whom the lawyer has no [client-lawyer] relationship.” Maurer, supra, 1-19 (quoting Committee on Standards of Attorney Conduct, Proposed New York Rules of Professional Conduct Rules 1.14, Reporters’ Notes, 206). We believe the fairer interpretation of the ABA’s Comments is that, as this Opinion describes, lawyers can help protect incapacitated non-clients in emergency situations as long as they avoid conveying the misimpression that they are acting as the non-clients’ lawyers. In any event, we do not consider the NYSBA’s decision not to adopt the ABA’s Comments as a rejection of any of the principles or guidance set forth in this Opinion.
FORMAL OPINION 2017-5: An Attorney’s Ethical Duties Regarding U.S. Border Searches of Electronic Devices Containing Clients’ Confidential Information

TOPIC: Duty to protect clients’ confidential information from disclosure that the client has not authorized; disclosure when border agents claiming lawful authority request access to clients’ confidential information; obligations upon disclosing clients’ confidential information.

DIGEST: Under the New York Rules of Professional Conduct (the “Rules”), a New York lawyer has certain ethical obligations when crossing the U.S. border with confidential client information. Before crossing the border, the Rules require a lawyer to take reasonable steps to avoid disclosing confidential information in the event a border agent seeks to search the attorney’s electronic device. The “reasonableness” standard does not imply that particular protective measures must invariably be adopted in all circumstances to safeguard clients’ confidential information; however, this opinion identifies measures that may satisfy the obligation to safeguard clients’ confidences in this situation. Additionally, Under Rule 1.6(b)(6), the lawyer may not disclose a client’s confidential information in response to a claim of lawful authority unless doing so is “reasonably necessary” to comply with a border agent’s claim of lawful authority. This includes first making reasonable efforts to assert the attorney-client privilege and to otherwise avert or limit the disclosure of confidential information. Finally, if the attorney discloses clients’ confidential information to a third party during a border search, the attorney must inform affected clients about such disclosures pursuant to Rule 1.4.

RULES: 1.1, 1.4, 1.6

QUESTION: What are an attorney’s ethical obligations with regard to the protection of confidential information prior to crossing a U.S. border, during border searches and thereafter?

OPINION:

I. Introduction

This opinion considers attorneys’ ethical obligations in the context of the following scenario:

An attorney traveling abroad with an electronic device (such as a smartphone, portable hard drive, USB “thumb drive,” or laptop) that contains clients’ confidential information plans to travel through a U.S. customs checkpoint or

* After the opinion was issued in July 2017, U.S. Customs and Border Protection issued a revised Directive on Border Search of Electronic Devices (CBP Directive No. 3340-049A), dated January 2018, to “provide guidance and standard operating procedures” for border searches of electronic devices; and federal policy may continue to change. The general principles set forth in the opinion nonetheless remain applicable.
border crossing. During the crossing, a U.S. Customs and Border Protection ("CBP") agent claiming lawful authority demands that the attorney “unlock” the device and hand it to the agent so that it may be searched. The attorney has not obtained informed consent from each client whose information may be disclosed in this situation.1

Searches of electronic devices at the U.S. border when travelers enter or leave the U.S. may include not only a physical inspection of these devices but also the review of information stored on them, such as emails, text messages and electronically-stored documents.2 CBP policy permits U.S. customs agents to review any information that physically resides on travelers’ electronic devices, including those of U.S. citizens, with or without any reason for suspicion, to demand disclosure of social media and email account passwords, and to seize the devices pending an inspection.3 In recent years, searches of cell phones, laptop computers, and other electronic devices at border crossings into the U.S. have become increasingly frequent. According to the Department of Homeland Security, more than 5,000 devices were searched by CBP agents in February 2017 alone. By way of comparison, that is about as many U.S. border searches of electronic devices as were undertaken in all of 2015, and just under a quarter of the approximately 23,877 U.S. border searches of such devices undertaken in 2016. Further, border agents have access to software tools that increase the effectiveness and thoroughness of device searches, and they have the ability to copy the contents of such devices to be reviewed later. To be sure, the 5000-plus individuals whose devices were searched in February 2017 amounted to only a fraction of the 1,069,266 individuals entering into the United States daily as reported by the CBP.4 However, depending on the extent of the search, border agents’ review of information

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1 This opinion does not address the potentially more difficult questions regarding an attorney’s duty to protect confidential information while in, or crossing into, foreign countries. While the principles described in this opinion regarding safeguarding clients’ confidential information are broadly applicable, efforts reasonably necessary to protect clients’ confidences at foreign borders and in foreign countries will vary depending on the laws and practices of those countries. Lawyers must therefore familiarize themselves with those laws and practices and determine what safeguards to adopt before transporting clients’ confidential information abroad.

2 In this respect, border searches apparently differ from Transportation Security Administration (TSA) searches of electronic devices in connection with domestic air travel. This Opinion only addresses ethical issues in connection with international travel.

3 See June 20, 2017 Due Diligence Questions for Kevin McAleenan, Nominee for Commissioner of U.S. Customs and Border Protection (CBP), available at: http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/170712-cpb-wyden-letter.pdf. According to this policy statement, CBP agents do not condition U.S. citizens’ reentry on the provision of passwords; nor do they currently review information that, although not physically resident on the devices, is accessible on remote servers via electronic devices. According to CPB, inspections may reveal that electronic devices contain contraband (e.g., child pornography), or that information on electronic devices reveals a threat to national security. CBP reserves the right to cooperate with other investigative agencies, which may seek other kinds of information on travelers’ electronic devices.

4 U.S. CUSTOMS AND BORDER PATROL, SNAPSHOT: A SUMMARY OF CBP FACTS AND FIGURES (2017), available at https://www.cbp.gov/sites/default/files/assets/documents/2017-Mar/CBP-Snapshot-UPDATE-03022017-FY16-Data.pdf (citing daily statistic of 1,069,266 average daily arrivals in February 2017; only 326,723 were by air). Based on these figures, only approximately 0.017% of all individuals...
stored on, or accessible via, individuals’ electronic devices may lead to the disclosure of substantial information, and therefore constitute a significant intrusion for the selected individuals. Under these circumstances, attorneys would benefit from guidance regarding their ethical obligations prior to crossing a U.S. border and when confronted with a border agent’s request to search electronic devices containing clients’ confidential information.

This Opinion addresses an attorney’s ethical obligations under the Rules with respect to U.S. border searches of electronic devices containing clients’ confidential information at three points in time: before the attorney approaches the U.S. border; at the border when U.S. border agents seek to review information on the attorney’s electronic device; and after U.S. border agents review clients’ confidential information.

Before crossing the U.S. border, both Rule 1.6(c), which requires “reasonable efforts to prevent . . . unauthorized access to” clients’ confidential information, and the duty of competence under Rule 1.1, require an attorney to take reasonable measures in advance to avoid disclosing confidential information in the event border agents seek to search the attorney’s electronic device. The “reasonableness” standard does not imply that particular protective measures must invariably be adopted in all circumstances to safeguard clients’ confidential information; however, this Opinion identifies measures that may satisfy the obligation to safeguard clients’ confidences in this situation.

At the border, if government agents seek to search the attorney’s electronic device pursuant to a claim of lawful authority, and the device contains clients’ confidential information, the attorney

entering the United States on a given day are subject to an electronic device search, even with the increase in such searches in 2017. There are no available statistics evidencing how many of the 5,000 searched devices belonged to members of the bar.


6 These circumstances have prompted the ABA to seek changes and clarifications to existing regulations and practices regarding the treatment of confidential and privileged materials during border searches. See American Bar Association, Preservation of Attorney-Client Privilege and Client Confidentiality for U.S. Lawyers and Their Clients During Border Searches of Electronic Devices (May 5, 2017), available at https://dlbzbizgnk95t.cloudfront.net/0921000/921316/letter.pdf.

7 The legality of a border search of an electronic device is apparently unsettled. See Abidor v. Napolitano, 10-cv-04059 (E.D.N.Y. Dec. 31, 2013) (dismissing claims challenging authority of CBP and ICE to detain electronic devices at borders, even absent reasonable suspicion); United States v. Cotterman, 709 F.3d 952, 965 (9th Cir. 2013)(border agents need reasonable suspicion of illegal activity before they could conduct a forensic search, aided by sophisticated software, of the defendant’s laptop but a manual search of a digital device is “routine” and so a warrantless and suspicionless search is “reasonable” under the Fourth Amendment); United States v. Kim, 103 F. Supp. 3d 32, 52 (D.D.C. 2015)(suppressing evidence found during a search of a laptop at the border after border agents made an exact copy of the laptop’s hard drive and searched it with forensic programs). See generally Patrick G. Lee, Can Customs and Border Official Search Your Phone? These Are Your Rights, Propublica (Mar. 13, 2017) https://www.propublica.org/article/can-customs-border-protection-search-phone-legal-rights; U.S. Customs and Border Patrol Directive No. 3340-049, Border Search of Electronic
may not comply unless “reasonably necessary” under Rule 1.6(b)(6), which permits disclosure of clients’ confidential information to comply with “law or court order.” Under the Rule, the attorney first must take reasonable measures to prevent disclosure of confidential information, which would include informing the border agent that the device or files in question contain privileged or confidential materials, requesting that such materials not be searched or copied, asking to speak to a superior officer and making any other lawful requests to protect the confidential information from disclosure. To demonstrate that the device contains attorney-client materials, the attorney should carry proof of bar membership, such as an attorney ID card, when crossing a U.S. border.

Finally, if the attorney discloses clients’ confidential information to a third party during a border search, the attorney must inform affected clients about such disclosures pursuant to Rule 1.4.

II. Before Crossing the U.S. Border Attorneys Must Undertake Reasonable Efforts to Protect Confidential Information

Attorneys have a duty under Rule 1.6 to protect clients’ confidential information. Rule 1.6(a) provides that an attorney may not knowingly use or disclose confidential information without the client’s informed consent or implied authorization. Few principles are more important to our legal system.

Additionally, an attorney’s obligation to safeguard clients’ confidential information against unintentional or unauthorized disclosure is implicit in the duty of competence under Rule 1.1. See ABA Formal Op. 11-459 (Aug. 4, 2011) (an attorney’s duty to “act competently to protect the confidentiality of clients’ information . . . is implicit in the obligation of Rule 1.1 to ‘provide competent representation to a client’”); cf. NYCBA Formal Op. 2015-3 (April 2015) (“In our view, the duty of competence includes a duty to exercise reasonable diligence in identifying and avoiding common Internet-based scams, particularly where those scams can harm other existing clients.”).

Further, the obligation to safeguard clients’ confidences is now codified in Rule 1.6(c), as amended January 1, 2017, which specifically requires attorneys to “make reasonable efforts to prevent the inadvertent or unauthorized use or disclosure of, or unauthorized access to,” confidential information obtained from prospective, current, and former clients. See Rule 1.1, cmts. [16] & [17]. The duty to protect client confidences from “unauthorized access” refers to access that is not authorized by the client. Cf. Rule 1.6, cmts. [5] & [13] (indicating that “authorization” must be given by the client, not the lawyer). Consequently, just as lawyers must take reasonable measures to prevent third parties’ unlawful access to client confidences, attorneys must refrain from conduct, including otherwise permissible disclosures, that may result DEVICES CONTAINING INFORMATION (2009) available at https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf.

8 Rule 1.6(a) defines “confidential information” as “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.”
in third parties’ *lawful* access to a client’s confidential information without the client’s consent. *See, e.g.*, NYCBA Formal Op. 2017-2 (Feb. 2017) (an attorney may not report attorney misconduct to the disciplinary authority where doing so might lead the disciplinary authority to require the production of a client’s confidential information without the client’s consent).

Prior opinions have recognized, in particular, that the duty to safeguard clients’ confidences includes a responsibility to take reasonable protective measures when engaging in electronic communications with clients and in electronically storing clients’ confidential information. *See, e.g.*, ABA Formal Op. 477R (May 11, 2017); ABA Formal Op. 11-459 (Aug. 4, 2011); ABA Formal Op. 99-413 (March 10, 1999); Cal. Ethics Op. 2010-179 (Jan. 1, 2010); NYSBA Ethics Op. 842 (Sept. 10, 2010); NYSBA Ethics Op. 709 (Sept. 16, 1998). To be “reasonable,” protective measures need not be foolproof: making reasonable efforts “does not mean that the lawyer guarantees that the information is secure from any unauthorized access.” NYSBA Ethics Op. 842, *supra*. Further, the adequacy of an attorney’s efforts to protect clients’ confidences depends upon a multitude of facts. *See, e.g.*, ABA Formal Op. 477R, *supra* (“Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a ‘reasonable efforts’ determination.”); ABA Formal Op. 11-459, *supra* (“particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters”).

Rules 1.1 and 1.6(c) require attorneys to make reasonable efforts prior to crossing the U.S. border to avoid or minimize the risk that government agents will review or seize client confidences that are carried on, or accessible on, electronic devices that attorneys carry across the border. Except in the unlikely event that an attorney has each affected client’s consent to disclose confidential information during a border search, such disclosure would be “unauthorized” under Rule 1.6(c) and the attorney would be obligated to make “reasonable efforts” to prevent such disclosure from occurring. In the above hypothetical, the attorney has not obtained informed consent from the clients whose confidential information would be affected, as is required to obtain authorization under Rule 1.6(a)(1). Further, it is hard to imagine a situation where disclosure to a government official during a border search would “advance the best interests of the client” and therefore be “impliedly authorized to advance the best interests of the client” under Rule 1.6(a)(2).

The necessary degree of precaution depends on the circumstances, including the sensitivity of the confidential information that is at risk. See Rule 1.6, cmt. [16] (listing relevant considerations). “Reasonableness” by its nature depends on the multiple facts and circumstances of a given situation and does not lend itself to categorical or bright-line rules. If in doubt, an attorney may, and would be well-advised to, take more cautious measures than what is minimally required by Rule 1.6(c).

Comment [16] to Rule 1.6 provides guidance by identifying the following non-exclusive list of factors relevant to the reasonableness of an attorney’s efforts:

1. The sensitivity of the information;
2. The likelihood of disclosure if additional safeguards are not employed;
3. The cost of employing additional safeguards;
4. The difficulty of implementing the safeguards; and
5. The extent to which the safeguards adversely affect the attorney’s ability to represent clients (e.g., by making a device or software excessively difficult to use).

Thus, the various facts and circumstances bearing on whether protective efforts are “reasonable” to avoid disclosing client confidences at the border – and therefore minimally required by Rule 1.6(c) – may include the type and nature of the confidential information involved; the need to bring the information across the border in the first instance; the safeguards used by the attorney; the availability, costs, and challenges associated with implementing additional safeguards; an attorney’s resources and capabilities; and any factors that may affect the likelihood of disclosure, such as the jurisdiction from which the attorney is returning. Among other things, these considerations suggest that an attorney should not carry clients’ confidential information on an electronic device across the border except where there is a professional need to do so, and especially that attorneys should not carry clients’ highly sensitive information except where the professional need is compelling.9

Given the rapid pace of technological development and the disparities between the practices, capabilities, and resources of attorneys, it would be difficult or impossible to identify a list of minimum mandatory prophylactic or technical measures for an attorney to adopt before crossing the U.S. border. Not only would such a list run the risk of quickly becoming obsolete, but it would also be of limited use, since “reasonableness” standards are not amenable to a one-size-fits-all analysis. Moreover, expectations regarding reasonable efforts are likely to evolve over time as the relevant technology changes, as practices regarding border searches and knowledge of those practices develop, and as attorneys become increasingly aware of the risks of disclosure and the available means to avoid them. However, as discussed below, an attorney must generally (i) evaluate the risks presented by traveling with confidential information and (ii) based on the risk analysis, consider what safeguards to employ to limit or reduce the risk that confidential information will be accessed or disclosed in the event of a search. While no particular safeguard is invariably required by the Rules as long as the attorney’s protective efforts are “reasonable,” we recommend that attorneys consider adopting the following safeguards to protect confidential information or to reduce the risk of its disclosure.

i. Evaluating the Risk of Disclosure and Potential Harms that May Result

An attorney must evaluate the risks associated with crossing the U.S. border while in possession of clients’ confidential information, including the likelihood that border agents will demand and secure disclosure of clients’ confidential information, the sensitivity of the information carried, and the harm that would result if the information were disclosed. This requires familiarity with the relevant laws and practices regarding border searches of electronic devices whenever an attorney opts to carry a device that contains, or can access, clients’ confidential information. Cf. NYSBA Ethics Op. 782 (Dec. 8, 2004) (requiring lawyers to use “reasonable care” to stay

9 An attorney whose client outside the United States provides electronically-stored confidential information (e.g., on a thumb drive) must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Rule 1.4(a)(2). The attorney should consider whether this obligation triggers, under all the circumstances, the need for a discussion concerning the manner in which the client’s confidential information will be transported and the attendant risks.
abreast of technological advances and the potential risks associated with using, storing, maintaining, accessing, and transmitting confidential information).

Although, as noted above, U.S. border searches of electronic devices (at the time of this opinion’s publication) are relatively infrequent, any unauthorized disclosure of a client’s confidential information entails a violation of the client’s expectation of confidentiality and is presumptively harmful, regardless of whether the unauthorized recipient otherwise uses the information to the client’s detriment. See, e.g., NYCBA Formal Op. 2017-2, supra (attorney may not provide client’s confidential information to the disciplinary authority without the client’s consent, even if the client would not be “embarrassed or harmed if the information were disclosed to the disciplinary authority specifically”). Moreover, even if a border search seems highly unlikely, that consideration should be weighed against the amount and sensitivity of the information held and any additional harm that may result from its disclosure without the client’s consent. For certain lawyers, practices, organizations, or clients, providing government agencies with access to sensitive confidential data can cause significant harm, which would strongly suggest in such circumstances that it would be unreasonable to carry confidential information that may be disclosed to border agents, even for legitimate professional reasons, if avoidable.

**ii. Implementing Safeguards**

Attorneys must also evaluate the efficacy, cost, and difficulty associated with implementing safeguards to prevent or limit confidential information. Rule 1.6, cmt. [16]. As discussed above, whether safeguards are ultimately required as minimally “reasonable efforts” depends on the circumstances of each such situation.

The simplest option with the lowest risk is not to carry any confidential information across the border. One method of avoiding the electronic transportation of clients’ confidences involves using a blank “burner” phone or laptop, or otherwise removing confidential information from one’s carried device by deleting confidential files using software designed to securely delete information, turning off syncing of cloud services, signing out of web-based services, and/or uninstalling applications that provide local or remote access to confidential information prior to the border search.

10 Traveling attorneys should also be aware that many customs and border protection agencies may demand that the attorney provide access to any information stored on a device (including information that may be otherwise protected or encrypted), and in addition may have access to software tools that allow them to copy the entirety of a device and/or permit the recovery of deleted information that has not been securely deleted using specialized tools. Test Results for Mobile Device Acquisition, DEPT. OF HOMELAND SECURITY, https://www.dhs.gov/publication/mobile-device-acquisition (last visited Apr. 11, 2017).

11 Comment [16] further recognizes that a client may “require the lawyer to implement special security measures not required by this Rule, or . . . give informed consent to forgo security measures that would otherwise be required by this Rule.” As this Comment reflects, an attorney may not forgo “reasonable efforts” to protect the client’s confidential information, as required by Rule 1.6(c), unless the client gives informed consent. Further, especially when it is necessary to travel with highly sensitive information, an attorney would be well advised to discuss with the client whether to adopt special security measures, beyond those required by Rule 1.6(c) in the situation.
crossing to the border.\textsuperscript{12} This is not to say that attorneys traveling with electronic devices must remove all electronically stored information. Some electronic information, including many work-related emails, may contain no confidential information protected by Rule 1.6(a). Even when emails contain confidential information, the obligation to remove these emails from the portable device before crossing the border depends on what is reasonable. As previously discussed, this turns on the ease or inconvenience of avoiding possession of confidential information; the need to maintain access to the particular information and its sensitivity; the risk of a border inspection; and any other relevant considerations.

A lawyer with access to greater resources or who handles more sensitive information should consider technological solutions that permit secure remote access to confidential information without creating local copies on the device; storing confidential information and communications in secure online locations rather than locally on the device; or using encrypted software to attempt to restrict access to mobile devices.

While attorneys thus have various available alternative means of safeguarding clients’ confidential information from disclosure at the U.S. border, whatever measures an attorney adopts must, under all the facts and circumstances, be “reasonable” to protect this information.\textsuperscript{13}

III. At the U.S. Border Attorneys May Disclose Clients’ Confidential Information Only to the Extent “Reasonably Necessary” to Respond to a Government Agent’s Claim of Lawful Authority

Assuming an attorney has made reasonable efforts to protect clients’ confidential information before crossing the U.S. border, in many cases the attorney will entirely avoid carrying clients’ confidential information in an electronic device. In other cases, when attorneys’ electronic devices do contain clients’ confidential information, the information will be limited to what is professionally necessary, and ideally limited in significance, so that clients would not be significantly harmed by its disclosure. But regardless of how limited or insignificant the information may appear to be, attorneys subject to a border search may disclose clients’ confidential information only to the extent permitted by Rule 1.6.

Rule 1.6(a) prohibits attorneys from knowingly disclosing “confidential information” or using such information to the disadvantage of the client, for the lawyer’s own advantage, or for the advantage of a third person, unless the client gives informed consent or implied authorization or the disclosure is permitted by Rule 1.6(b). Rule 1.6(b), in turn, permits, but does not require, an attorney to use or disclose confidential information in specified exceptional circumstances, of which only 1.6(b)(6) is relevant to the above-described border-search scenario.

Rule 1.6(b)(6) permits an attorney to “reveal or use” confidential information to the extent the attorney “reasonably believes necessary . . . when permitted or required . . . to comply with other

\textsuperscript{12} Prior to any such deletion, however, an attorney should ensure that the information deleted is securely backed up so that the attorney may use the information at a later date.

Comment [13] to Rule 1.6 recognizes that this exception permits the disclosure of a client’s confidential information insofar as reasonably necessary to respond to an order by a “governmental entity claiming authority pursuant to . . . law to compel disclosure.” The exception applies even when the validity of the relevant law or court order, or its application, is subject to legal challenge, although, in ordinary circumstances, compliance is not “reasonably necessary” until any available legal challenge has proven unsuccessful. See Rule 1.6, cmt. [13] (“Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason.”).

In general, disclosure of clients’ confidential information is not “reasonably necessary” to comply with law or a court order if there are reasonable, lawful alternatives to disclosure. Even when disclosure is reasonably necessary, the attorney must take reasonably available measures to limit the extent of disclosure. See, e.g., ABA Formal Op. 10-456 (July 14, 2010). For example, compliance with a subpoena or court order to disclose confidential information is not “reasonably necessary” until the attorney or the attorney’s client (or former client) has asserted any available non-frivolous claim of attorney-client privilege. See, e.g., NYCBA Formal Op. 2005-3 (March 2005). Likewise, a lawyer must ordinarily test a government agency’s request for client confidential information made under color of law. See, e.g., NYCBA Formal Op. 1986-5 (July 1986) (“If presented with a request by a governmental authority for production of information pertaining to escrow accounts when a client is a target of an investigation, a lawyer must, unless the client has consented to disclosure, decline to furnish such information on the ground either that it is protected by the attorney-client privilege or that it has been gained in the course of a confidential relationship. . . . If disclosure is [subsequently] compelled [by a court], it will not breach a lawyer’s ethical obligation with respect to his client's confidences or secrets.”).

At the same time, attorneys need not assume unreasonable burdens or suffer significant harms in seeking to test a law or court order. See, e.g., NYSBA Ethics Op. 945 (Nov. 7, 2012) (indicating that “when the law governing potential disclosure is unclear, a lawyer need not risk violating a legal or ethical obligation, but may disclose client confidences to the extent the lawyer reasonably believes it is necessary to do so to comply with the relevant law, even if the legal obligation is not free from doubt”). For example, although an attorney must consult with the client about an adverse ruling, see Rule 1.4, the attorney need not finance an appeal of the court’s ruling much less intentionally defy the trial court and accept a contempt-of-court order. See, e.g., ABA Formal Op. 473 (Feb. 17, 2016) (“Requiring a lawyer to take an appeal when the client is unavailable places significant and undue burdens on the lawyer.”); NYCBA Formal Op. 2005-3, supra (“Should the court overrule the objection or assertion of privilege or other protection, the attorney may then testify about the privileged or protected material”).

Rule 1.6(b)(6) permits an attorney to comply with a border agent’s demand, under a claim of lawful authority, for an electronic device containing confidential information during a border search. While legal challenges in court might be made to the relevant law or its application, it would be an unreasonable burden to require that attorneys, having made reasonable efforts to protect clients’ confidential information, forgo reentry into the United States or allow themselves to be taken into custody while litigating the lawfulness of a border search. Unless court rulings
forbid such border searches, an attorney may ultimately comply with a border agent’s demand. Likewise, in this unusual circumstance, it would ordinarily be impracticable and of no utility for attorneys stopped at the border to consult with the affected clients before complying. (The obligation to consult thereafter is addressed below in Part IV.)

That said, compliance is not “reasonably necessary” unless and until an attorney undertakes reasonable efforts to dissuade border agents from reviewing clients’ confidential information or to persuade them to limit the extent of their review. Accord Rule 1.6(c) (requiring “reasonable efforts” to protect clients’ confidential information). Such efforts would include informing the border agent that the subject devices or files contain privileged or confidential materials, requesting that such materials not be searched or copied, asking to speak to a superior officer and making any other reasonably available efforts to protect the confidential information from disclosure. To add credence to the claim of attorney-client privilege, an attorney should carry and be prepared to present some form of attorney identification, such as a court-issued identification or in the very least a business card, when crossing a U.S. border. An attorney should know the relevant law and practices and should consider bringing a printed copy of a given customs agency’s policies or guidelines regarding searches of privileged information.14

The practical significance of clearly informing the border agent of the presence of confidential or privileged information arises from the regulations of the CBP and the U.S. Immigration and Customs Enforcement Bureau (“ICE”), which each recognize the sensitivity of legal materials. The regulations require a border agent confronted with a claim of legal privilege to seek an additional review or authorization prior to conducting a search of the information that the attorney claims is confidential or privileged. This obligation to obtain further review applies “only to the extent that the agent Officer suspects that the content of such a material may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of” CBP or ICE, respectively.15 Although it is uncertain how border agents apply this “suspicion”


15 Section 5.2.1 of CBP Directive No. 3340-49, provides: “Officers may encounter materials that appear to be legal in nature, or an individual may assert that certain information is protected by attorney-client or attorney work product privilege. Legal materials are not necessarily exempt from a border search, but they may be subject to the following special handling procedures: If an Officer suspects that the content of such a material may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the Officer must seek advice from the CBP Associate/Assistant Chief Counsel before conducting a search of the material, and this consultation shall be noted in appropriate CBP systems of records. CBP counsel will coordinate with the U.S. Attorney’s Office as appropriate.” U.S. CUSTOMS AND BORDER PATROL DIRECTIVE NO. 3340-049, BORDER SEARCH OF ELECTRONIC DEVICES CONTAINING INFORMATION (2009) available at https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf

Section 8.6(2)(b) of the parallel ICE Directive similarly provides: “Special Agents may encounter information that appears to be legal in nature, or an individual may assert that certain information is protected by the attorney-client or attorney work product privilege. If Special Agents suspect that the
standard in actual searches, attorneys should take advantage of this possible avenue for preventing the disclosure of clients’ confidential information.

IV. If Confidential Information Is Disclosed During a Border Search, An Attorney Must Promptly Inform Affected Clients

If an attorney’s electronic device containing clients’ confidential information is reviewed or seized at the border, the attorney must notify affected clients of what occurred and of the extent to which their confidential information may have been reviewed or seized.\(^{16}\) This obligation arises out of the general duty under Rule 1.4 to communicate with the client about the status of a matter and about decisions that the client faces in the representation. See Rule 1.4(a)(1)(i) & (a)(3); see also Rule 1.6, cmt. [13]; compare NYCBA Formal Op. 2015-6 (June 2015) (“Given that lawyers have a duty to preserve client files (at least for some period of time), it follows that an attorney may have a duty to notify the client or former client when such files have been inadvertently destroyed.”); NYSBA Ethics Op. 1092 (May 11, 2016) (“a lawyer must report to a client a significant error or omission by the lawyer in his or her rendition of legal services”). Disclosure will provide the client an opportunity to determine whether to file a legal challenge, assuming one is available, or to undertake any other available responses. Whether attorneys have legal obligations in this situation independently of the Rules is a question outside the scope of this opinion.

CONCLUSION:

Before crossing the U.S. border, an attorney must make reasonable efforts to protect against the disclosure of clients’ confidential information in response to a demand by border agents. Because “reasonable efforts” depend on the circumstances, no particular safeguards are invariably required. However, attorneys should generally (i) evaluate the risks of traveling with confidential information and (ii) consider what safeguards to implement to avoid or reduce the risk that confidential information will be accessed or disclosed in the event of a search. At the border, if government agents seek to search the attorney’s electronic device pursuant to a claim of lawful authority, and the device contains clients’ confidential information, the attorney may not comply until first making reasonable efforts to assert the attorney-client privilege and to otherwise avert or limit the disclosure of confidential information, e.g., by asking to speak to a superior officer. To add credence to the claim of attorney-client privilege, an attorney should carry attorney identification and be familiar with the customs agency’s policies or guidelines.

content of such a document may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of ICE, the ICE Office of the Chief Counsel or the appropriate U.S. Attorney’s Office must be contacted before beginning or continuing a search of the document and this consultation shall be noted in appropriate ICE systems.”

\(^{16}\) In the context of responding to disclosures as a result of hacking, legal data security experts recommend, where possible, applying forensic analysis to systems after a breach occurs since the appropriate response must be guided by the scope of the breach. A similar approach may be warranted when an electronic device has been confiscated, i.e. a lawyer should take available steps to learn what was disclosed. See Allison Grande, 5 Steps to Take When Your Law Firm Is Hacked, LAW360 (Jul 22, 2014 3:16 PM EDT), https://www.law360.com/articles/556398/5-steps-to-take-when-your-firm-is-hacked.
regarding searches of privileged information. Finally, if the attorney discloses clients’ confidential information to a third party during a border search, the attorney must inform affected clients about such disclosures.

Reissued May 2018
Fees
New York State Bar Association
Committee on Professional Ethics

Opinion 1143 (1/18/2018)

Topic: IOLA accounts; court appointed referee; deposit of third-party funds

Digest: An attorney who is appointed as a referee to conduct foreclosure sales pursuant to Part 36 of the Rules of the Chief Judge may deposit funds received from those sales into an IOLA account or special account maintained by the lawyer’s firm or by the lawyer.

Rules: 1.15, 5.1.

FACTS

1. The inquirer is an attorney who is occasionally appointed as a referee to conduct foreclosure sales pursuant to Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36). Most often, when the inquirer conducts these foreclosure sales, a bank representative is present at the sale to receive any sale proceeds, which are typically owed to a third party. At other times, no bank representative is present, so the sale proceeds are left in the possession of the inquirer.

2. The inquirer is a member of a law firm. The inquirer wishes to deposit the excess funds from foreclosure sales into the law firm’s Interest on Lawyer Account (“IOLA”), but the inquirer’s firm is reluctant to permit a deposit into the firm’s IOLA account because only the inquirer, not the firm, was appointed as referee.

QUESTION

3. When an individual member of a law firm, and not the law firm itself, is appointed pursuant to 22 NYCRR Part 36 as a referee to conduct a foreclosure sale, may the attorney/referee deposit sale proceeds funds owed to a third party into the IOLA account of the individual attorney’s law firm?

OPINION

4. Rule 1.15(b)(1) of the N.Y. Rules of Professional Conduct (the “Rules”), which addresses the handling of client and third-party funds in the possession of an attorney, says in relevant part:

A lawyer who is in possession of funds belonging to another person incident to the lawyer’s practice of law shall maintain such funds in a banking institution within New York State. . . Such funds shall be maintained, in the lawyer’s own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer’s firm, and
5. An IOLA account is one such “special account.” See Judiciary Law § 497. Our Committee opines only on ethical issues arising under the Rules and not on questions of law. Thus, we offer no view on whether the Judiciary Law, 22 NYCRR Part 36, or any other statute or rule relating to foreclosure sales, address the question presented. If so, then the requirements of law would govern. But if the law is not to the contrary, we see no reason under the Rules why the proceeds of a foreclosure sale belonging to a third party may not be placed into the IOLA account of the inquirer’s law firm. (For convenience, we refer to trust accounts or escrow accounts as “special accounts” except when reference to IOLA accounts – a species of special accounts -- is appropriate.)

6. By way of background, the appointment of a referee is usually set out in a judgment of sale entered following foreclosure. That judgment dictates the distribution of proceeds, which typically the referee computes. The referee cannot alter the terms of the judgment of foreclosure and sale. On the day of the sale, the referee announces the sale and reads its terms aloud. Following the sale, the referee is responsible for executing a referee’s deed, obtaining the purchase deposit (or price), executing the memorandum of sale and the report of sale, calculating the final amount due, and distributing the funds in accordance with the judgment. Familiarity with these requirements is integral to service as a referee. Thus, although a person need not be a lawyer to act as a referee, courts often name lawyers to serve in that position.

7. Such service, in our view, is “incident to the lawyer’s practice of law” within the meaning of Rule 1.15(a) even though non-lawyers are legally eligible to serve as foreclosure referees. The Rules may apply to a lawyer (or law firm) when engaged in activities that a non-lawyer may provide. We find support for this conclusion in our prior opinions applying the Rules to lawyers acting as referees in foreclosure matters. For instance, in N.Y. State 924 ¶¶ 4, 6 (2012), we concluded that an attorney could act as a referee in a mortgage foreclosure proceeding in which a client held a judgment on the mortgaged property, provided that the lawyer complied with the confidentiality provisions of Rules 1.6 and 1.8(b), as well as the conflicts provisions of Rules 1.7 and 1.9. Similarly, in N.Y. State 893 ¶ 5 (2011), we said that a prosecutor could accept appointment to a panel of foreclosure referees provided that the lawyer complied with the conflicts provisions of Rule 1.7. Cf. N.Y. State 979 (2013) (lawyers acting as mediators may be subject to the Rules). In light of the prevalence of lawyers appointed to referee foreclosure sales, we have no difficulty concluding that service as such is “incident to” the practice of law, and hence that Rule 1.15 applies.

8. It follows that a lawyer in possession of third-party funds yielded by the sale must assure their safekeeping in a special account segregated from the firm’s own business or operating accounts. We know of no reason in the Rules why these funds may not be deposited into an IOLA account maintained by the firm of which the inquirer is a member if the funds qualify for deposit there under applicable laws and regulations. Rule 1.15(a) specifically says that funds so qualifying may be held in special accounts either “in the lawyer’s own name, or in the name of a firm of lawyers of which the lawyer is a member.” This means that, while the inquirer is not
obligated to place the funds into a firm IOLA account, the inquirer is free to do so and the firm is free to accept them.

9. Alternatively, a lawyer in the inquirer’s situation may set up a special account (including an IOLA account) in the lawyer’s own name. We recognize that some law firms may have their own rules or agreements on such matters – for instance, a partnership provision prohibiting members of the firm from setting up special accounts in the lawyer’s own name – but we have not been told of any such provision here. No ethics violation arises if a lawyer sets up a special account only in the lawyer/referee’s name. But the inquirer need not do so if the firm will allow him to deposit the money into the firm’s IOLA or other special account.

10. Under all circumstances a lawyer or law firm in possession of funds due a third party must maintain a special account to hold the third-party funds. Whichever course is selected, we note that, under Rule 5.1(a), the firm and its members are responsible to make “reasonable efforts to ensure that all lawyers in the firm conform” to the Rules, including proper maintenance of IOLA accounts and other special accounts.

CONCLUSION

11. An attorney who is appointed as a referee to conduct foreclosure sales, and who is in possession of funds belonging to a third party received from those sales, may ethically deposit funds into either the attorney’s firm’s IOLA account or into a special account set up by the attorney/referee individually. In any case, the attorney or the law firm must hold such third-party funds in a special account separate from the firm’s business or operating account.

(27-17)
New York State Bar Association
Committee on Professional Ethics

Opinion 1146 (3/20/2018)

Modifies N.Y. State 808

Topic: Contingency Fees: Paying Fees in a Criminal Matter from Personal Injury Settlement

Digest: A lawyer who represents a client in a personal injury matter and proposes to represent the client in a contemporaneous criminal defense matter and apply any funds recovered in the personal injury matter toward payment of legal fees in the criminal defense matter has a differing interest in any recovery in the personal injury matter and must satisfy the requirements of fairness, full disclosure and written consent set forth in Rule 1.8(a) to enter into the proposed retention.

Rules: 1.0(f), 1.0(j), 1.5(a), 1.8(a), 1.8(i)

FACTS

1. The inquirer’s law firm represents clients in personal injury, criminal defense, and other matters. Occasionally, a client who has a personal injury case becomes involved in a criminal matter and asks the firm to represent the client in the criminal matter as well. Clients who are unable to pay in advance for the criminal defense sometimes propose to secure the payment of fees for the criminal representation against the prospective monetary recovery from the personal injury settlement, judgment, or award.

QUESTIONS

2. The inquirer poses three questions:

(a) Is it permissible for a client to pay fees for services rendered by the firm in criminal defense matters from a settlement, judgment, or award obtained by the firm on behalf of the client in the personal injury matter?

(b) Is it permissible to enter into a criminal retainer agreement with a current personal injury client which grants a lien against the client’s potential personal injury award to cover fees earned on an hourly basis in the contemporaneous criminal representation?

(c) If it is not permissible to enter into a criminal defense retainer agreement which purports to create a lien against the personal injury recovery, is it nevertheless permissible to enter into a retainer agreement for the criminal defense matter, and to create a charging lien against the personal injury settlement, papers, or other materials or funds related to the personal injury case, should the client ultimately fail to pay the fees for the criminal defense case?
3. We think the inquirer’s first two questions pose the same issue, namely, whether the N.Y. Rules of Professional Conduct (the “Rules”) permit the inquirer to enter into an agreement with a client to have fees for services rendered in the criminal defense matter paid out of, or secured by, the proceeds of any settlement, judgment, or award obtained in a personal injury matter in which the firm also represents the client. We assume the inquirer will have the client sign an engagement letter in the criminal defense matter that provides for billing the client at a fixed rate, hourly or otherwise, but provides, too, that fees for the criminal defense matter may be paid out of funds obtained in any recovery in the representation of the client in the personal injury matter, thus establishing an additional source for payment of the fees. This is analytically indistinguishable from a scenario in which the lawyer acquires a lien on any recovery obtained in the personal injury matter as security against payment of fees earned on an hourly basis in the contemporaneous criminal representation. In each instance, the proceeds of any recovery in the personal injury matter will be used to cover legal fees in the criminal defense matter only if the client is unable to cover those fees through the client’s own personal funds. This arrangement therefore differs from an arrangement in which payment of legal fees in the criminal matter is contingent on the outcome of that matter, which is expressly prohibited by Rule 1.5(d)(1) (a lawyer “shall not enter into an arrangement for, charge or collect” a “contingent fee for representing a defendant in a criminal matter”). Here, payment in the criminal matter is not contingent on its outcome, and thus not the product of the lawyer’s defense of the criminal matter.

4. Rule 1.8(i) permits a lawyer “to acquire a lien authorized by law” to secure payment of the lawyer’s legal fees or expenses. This differs from the predecessor of the Rules, the N.Y. Code of Professional Responsibility (the “Code”), which in DR 5-103(A) allowed liens only if “granted by law.” In N.Y. State 808 (2007), which was decided under the Code, we contrasted DR 5-103(A) with Rule 1.8(i) of the ABA Model Rules of Professional Conduct (the “Model Rules”), which permitted liens “authorized by law.” This led us to conclude that, under the Code, a lawyer could not obtain a security interest in a client’s claim when the lawyer represents the client in that claim. But the change from “granted” to “authorized” is of consequence. In explaining the Model Rules, ABA 02-247 said that, “[b]y use of the word ‘authorized’ in place of the word ‘granted’ under former [Model] Rule 1.8(j), Rule 1.8(i) is intended to permit any legally recognized lien to secure fees to be acquired in property that is the subject of litigation.” The Comments to Rule 1.8 echo this same sentiment concerning New York’s adoption of Rule 1.8(i): Although Rule 1.8(i) generally prohibits lawyers from acquiring a proprietary interest in the cause of action or subject matter of a litigation the lawyer is handling, the Rule excepts “liens granted by statute, [] originating in common law and [] acquired by contract with the client.” Rule 1.8, Cmt. [16]. Here, the inquirer proposes to enter into a contract with the client providing for a lien on recovery in the personal injury matter, which is permissible under the exception in Rule 1.8(i).

5. While a permitted exception to Rule 1.8(i), the inquirer’s proposed arrangement for payment of fees in the criminal defense representation must abide by Rule 1.8(a), which governs business transactions with a client. See Rule 1.8, Cmt. [16] (“When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer’s efforts in the litigation, such an acquisition is a business or financial transaction with a client and is
governed by the requirements of paragraph (a).”) Rule 1.8(a) provides that “[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client” unless the transaction is “fair and reasonable” to the client, the terms are fully disclosed to the client in writing, the client is advised and given an opportunity to seek independent legal counsel, and the client gives informed consent in writing signed by the client.

6. “Differing interests” are defined to “include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.” Rule 1.0(f). Here, the interests of the inquirer and the client will differ in connection with the inquirer’s representation of the client in the personal injury action because the client and lawyer may have differing interests with respect to the amount of recovery sought and the risk analysis each would apply to obtaining it. For example, the lawyer may advise the client to reject a settlement that would otherwise be acceptable to the client because it is insufficient to cover costs in the criminal defense matter, or advise that the client accept a settlement that provides certainty in payment of the criminal defense costs rather than risk pursuing the case to trial when a credible chance exists of a larger recovery for the client at trial. See N.Y. State 1139 ¶ 9 (2017). In addition, we have previously observed that when a client has no other counsel in the matter and is an individual, and when the lawyer is responsible for client matters in the subject area – which is true here – it is more likely that the client will expect the lawyer to exercise professional judgment on the client’s behalf. See N.Y. State 1055 n.1 (2015); see also ABA 11-458 (2011) (amendment to fee arrangements that involves a lawyer acquiring an interest in client property is subject to Model Rule 1.8(a)).

7. The lawyer must determine whether the transaction is “fair and reasonable” to the client. Rule 1.8(a)(1). Determining whether a transaction is “fair and reasonable” to the client requires a fact-specific inquiry of the facts ascertainable at the time. See N.Y. State 913 ¶¶ 11-12 (2012); see also N.Y. State 1139 ¶ 10; ABA 00-418 (2000). In addition, the lawyer must satisfy Rule 1.8(a)’s disclosure and consultation provisions, including assuring that the engagement letter in the criminal defense matter fully discloses the transaction in a manner that can be reasonably understood by the client; that the client provides informed written consent to the terms of the transaction (including the lawyer’s role in the matter) after the lawyer has adequately explained the material risks of the proposed fee arrangement and reasonably available alternatives (see Rule 1.0(j)); and that the client has been advised to seek, and has been provided a reasonable opportunity to obtain, the advice of independent legal counsel regarding the proposed engagement. If all of the steps outlined above are taken, we see no ethical prohibition to the proposed fee arrangement.

8. The inquirer’s third question – whether the law firm may enter into a retainer in the criminal defense matter that creates a charging lien against the personal injury case if the client fails to pay the fees in the criminal defense matter – is moot unless the inquirer is unable to comply with Rule 1.8(a). If compliance with Rule 1.8(a) is not possible, then the question whether a charging lien may be created against the recovery in the personal injury matter is an issue of law that is beyond the scope of this Committee. See N.Y. State Judiciary Law § 475.

CONCLUSION

9. A lawyer who represents a client in a personal injury matter and proposes to represent the
client in a contemporaneous criminal defense matter and apply any funds recovered in the
personal injury matter toward payment of legal fees in the criminal defense matter may do so
provided that the lawyer complies with the Rule concerning business transactions with a client.

(38-17)
Formal Opinion 2018-5: Litigation Funders’ Contingent Interest in Legal Fees

**TOPIC:** Law firm finance; obligation to avoid fee-splitting with nonlawyers.

**DIGEST:** A lawyer may not enter into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer’s future payments to the funder are contingent on the lawyer’s receipt of legal fees or on the amount of legal fees received in one or more specific matters.

**RULES:** 5.4(a)

**QUESTION:** May a lawyer enter into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer’s future payments to the funder are contingent on the lawyer’s receipt of legal fees or on the amount of legal fees received in one or more specific matters?

**OPINION:**

This opinion addresses whether the New York Rules of Professional Conduct (the “Rules”) permit a lawyer to enter into an agreement with a litigation funder, a non-lawyer, under which the lawyer’s future payments to the litigation funder are contingent on the lawyer’s receipt of legal fees or on the amount of legal fees received in one or more specific matters. For the following reasons, we conclude that such an arrangement violates Rule 5.4’s prohibition on fee sharing with non-lawyers.

**I. Background on Litigation Funding**

In the litigation-finance industry, entities (often referred to as “litigation funders”) extend financing to litigators or their litigation clients under which repayments are contingent on the outcome of the litigation. The number of lawyers and clients benefitting from litigation funding has increased substantially over the last several years.\(^1\) It is now common for litigants and their lawyers to contemplate or obtain litigation funding. Without litigation funding, some lawsuits arguably could not be filed or maintained. In this respect, litigation funding may expand access to the courts to litigants who would otherwise be financially unable to pursue their legitimate claims. Litigation funding may also advance fairness by levelling the dispute-resolution field between parties with deep pockets and those with limited resources.\(^2\)

Prior opinions of this and other ethics committees have addressed litigation funding arrangements between the funder and the client. Under typical client-funder arrangements, the funder agrees directly with the lawyer’s client to provide funding for a specific matter and the

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client agrees to make future payments if the client prevails. When the client is the plaintiff in a
civil lawsuit, the amount of the client’s future payments to the funder may depend on the amount of
the client’s recovery. Client-funder arrangements of this nature do not implicate Rule 5.4,
which forbids a lawyer from sharing legal fees with a non-lawyer, because the lawyer is not a
depends on the amount of the lawyer’s recovery and do
not affect the amount of the lawyer’s fee. See NYCBA Formal Op. 2011-2 (2011) (“It is not 
unethical per se for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third party lender.”); see also NYSBA Ethics Op. 666 (1994)
lawyer may refer client to lender who will commit to provide financial support during pendency of case).³

This opinion, however, addresses litigation funding arrangements between the funder and the
lawyer or law firm. Lawyer-funder agreements may take various forms. As discussed below, the
fee-sharing rule does not forbid a traditional recourse loan requiring the lawyer to repay the loan
at a fixed rate of interest without regard to the outcome of, or the lawyer’s receipt of a fee in, any
particular lawsuit or lawsuits. That is the case regardless of whether the loan is or is not secured
by some kind of collateral. However, the fee-sharing rule forbids two alternative arrangements –
first, where an entity’s funding is not secured other than by the lawyer’s fee in one or more
lawsuits, so that it is implicit that the lawyer will pay the funder only if the lawyer receives legal
fees in the matter or matters; and second, where a lawyer and funder agree, whether in a recourse
or non-recourse arrangement, that instead of a fixed amount or fixed rate of interest, the amount
of the lawyer’s payment will depend on the amount of the lawyer’s fees – for example, where the
agreement sets a payment rate on a sliding scale based on the total legal fees or total recovery in
the case or portfolio of cases.

II. The Rule against Fee-Sharing with Non-Lawyers

Rule 5.4, titled “Professional Independence of a Lawyer,” includes four provisions that regulate
lawyers’ business relations and other interactions with non-lawyers,⁴ including provisions
forbidding law firms from having non-lawyer partners or owners.⁵ Rule 5.4(a) addresses fee-

³ As we cautioned in Opinion 2011-2, however, lawyers must still be cognizant of the risks of client-funder transactions, including the risk of compromising confidentiality, any possible waiver of attorney-client privilege, and any potential impact on a lawyer’s exercise of independent judgment. See NYCBA Formal Op. 2011-2.

⁴ See, e.g., Rule 5.4(c) (prohibiting a lawyer from allowing a third party “to direct or regulate the lawyer’s professional judgment”); Rule 5.4(d)(3) (prohibiting a lawyer from allowing a non-lawyer to “direct or control the professional judgment of a lawyer”). Other provisions of the Rules are similarly designed to protect lawyers’ independence from third parties. See, e.g., Rule 1.8(f) (prohibiting “interference with [a] lawyer’s independent professional judgment”); Rule 2.1 (requiring a lawyer to “exercise independent professional judgment”); see generally Bruce A. Green, “Lawyers’ Professional Independence: Overrated or Undervalued?,” 46 Akron L. Rev. 599 (2013).

⁵ Rule 5.4(b) (“A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”); Rule 5.4(d) (forbidding the practice of law in any entity in
sharing with non-lawyers. Subject to three exceptions not implicated here, Rule 5.4(a) provides that “[a] lawyer or law firm shall not share legal fees with a nonlawyer.”

As the title of Rule 5.4 reflects, the fee-sharing restriction is intended “to protect the lawyer’s professional independence of judgment.” Rule 5.4 Cmmt. [1]; see also NYCBA Formal Op. 2014-1 (2014) (“The purpose of the fee-sharing prohibition is to remove incentives for nonlawyers to interfere with the professional judgment of lawyers in legal matters, and to remove incentives for nonlawyers to engage in other objectionable conduct.”); Jacoby & Meyers, LLP v. Presiding Justices, 852 F.3d 178, 192 (2d Cir. 2017) (noting that Rule 5.4(a) serves New York’s interest in maintaining “independence” in the legal profession); Roy D. Simon and Nicole Hyland, Simon’s New York Rules of Professional Conduct Annotated, at 1420 (“[t]he purpose of the rule against fee sharing is to remove any incentive for nonlawyers to engage in undesirable behavior such as (1) interfering with a lawyer’s professional judgment in handling of a legal matter, (2) using dishonest or illegal methods . . . in order to win cases . . . or (3) encouraging or pressuring a lawyer to use such improper methods.”).

The fee-sharing restriction is of long standing. In 1928, drawing on precedent dating back to the 1700s, the ABA adopted Canon 34 of the Canons of Professional Responsibility, which provided that “[n]o division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.” Roy Simon, “Fee Sharing Between Lawyers and Public Interest Groups,” 98 Yale L.J. 1069, 1079–80 (1989). In 1969, the ABA re-codified this principle as DR 3-102(A) of the Model Code, which provided that “[a] lawyer or law firm shall not share fees with a nonlawyer.” Id., 98 Yale L.J. at 1082. New York’s implementation inserted the word “legal” before “fees,” but otherwise made no changes to the Model Code. See NY Code of Prof. Responsibility, DR 3-102(A). The first clause of Rule 5.4(a) is identical to DR 3-102(A).

Rule 5.4(a) has generally been interpreted to forbid business arrangements in which lawyers agree to make payments based on the receipt of legal fees or the amount of legal fees in particular matters. For instance, in NYSBA Op. 917 (2012), the ethics committee opined that a lawyer could not compensate a non-lawyer marketing professional based on the amount of fees paid by clients whom the non-lawyer professional obtained for the firm. In NYSBA Ethics Op. 992 (2013), the committee concluded that a lawyer may not compensate a business owner for marketing services based on a percentage of fees from a particular matter. Its opinion explained: “Payment of a percentage of firm profits for a specific matter is tantamount to fee sharing and is not permitted.” The opinion noted that although Rule 5.4(a)(3) permits lawyers to establish retirement plans for nonlawyer employees based on “a profit-sharing arrangement,” even nonlawyer employee retirement plans may not be “tied to profit from a particular case or cases.”

which a nonlawyer owns an interest). On the early history of restrictions on lawyer-nonlawyer collaborations, see Bruce A. Green, “The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate,” 84 Minn. L. Rev. 1115 (2000).
Many other opinions reflect the same general principle. See, e.g., NYSBA Ethics Op. 1062 (2015) (law firm attempting to raise money on a “crowdfunding” website would violate Rule 5.4 (a) if investors were to receive a percentage of the firm’s revenues); NYCBA Formal Op. 2015-1 (2015) (law firm may not pay professional employer organization for administration services based on percentage of fees the firm generates); NYCLA Ethics Op. 697 (1993) (lawyer may not agree to pay landlord percentage of firm’s revenues as office rent); NYSBA Ethics Op. 633 (1992) (lawyer may not enter into payment arrangement with non-lawyer based on “percentage of business developed”); NYSBA Ethics Op. 565 (1984) (lawyer may not compensate marketing agency based on “volume of business developed”); cf. In re Friedman, 196 A.D.2d 280 (1st Dept. 1994) (attorney violated DR 3-102(A) by agreeing to pay private investigator in part based on success of litigation); In re Shapiro, 90 A.D.2d 22 (1st Dep’t 1982) (disciplinary proceeding against attorney who, inter alia, paid salary to non-lawyer employee contingent on total fees earned); see generally Simon & Hyland, supra, at 1419 (“If the nonlawyer’s income depends in any way on the lawyer’s receipt of legal fees in a specific case or cases, then the lawyer is violating Rule 5.4(a).”).

III. The Application of Rule 5.4(A) to Certain Litigation Funding Arrangements

Lawyer-funder arrangements do not necessarily involve impermissible fee sharing under Rule 5.4(a). The rule is not implicated simply because the lawyer’s payments to a funder come from income derived from legal fees. But Rule 5.4(a) forbids a funding arrangement in which the lawyer’s future payments to the funder are contingent on the lawyer’s receipt of legal fees or on the amount of legal fees received in one or more specific matters. That is true whether the arrangement is a non-recourse loan secured by legal fees or it involves financing in which the amount of the lawyer’s payments varies with the amount of legal fees in one or more matters. Rule 5.4(a) has long been understood to apply to business arrangements in which lawyers’ payments to nonlawyers are tied to legal fees in these types of ways. See Part II, supra.

No New York ethics committee has yet addressed the rule’s application specifically to litigation funding arrangements. However, we see no meaningful difference between payments for financing, on the one hand, and payments for goods and services, on the other, that would call for a different interpretation of “fee sharing” when a lawyer’s payments to a provider of funding,

6 The Rules do not define what it means to “share” a “legal fee,” but the cases and opinions cited herein leave no doubt that Rule 5.4(a) does not forbid payments from income derived from legal fees. An interpretation to the contrary would be unrealistic, since all or virtually all of lawyers’ income ordinarily derives from legal fees and therefore all payments they make for nonlawyer salaries, services, etc., ordinarily derive from legal fees. See Preamble [6] (“The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of the legal representation and of the law itself.”).

7 Further, a litigation-funding arrangement involves impermissible fee sharing where the arrangement in effect makes the lawyer’s payments contingent on the receipt or amount of fees, regardless of how the arrangement is worded. For example, Rule 5.4(a) applies equally regardless of whether the lawyers’ future payments are explicitly contingent on the receipt of fees or are contingent on the client’s success which in turn will result in legal fees.
rather than a provider of goods or services, are contingent on the lawyer’s receipt of fees in a particular matter.\(^8\) Rule 5.4(a) must therefore be read to foreclose a financing arrangement whereby payments to the funder are contingent on the lawyer’s receipt of legal fees.\(^9\) A non-recourse financing agreement secured by legal fees in a matter – i.e., an arrangement in which it is contemplated that the lawyer will make future payments only if the lawyer recovers fees – constitutes an impermissible fee-sharing arrangement regardless of how the lawyer’s payments are calculated. Likewise, a financing arrangement constitutes impermissible fee sharing if the amount of the lawyer’s payment is contingent on the amount of legal fees earned or recovered. Further, Rule 5.4 is equally applicable when the lawyer’s payment to the funder is based on the recovery of legal fees in multiple matters (e.g., a portfolio of lawsuits against the same defendant or involving the same subject matter) as opposed to a single matter.

For purposes of Rule 5.4, a non-recourse funding arrangement in which the lawyer’s payments are contingent on the lawyer’s receipt of legal fees, or a funding arrangement in which the lawyer’s payments depend on the amount of legal fees received in a matter, is different from the traditional “recourse” loan agreement described above in which a lawyer’s payments are not contingent on the receipt or amount of legal fees in particular matters.\(^10\) To be sure, the lawyer in both scenarios will pay the lender from the firm’s revenues (i.e. legal fees). But, given the long line of prior opinions, it matters that in the former scenario the lawyer’s payments are tied to the lawyer’s receipt of fees in one or more matters. Rightly or wrongly, the rule presupposes that

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\(^8\) Several other states have also reached a similar conclusion. See Prof’l Ethics Comm’n Me. Bd. of Overseers of the Bar, Op. 193 (2007) (“[P]ayment on a non-recourse loan to finance litigation in a contingency fee case, where the lawyer is obligated to repay the loan only if a fee results in the case, constitutes sharing legal fees with a non-lawyer in violation of the rule.”); State Bar of Nevada Op. 36 (2007) (“Any loan obtained for purposes of litigation funding must be a ‘recourse’ loan that counsel is obligated to pay.”); Utah Bar Ass’n Adv. Op. 97-11 (1997) (“[A]n attorney may not finance the costs of a contingent-fee case in which a non-recourse promissory note is secured by the attorney’s interest in the contingent fee.”); see also Va. State Bar Standing Comm. on Legal Ethics, Advisory Op. 1764 (2002) (“not[ing] a basic ethical problem” in a proposed financing agreement that called for a “finance company to receive a portion of the attorney’s legal fee”).

\(^9\) This opinion does not read Rule 5.4(a) to forbid funding arrangements in which the lawyer’s debt obligation is secured by current or future accounts receivable but repayment is not contingent on the receipt or amount of fees. For example, a recourse debt that is not contingent on the amount of legal fees – e.g., a promise to repay a loan with interest over a particular period of time – does not constitute impermissible fee sharing simply because the debt is secured by accounts receivable in one or more matters. In the case of a recourse loan, there is no implicit or explicit understanding that the debt will be repaid only if legal fees are obtained in particular matters, and the creditor may seek repayment out of all of the law firm’s assets. Nor do we believe the fee-sharing rule forbids funding arrangements in which the timing of the lawyer’s payments is determined by the resolution of a matter – e.g., where the lawyer’s payment obligation does not begin until a matter is resolved – but the amount of lawyer’s payment obligation does not itself depend on whether, or in what amount, legal fees are obtained.

\(^10\) It is important to note that this opinion does not address legal fees that have been earned and that are subject to collection but that have not yet paid. We do not question the State Bar ethics committee’s conclusion in NYSBA Ethics 608 (1975) that a lawyer employing a collections agency to collect earned but unpaid legal fees may compensate the collections agency based on a percentage of the recovery.
when nonlawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer.11

There is room to argue whether the prohibition on fee sharing is overbroad. One might argue that the rule sweeps more broadly than necessary to serve its purpose of protecting lawyers’ independence, or whether there are adequate contractual means or other alternative means of preventing litigation funders from encroaching on litigators’ exercise of independent professional judgment. But that is a matter to be decided by the state judiciary, which periodically reviews the Rules, or by the state legislature. Nothing in the language, history or prior interpretations of Rule 5.4(a) supports an interpretation carving out litigation funding arrangements.12

IV. Conclusion

Under Rule 5.4(a), a lawyer may not enter into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer’s future payments to the funder are contingent on the lawyer’s receipt of legal fees or on the amount of legal fees received in one or more specific matters.

11 Of course, even under a recourse loan, a law firm that receives no legal fees and therefore has no income may be unable to make payments to a funder or to others to whom the law firm is in debt. Likewise, a law firm whose debt exceeds its incoming legal fees and other assets may be unable to meet its financial obligations. One might therefore argue that any creditor has an incentive to encroach on lawyer independence and that there is no reason to single out those particular creditors who have a stake in lawyers’ fees in particular matters. But 90 years of ethics rules and opinions interpreting them have at least implicitly assumed either that there is a meaningful difference or that the distinction has another justification (such as that rules cannot realistically prevent lawyer insolvency).

12 We recognize that several New York courts have upheld litigation funding agreements in the face of public-policy challenges. See Hamilton Capital VII, LLC, I v. Khorrami, LLP, 2015 N.Y. Slip Op. 51199(U) (Sup. Ct. N.Y. County Aug. 17, 2015) (distinguishing between fee-sharing agreements and a credit facility giving lender a security interest in law firm’s accounts receivable); Lawsuit Funding, LLC v. Lessoff, 2013 WL 6409971 (Sup. Ct. N.Y. County Dec. 4, 2013) (refusing to use Rule 5.4(a) to invalidate a settlement agreement on public policy grounds where lawyer agreed to repay lender a set amount from lawyer’s fees in eight other lawsuits); see also Heer v. North Moore St. Developers, L.L.C., 140 A.D.3d 675, 676 (1st Dep’t 2016) (rejecting law firm-defendant’s argument that N.Y. Judiciary Law barred collection agency’s motion to intervene, as § 474 permits “litigation loans obtained by law firms and secured by their accounts receivable”). However, insofar as the lawyers’ payments to funders in these cases depended on the receipt of legal fees in particular matters, the judicial decisions enforcing the lawyers’ contracts do not necessarily establish that Rule 5.4 applies differently to litigation funding arrangements than to other business arrangements. Regardless of whether the funding arrangements were forbidden by Rule 5.4, New York courts could be expected to enforce the arrangements, because lawyers who violate the Rules cannot ordinarily invoke their own transgressions to avoid contractual obligations. See Marin v. Constitution Realty, LLC, 28 N.Y.3d 666, 672 (2017) (rejecting lawyers attempts to “use the ethics rules as a sword” to render an agreement unenforceable).
Advertising
New York State Bar Association
Committee on Professional Ethics

Opinion 1147 (3/23/2018)

**Topic:** Advertising: Use of “Esq.” by a lawyer not admitted in New York.

**Digest:** A lawyer not admitted to practice in New York may use the term “Esq.” in connection with a non-legal business conducted in New York, provided that care is taken to avoid confusion about the lawyer’s status. A lawyer who performs *pro bono* immigration services for a nonprofit organization may be described to clients and others as a lawyer, as long as all communications disclose the lawyer’s jurisdictional and practice limitations.

**Rules:** 5.5, 7.5(a) 7.5(d), 8.4(b) & (c).

**FACTS**

1. The inquirer is admitted to practice law in California but not New York, where the inquirer currently resides. The inquirer works for a municipal agency in New York, but the scope of the inquirer’s employment does not involve the practice of law; the municipal agency employs a New York lawyer who acts as the agency’s counsel. The inquirer would like to use the term “Esq.” on business cards relating to the municipal employment.

2. In addition, the inquirer is a volunteer immigration lawyer for a non-profit organization, representing individuals in proceedings before the federal immigration court, an administrative agency. The inquirer has registered with the court and is identified as counsel on the court’s forms when representing clients before the court. The inquirer advises these clients that the inquirer is not admitted to the practice of law in New York but is admitted in California.

**QUESTIONS**

3. The inquiry poses two questions:

   a. May a lawyer not admitted in New York use the honorific “Esquire,” more commonly abbreviated as “Esq.,” on business cards that the lawyer uses as a municipal employee performing non-legal services?

   b. When a lawyer not admitted in New York performs *pro bono* legal services to clients before a federal immigration tribunal, what disclosures of jurisdiction and subject matter limitations must the lawyer provide to clients?

**OPINION**

4. In N.Y. State 1089 (2016), we addressed whether a “retired lawyer” within the meaning...
of Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 NYCRR § 118.1(g), may use the title “Esq.” in performing legal services that Section 118.1(g) allows for someone so designated. There (in ¶ 4), we cited with approval N.Y. City 1994-5, which says:

The title “esquire” does not legally designate an individual as a lawyer because it is not conferred in this country as an academic degree or license. It has, however, been adopted by lawyers by convention as a form of designation. Thus, one using the title in the United States is identifying himself or herself as a lawyer.

5. In the same opinion, we added (in ¶ 5), “that the term ‘Esq.’ does not have precisely the same connotation as, for example, ‘Attorney-at-Law,’” and that, while lawyers acting in a non-legal capacity such as working for a nonprofit organization in administration or public relations could use the honorific “Esq.” without qualification, a lawyer may not lead the recipient of the communication “to conclude that the lawyer was acting in a legal capacity.” Id. Thus, when someone who is not admitted to practice law in New York uses the term “Esq.” on a business card or otherwise, the question is whether the use of that abbreviation is misleading under Rule 8.4(c) of the N.Y. Rules of Professional Conduct (the “Rules”), prohibiting lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.”

6. We think the analysis in N.Y. State 1089 controls here. There, we noted that the retired lawyer remains a lawyer (although limited to performing unpaid legal work), and that while use of the term “Esq.” is accurate, public perception must also be considered. A name on a business card containing solely a New York address and the honorific “Esq.” could reasonably lead a member of the public to believe that the cardholder is a lawyer. A name on a business card with the honorific “Esq.” but describing the person’s position as one performing obviously non-legal services conveys a very different message. The issue, then, is not so much the use of “Esq.” – provided the person is a lawyer – but the context in which the title appears. If the business transmits the message that the person is a lawyer but not performing legal services, then we see no reason under the Rules why the inquirer may not say as much. As long as the message is not misleading – as long as the lawyer who chooses to use the title takes care to avoid confusion and assure that the relevant audience is not misled to believe that the lawyer is acting as a lawyer – then we have no quarrel with its use on a business card.

7. The inquirer asks also if it is sufficient to explain to clients whom the inquirer represents as a volunteer immigration lawyer that the inquirer is admitted only in California and not in New York. Although we do not address questions of law, it has been our understanding that federal law permits a member in good standing of the bar of any state not under suspension or otherwise restricted in his or her practice of law may practice before federal immigration tribunals. See N.Y. State 863 ¶ 5 (2011).

8. In N.Y. State 863, applying the Rules to determine the disclosure that an attorney not admitted in New York must make, we said that a lawyer must note on letterhead and business cards that the lawyer is admitted to practice only in the state of admission, and that the lawyer’s practice in New York is limited solely to immigration matters. We said, too, that prudence in that situation suggests that the lawyer add that the lawyer is “not licensed in New York State,” in order to “avoid any possible confusion regarding whether the inquirer is or is not licensed in New York.” See id. ¶ 14.
9. While the jurisdictional and subject matter limitations need not be included in an email signature block, nothing in an email or any communication may state or imply that the lawyer is admitted to practice in New York, because to do so would violate Rule 8.4(c), prohibiting a lawyer from engaging in misrepresentation. Id. ¶ 15.

CONCLUSION

10. A lawyer not admitted in New York may use the term “Esq.” on business cards as long as the card does not suggest that the lawyer is performing or qualified to perform legal services in this State. A lawyer may engage in a voluntary immigration practice with a nonprofit organization, and may refer to him or herself as a lawyer, provided that letterhead and business cards used in the practice fairly disclose applicable jurisdictional and subject matter limitations. (37-17)
New York State Bar Association  
Committee on Professional Ethics  

Opinion 1151 (5/1/2018)  

**Topic:** Restrictive Covenants on Lawyers  

**Digest:** A lawyer may not enter into an agreement with an employer restricting the lawyer’s right to practice law following termination of employment, even when the employment does not involve the practice of law, but a lawyer may agree to a post-employment restriction expressly made subject to applicable ethical rules.  

**Rules:** 5.6(a)  

**FACTS**  

1. The inquirer, admitted to practice law in New York, is currently employed by an organization that does not render legal services. As an employee, the inquirer does not practice law, does not render legal advice to the organization or any of its constituents, and does not hold herself out as an attorney.  

2. The organization’s standard procedure is to ask its employees to sign an agreement with various provisions which the organization considers protective of its business interests. The contract, in nine single-spaced pages, deals with many matters, including, among other things, confidential information (meaning data the organization regards as proprietary as defined in the contract); ownership of intellectual property; business conflicts; and interactions with the organization’s customers and contractors. Of particular relevance here is a provision – headed “Agreement Not To Solicit” – which says, in part, that an employee signatory “may not, directly or indirectly,” communicate with or provide services to any current or prospective customer of the organization “relating in any way” to “any services related to the business” of the organization. The contract provides that this prohibition applies during the signatory’s employment and for eighteen months following the end of employment.  

3. The inquirer wishes to retain the option, at such time as her current employment ends, to engage in the practice of law. She is concerned that the post-employment 18-month tail on the “Agreement Not To Solicit” is so broad as to permit an interpretation imposing a restrictive covenant on her right to practice. In view of this concern, her employer offered to include a proviso that the clause is enforceable only “to the extent not inconsistent” with applicable ethical rules.  

**QUESTIONS**  

4. May a lawyer enter into an agreement with an employer stipulating that, during the course of employment and for a stated period thereafter, the lawyer may not provide any services
relating to the business of the employer when the employer is not engaged in, and the lawyer’s employment does not involve, the rendition of legal services?

OPINION

5. Rule 5.6(a)(1) of the New York Rules of Professional Conduct (the “Rules”) says that a “lawyer shall not participate in offering or making” any “partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of the lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.” The main purposes of Rule 5.6(a)(1) are to protect the ability of clients to choose their counsel freely and to protect the ability of counsel to choose their clients freely.” N.Y. State 858 ¶ 7 (2011); see Rule 5.6, Cmt. [1] (“An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.”). Agreements prohibited by Rule 5.6(a)(1) limit the pool of available attorneys, a client’s choice of legal counsel, and a lawyer’s autonomy in accepting new engagements.

6. Rule 5.6(a)(1) applies no matter whether the employment agreement engages the lawyer to practice law. We have not previously had a chance to address this precise issue. Our prior opinions on Rule 5.6(a)(1) – including those issued under its substantially identical predecessor, DR 2-108 of the New York Code of Professional Responsibility (the “Code”) – as well as the New York case law applying the ban on restrictive covenants, involve law partnership agreements, or agreements between practicing lawyers and their clients. See, e.g., N.Y. State 858 (confidentiality clauses in agreements with members of an in-house legal department may not extend so beyond a lawyer’s duty to maintain confidential information as to restrict a lawyer’s post-employment right to practice law); Cohen v. Lord, Day & Lord, 75 N.Y.2d 95 (1989) (striking down non-compete restrictions in a law partnership agreement). Nevertheless, the unambiguous language of Rule 5.6(a)(1), and the purposes it promotes, supply no basis to distinguish between a contract with a non-client employer (or any other party) restricting a lawyer’s right to practice law after the relationship is ended. In each circumstance, the lawyer would be making or participating in the making of an agreement that, by restraining the lawyer’s ability to practice law, constricts the freedom of the client to choose a lawyer and the lawyer to accept an engagement.

7. Hence, if the language set forth in the “Agreement Not To Solicit” clause “restricts the right of the lawyer to practice law after termination of” the inquirer’s employment, then Rule 5.6(a)(1) forbids the lawyer to agree to that language. Whether contractual language amounts to such a restriction – a separate issue – is a fact-intensive inquiry that customary canons of contract construction control. Although arguments may exist that the employment agreement at issue here is not intended to restrict the inquirer’s post-employment right to practice law, the inquirer believes, and we think reasonably so, that the sweeping language of the “Agreement Not To Solicit” clause is sufficiently broad to restrain the lawyer from engaging in the practice of law following termination of her employment. Accordingly, in these circumstances, we conclude that the inquirer may not enter into the employment contract as currently written.

8. Here, though, the inquirer has another option, which is to accept the employer’s offer to include language in the agreement to the effect that the “Agreement Not To Solicit” clause is enforceable, and may be invoked, only to the extent that the language is consistent with Rule
5.6(a)(1) or other applicable Rule. This added language, in our view, would remove any doubt about whether the clause impermissibly impinges on the lawyer’s right to practice law following the end of employment.

CONCLUSION

9. A lawyer may not enter into an employment agreement that restricts the lawyer’s right to practice law following termination of employment, even when the employment itself does not involve the practice of law, but a lawyer may agree to a post-employment restriction that is expressly made subject to applicable ethical rules.

(3-18)
Opinion 1152 (5/17/2018)

Topic: Law Firm Name: Use of Lawyer’s First Name as Firm Name

Digest: A lawyer may not use only a first name as the sole name of the lawyer’s firm.

Rules: 7.1, 7.5(b), 8.4(c).

FACTS

1. The inquirer is a New York lawyer who practices in both New York and other jurisdictions. The inquirer’s surname, we are told, is shared by a number of other firms in New York and other places where the inquirer practices. To distinguish the inquirer’s firm from these other firms, the inquirer proposes to use only the inquirer’s first name – say, John or Jane – as the sole name of the firm, as in John’s Law Offices LLC or The Jane Law Firm LLC. The inquirer asserts that this nomenclature would not only serve to differentiate the firm from others bearing the inquirer’s surname but also effect efficiencies – such as how the staff answers telephone calls – with existing or prospective clients. The inquirer assures us that the inquirer’s first name is the first name by which the inquirer is admitted to practice in New York.

QUESTION

2. May lawyer use only the lawyer’s first name as the name of the lawyer’s firm?

OPINION

3. The answer is no – that lawyer may not use solely the lawyer’s first name as the name of a law firm under the New York Rules of Professional Conduct (the “Rules”).

4. Rule 7.5(b) provides, in pertinent part, that a “lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm.” “The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm.” N.Y. State 869 (2011) (lawyer may not use practice area in the name of the law firm). This Rule “serves to protect the public from being deceived about the identity, responsibility or status of the individuals using the name.” N.Y. State 920 ¶ 3 (2012); accord, N.Y. State 732 (2000) (applying prohibition on trade names in DR 2-102(B) of the New York Code of Professional Responsibility (the “Code”), the predecessor of the Rules). "Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a ‘trade name’ within the meaning of the predecessor to Rule 7.5(b).” N.Y. State 740 (2001) (applying the
We recognize that here, the inquirer proposes to use the inquirer’s real first name to identify the inquirer’s firm. We have not previously had occasion to address this precise issue, nor can we find any other authority that has done so. Nevertheless, although the term "trade name" is not defined by the Rules, we have written numerous opinions that provide useful guidance in interpreting the meaning of that term. N.Y. State 948 ¶ 3 (2012) (so noting). In N.Y. State 948, for example, we concluded that a “law firm name may not include a variant on the lawyer's name that is created by conjoining the lawyer's initials with an abbreviation of the lawyer's surname.” Id. ¶ 7. In N.Y. State 920 ¶ 5, we opined that a lawyer may not use a firm name comprised only of the lawyer’s initials. In N.Y. State 861 ¶ 4 (2011), we considered the inclusion in a firm name of initials signifying the firm’s practice area to constitute an impermissible trade name. In N.Y. State 740, decided under the identical language in the Code, we said that a lawyer may not insert an arbitrary letter in the firm name unconnected to the names of lawyers who practiced there. Most recently, in N.Y. State 1138 ¶ 7 (2017), we regarded the English translation of the inquirer’s actual surname “more than a slight deviation from the inquirer’s actual surname” and hence impermissible. See N.Y. County 677 (1990) (firm name may not include first name of one partner and contraction of surname of another partner, as such a name would violate requirement that lawyers practice only under names of lawyers in the firm).

6. Common to all these opinions – and to all the opinions we can locate on the meaning of “trade name” – is the presumption that, in requiring the use of only a lawyer’s name in the name of a law firm, the Rules intend to refer to the lawyer’s (or lawyers’) surname(s). In our view, Rule 7.5(b) embeds an understanding that a law firm’s name consists of surnames of lawyers who either practice there or once did. We are unaware of any authority or precedent that breaks from this pattern, and it cannot be denied that, at the time the Rules and their predecessors were adopted, the universal practice in this State was to confine the names of law firms to the surnames of its current or former lawyers. We cannot ignore this context in interpreting the meaning of “trade name.” Rather, customary usage teaches us that the public in general and the legal profession in particular expect that the name of a law firm reflects the surnames of lawyers currently or formerly associated with the law firm. Cf. N.Y. State 148 (1970) (under the pre-Code Canon of Ethics, relying on local custom to determine that a firm may continue use of deceased partners in a firm name); N.Y. State 70 (1968) (to the same effect); N.Y. State 45 (1967) (same); see also N.Y. State 622 n.3 (1991) (citing the foregoing to reach the same result under the Code).

7. To disrupt that expectation would, in our view, undermine Rule 7.5(b) and therefore be misleading because of the universal convention on the use of surnames in the names of law firms. See Rule 7.1(a); Rule 8.4(c). To us, any firm name that does not include the surname(s) of lawyer(s) who either practice at the firm – or, “if otherwise lawful,” as Rule 7.5(b) says, “the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession” – is inherently misleading. This does not preclude the inclusion of the inquirer’s first name in the name of the firm, provided the surname appears there as well. See N.Y. State 1003 ¶ 9 (2014) (if not misleading, a lawyer may “drop his first name to formulate a firm name that includes his middle initials and legal surname”).
8. We note that our conclusion refers only to the name of the inquirer’s law firm. Subject to the advertising regulations of Rule 7.1, nothing in the Rules prohibits the inquirer from using the inquirer’s first name as a motto, a means of branding, or other advertising. Thus, the inquirer may use only the inquirer’s first name in branding the inquirer’s law firm on websites and other media to create a distinct identity, provided always that the inquirer complies with Rule 7.1 and any other Rule regulating a lawyer’s communications with the public. Rule 7.5, Cmt. [2]; Rule 7.1, Cmt. [8] (permissible to heighten brand awareness); see In re Von Wiegen, 63 N.Y.2d 163, 176-77 (1984) (allowing lawyer to accompany firm name with the logo “The Country Lawyer”); N.Y. State 1017 ¶ 8 (2014) (use of the firm’s initials in sponsoring a local sports team did not constitute an impermissible use of a trade name); N.Y. State 937 ¶ 3 (2012) (firm may use firm logo on promotional gifts). We likewise find no obligation in the Rules that a law firm’s staff must use the firm’s full name in responding to telephone calls. N.Y. State 1017 ¶ 8 (allowing use of the firm’s initials in answering telephone calls). There are, in short, various ways for the inquirer to establish a unique identity for the inquirer’s law firm and to differentiate the law firm from others that may contain the same surname as the inquirer’s. Our point here is that the use of a trade name, that is, one omitting the lawyer’s surname, is neither consistent with Rule 7.5(b) nor longstanding expectations about law firm names.

CONCLUSION

9. A lawyer may not use only the lawyer’s first name as the name of the lawyer’s firm but may use a first name, together with the lawyer’s surname, in the name of the firm. A lawyer may use only the lawyer’s first name in promoting the lawyer’s practice as a motto or branding element consistent with the rules governing lawyer advertising.
A.G. Underwood Announces Agreement With Online Legal Directory To Reform Its Attorney Ratings And Improve Disclosures For Consumers

**Avvo Will Reform Its Attorney Rating System, Improve Consumer Disclosures, and Pay $50,000 to State**

NEW YORK – Attorney General Barbara D. Underwood today announced an agreement with Avvo, an online legal directory, to reform its attorney rating system and improve its disclosures to consumers after an investigation by the Attorney General’s office revealed that the content and limits of Avvo’s rating system were not clearly disclosed. Avvo relied on attorneys to voluntarily provide additional information to their profiles to determine rankings – resulting in those that added information to their profiles generally having higher ratings than those who did not participate. In addition to changing its practices, Avvo will pay $50,000 to the State.

“When seeking legal advice, consumers most often turn to the internet – and directories like this have an obligation to ensure consumers know what they’re getting,” said Attorney General Underwood. “My office will continue to protect New York consumers and ensure they get the transparency and accurate information they deserve.”

Avvo, which was acquired by Internet Brands in January 2018, uses public records to create an attorney directory and then relies on the attorneys to add information to their profiles – such as their background and legal practice – in order to rank attorneys on a scale from 1 to 10. As a result, attorneys who shared their resumes with Avvo or added information about work experience tended to receive higher ratings than their peers who did not post to the website. In response to the Attorney General’s concerns about the neutrality and comprehensiveness of Avvo’s ratings, Avvo agreed to remove its rankings for attorneys who do not actively participate in Avvo’s directory and to disclose to consumers the content and limit of its ratings system.

On the webpages describing the Avvo rating, Avvo now tells users clearly and conspicuously that its ratings model relies on information attorneys add to their profiles, meaning that attorneys who claim their profiles and provide Avvo with more information tend to have higher ratings than those who do not. Avvo has also clearly and conspicuously informed users on the Avvo Rating page that the company does not independently collect all available information that could increase an attorney’s rating. Avvo will no longer refer to its ratings as “unbiased.”

In addition, Avvo changed the process by which it posts legal forms to its website for consumer use. Avvo agreed to ensure any legal forms posted to the website for consumer use are first reviewed by a
lawyer admitted to practice in New York with relevant experience. Avvo also agreed to better inform consumers that the attorney disciplinary information may not be comprehensive or frequently updated, and that users should independently check a lawyer’s disciplinary status with respective state bar associations before hiring them. Avvo has committed to helping lawyers contact Avvo Customer Care via online chat, email, or phone to request correction of inaccurate information on their profile – such as the attorneys’ main practice area – without being required to create an Avvo account or agree to the website’s Terms of Use.

Avvo will also pay $50,000 to cover the costs of the Attorney General’s investigation.

The Attorney General’s Consumer Protection Bureau encourages all websites to ensure that their ratings systems are transparent to consumers. The Attorney General urges consumers to review these disclosures carefully, and to demand any further information they need to evaluate the accuracy and meaning of online ratings and reviews.

This case was handled by Assistant Attorney General Mark Ladov, Deputy Bureau Chief Laura J. Levine, and Bureau Chief Jane M. Azia of the Bureau of Consumer Frauds and Protection. The Consumer Frauds and Protection Bureau is overseen by Executive Deputy Attorney General for Economic Justice Manisha M. Sheth.
Formal Opinion 2018-3: Ethical Implications of Plagiarism in Court Filings

TOPIC: Lawyer’s duties when copying from other sources while drafting litigation filings.

DIGEST: Although a lawyer’s verbatim use of another’s writing without attribution in a brief or litigation filing is not always per se deceptive under Rule 8.4(c), lawyers are well-advised to cite source material, particularly where language is lifted from published writings or judicial opinions as distinguished from prior briefs. Under specific circumstances, lifting language from source materials without attribution may violate any of several other Rules, including those requiring competence and diligence and forbidding frivolous filings. Moreover, although there does not appear to be a consensus of judicial opinion or an authoritative judicial rule or ruling in New York, many courts have disapproved of extensive copying in briefs.

RULES: 1.1(a), 1.3(b), 3.1, 3.3(a), 8.4(c)

QUESTION: Is it a violation of Rule 8.4(c) for a lawyer to copy verbatim from other sources without attribution when drafting a litigation filing?

OPINION:

I. INTRODUCTION

This Opinion addresses the ethical implications of a lawyer’s verbatim use of another’s writing in a brief or litigation filing. Specifically, we address whether the New York Rules of Professional Conduct (the “Rules”) forbid a litigator from copying from other sources without attribution.

Rule 8.4(c) of the Rules provides that “[a] lawyer or law firm shall not: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Although, as detailed below, courts have invoked Rule 8.4(c) to discipline lawyers who plagiarize in academic settings,1 we recognize that litigation filings serve a different purpose. Unlike academic papers (or writing samples), which purport to reflect the author’s original work and analysis, legal briefs are submitted to present an argument on behalf of a client, and their value derives from their persuasiveness, not from their originality of thought or expression. A lawyer’s signature on a brief is not a representation of authorship, much less of sole authorship, but rather a commitment to take responsibility for the contentions in the brief and an implied representation that the brief is not frivolous. For these reasons, we conclude that copying from other writings without attribution in a litigation filing is not per se deceptive and therefore is not a per se violation of Rule 8.4(c).2

1 For the purposes of this Opinion we interpret plagiarism to mean the use of “another person’s original ideas or creative expression” as one’s own. Black’s Law Dictionary (10th Ed. 2014).

We emphasize, however, that the filing lawyer is responsible for the brief and cannot rely on the prior author to ensure compliance with the Rules. In particular, as discussed below, Rule 1.1(a) (competence), Rule 1.3 (diligence), Rule 3.1 (non-meritorious claims and contentions), and Rule 3.3 (conduct before a tribunal), are implicated when a lawyer files a document in court. In addition, if the lawyer subjectively intends to commit deception by omitting a citation in a litigation filing, then the lawyer may be violating Rule 8.4(c) and risks discipline under that Rule as well as under Rules 1.1, 1.3, 3.1, and 3.3.

That said, we strongly encourage lawyers to cite their sources, particularly when the copied source is a prior judicial opinion or a published writing. And we emphasize that, notwithstanding the views expressed herein regarding the reach of the Rules, some judicial decisions disapprove of the practice of filing briefs that employ language from prior writings without attribution, and some judges have sanctioned lawyers for doing so on the grounds that the absence of a citation makes the brief misleading. Lawyers must take care to comply with the applicable judicial decisions on litigation conduct, whether based on an interpretation of the jurisdiction’s professional conduct rules or derived from inherent judicial authority or other sources.

II. JUDICIAL DISAPPROVAL

In several cases, courts have disciplined lawyers for copying without attribution. The strongest condemnations are in a pair of Iowa opinions: Iowa Sup. Ct. Atty. Disciplinary Bd. v. Cannon, 789 N.W.2d 756 (Iowa 2010), and Iowa Sup. Ct. Bd. of Prof. Ethics and Conduct v. Lane, 642 N.W.2d 296 (Iowa 2002).

In Lane, the court suspended a lawyer for copying from a treatise without attribution. 642 N.W.2d at 298, 302. Lane held that this was a “misrepresentation to the court,” which violated Iowa’s version of Rule 8.4(c). Id. at 299. The court reasoned that “plagiarism itself is unethical,” citing decisions involving academic plagiarism by lawyers. Id. at 300 (citing In re Zbiegen, 433 N.W.2d 871, 875 (Minn. 1988) (term paper); and In re Lamberis, 93 Ill.2d 222, 227-28 (1982) (masters of law thesis)). Aggravating factors may have informed the Lane court’s view. When confronted, Lane initially admitted that he had “borrowed liberally,” but then delayed responding to an order requiring him to identify the source; when he eventually complied, it was by submitting a four-page single-spaced list of sources in which he drew no attention to the treatise from which he had copied. 642 N.W.2d at 298, 300. This led the disciplinary court to conclude that Lane had “knowingly plagiarized and intended to deceive.” Id. at 300 (emphasis added). Lane also claimed he had spent eighty hours drafting the brief, which the Court found “brings [his] integrity into question and the entire legal profession into disrepute.” Id. at 301.

In Cannon, eight years after Lane, the Iowa Supreme Court publicly reprimanded a lawyer for copying seventeen pages out of a nineteen-page brief from an article without attribution. 789 N.W.2d at 758. Cannon acknowledged Lane’s holding that plagiarism is misconduct, and (like Lane) cited Zbiegen, the case involving plagiarism of a term paper. See Cannon, 789 N.W.2d at

However, if it does, the copying lawyer may be violating Rule 8.4(b), which prohibits lawyers from engaging in "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."
Cannon also cited two additional disciplinary decisions post-dating Lane, both of which had characterized a lawyer’s use of another’s brief without citation as misconduct. See id. at 759 (citing In re Ayeni, 822 A.2d 420, 421 (D.C. 2003) and Columbia Bar Ass’n v. Farmer, 111 Ohio St.3d 137 (Ohio 2006)). Both Ayeni and Farmer, like Lane, involved evidence of a subjective intent to mislead.

In Ayeni, the lawyer filed a brief that was virtually identical to one filed by another lawyer on behalf of a codefendant. When confronted, the lawyer “denied having plagiarized,” claimed that he had “never seen the co-defendant’s brief,” and asserted that his client’s brief had been written “by an intern” — but the lawyer also submitted a voucher asserting he had personally spent nineteen hours researching and writing the brief. See In re Ayeni, 822 A.2d at 421. The court adopted the D.C. Board on Professional Responsibility’s conclusion that this conduct violated Rule 8.4(c). Id.

In Farmer, the lawyer convinced a client to retain him after denigrating prior counsel’s brief, but then re-filed the brief as his own. Farmer, 111 Ohio St.3d at 139-140. When questioned by the disciplinary board, the lawyer insisted that his clients were “lying about his promises and puffery.” Id. at 141. The court concluded that the lawyer violated DR 1-102(A)(4) (the Ohio equivalent of Rule 8.4(c)) by “overpromising to perform in a way that would persuade the Martin family to retain him and continue to pay for his services.” Id. at 142. For that violation, and others, the court suspended the lawyer from the practice of law for two years. Id. at 148.

The Iowa Supreme Court in Cannon, after citing Zbiegen, Ayeni, and Farmer, offered the following explanation:

We do not believe our ethical rules were designed to empower the court to play a “gotcha” game with lawyers who merely fail to use adequate citation methods. This case, however, does not involve a mere instance of less than perfect citation, but rather wholesale copying of seventeen pages of material. Such massive, nearly verbatim copying of a published writing without attribution in the main brief, in our view, does amount to a misrepresentation that violates our ethical rules. We note that before this court, Cannon has candidly admitted that his activity represented dishonesty and not negligence or incompetence.

In another case, In re Mundie, 453 Fed.Appx. 9 (2d Cir. 2011), the court disciplined a lawyer, in part for copying without attribution in a brief. However, Mundie did not analyze Rule 8.4(c) (or the prior relevant Code provision, DR 1-102(A)(4)). Instead, Mundie considered the issue as one of inadequate diligence. The brief “contained a number of defects and referenced irrelevant facts and issues as a result of Mundie having incorporated portions of a brief from a different case without making necessary changes.” Id. at *1. Mundie had obtained a model from a fellow practitioner and admitted that his adaptation had been careless. Id. at *7. The grievance committee (whose findings were adopted by the court) found that the conduct “does not amount to plagiarism,” but did (together with the lawyer’s having defaulted on dozens of other cases) warrant a finding that the lawyer breached his duty of diligence in violation of DR 6-101(A)(3)
and Rule 1.3(b). *Id.* at *20-21.* While the Court did not invoke Rule 1.1 (competence), the deficiencies in the brief clearly represent a violation of that Rule. *See, e.g., id.* at *20 (“his failure to take proper care in that case had the potential to prejudice his client”). The court issued a public reprimand. *Id.* at *1.* The First Department imposed reciprocal discipline without additional analysis. *See In re Mundie, 97 A.D.3d 194 (1st Dep’t 2012).*

Additionally, two federal district courts in the Eastern District of New York have expressed the view that copying without attribution is deceptive and likely a violation of Rule 8.4(c). *See Liberty Towers Realty, LLC v. Richmond Liberty, LLC, 569 B.R. 534, at 541 n. 6 (E.D.N.Y. 2017)* (admonishing counsel not to omit citations in the future and asserting that plagiarism “violates rules of professional conduct in jurisdictions including New York”); *Lohan v. Perez, 924 F. Supp.2d 447 (E.D.N.Y. 2013)* (sanctioning counsel and asserting that “plagiarism of the type at issue here would likely be found to violate” Rule 8.4(c)). Both *Liberty Towers* and *Lohan* relied on *In re Steinberg, 206 A.D.2d 232 (1st Dep’t 1994)*, in which the court publicly censured a lawyer who submitted briefs written by others as writing samples in support of his application to be appointed to an assigned counsel panel. *See id.* at 233-34. While the misconduct involved briefs, the lawyer was not filing these briefs in a lawsuit as an act of advocacy but was instead relying on them as purported evidence of his own skill as a writer. *See id.* at 233.

Other decisions outside New York and the Second Circuit have invoked the rules of ethics as a basis to criticize the unattributed use of others’ writings. For the most part, these decisions also appear to rely, directly or indirectly, on prior cases involving academic plagiarism. *See Consol. Paving, Inc. v. City of Peoria, 2013 WL 916212, at *6 (C.D. Ill. Mar. 8, 2013)* (declining to award otherwise compensable fees for preparation of fee application, based on counsel’s having copied 5 out of 13 pages of a brief from prior cases (citing, *inter alia, Lamberis et al.* and *Venesevich v. Leonard, 2008 WL 5340162, at *2 n.2 (M.D. Pa. Dec. 19, 2008)); *United States v. Sypher, 2011 WL 579156, at *3 n. 4 (W.D. Ky. Dec. 19, 2011)* (admonishing counsel for having copied legal standard section from Wikipedia without citation (citing *In re Burghoff, 374 B.R. 681*)); *Venesevich, 2008 WL 5340162, at *2 n.2 (admonishing counsel for having copied 5 out of 8-page legal discussion section of brief from prior cases without citation (citing, *inter alia, Lamberis* et al.* and *Kingvision Pay Per View Ltd. v. Wilson, 83 F. Supp.2d 914, 916 n. 4 (W.D. Tenn. 2000)); *Kingvision, 83 F. Supp.2d at 916 n. 4 (admonishing counsel for having copied from treatise without citation (citing *Lamberis* et al.* and *Steinberg)).

A number of other courts have condemned copying without attribution in litigation filings without citing specific ethics rules. Foremost among these are three opinions from the federal Courts of Appeals for the Third, Sixth, and Eighth Circuits. *See, e.g., United States v. Bowen, 194 Fed. Appx. 393, 402 n.3 (6th Cir. 2006)* (counsel’s “plagiarism” of a district court decision was “completely unacceptable” and “citation to authority is absolutely required when language is borrowed”); *United States v. Lavanture, 74 Fed.Appx. 221, 224 n.2 (3d Cir. 2003)* (“[I]t is certainly misleading and quite possibly plagiarism to quote at length a judicial opinion (or, for

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3 Rule 1.3(b) provides that “A lawyer shall not . . . [n]eglect a matter entrusted to the lawyer.” DR 6-101(A)(3) was the corresponding provision under the prior Code of Professional Responsibility. Its text was identical to Rule 1.3(b).
that matter, any source) without clear attribution”); United States v. Jackson, 64 F.3d 1213, 1219 n. 2 (8th Cir. 1995) (condemning counsel’s appropriation of “both arguments and language without acknowledging their source”). These decisions have been cited for the general proposition that citations must be provided when lawyers copy from prior sources. Notably, however, most of the cases discussed in Part II involved instances of copying without attribution from judicial opinions or published non-litigation sources such as treatises or articles, rather than copying from prior briefs.

III. DIFFERENT CONTEXT, DIFFERENT NORMS

The above-discussed cases in which discipline was imposed – Lane, Cannon, Ayeni, Farmer, and Mundie – presented ethical issues beyond copying without attribution. In Lane, Cannon, and Ayeni, the circumstances (extensive copying, conscious lack of candor to court, and the amounts charged by lawyers for their work on briefs) suggested a subjective intent to mislead. In Farmer, the nature of the conversations between lawyer and client surrounding the copied brief led to a finding of misconduct. And in Mundie, the brief was hastily prepared and likely incompetent.

We are skeptical of the suggestion in some decisions that, like academic plagiarism, any copying without attribution is inherently unethical and deceptive. The academic plagiarism which led to the ruling in, for example, Lamberis, 93 Ill., 2d 222 (1982), which is widely cited in later opinions, was clearly deceitful and warranted discipline under Rule 8.4(c). See id. at 225 (46 pages of 93-page masters-of-law thesis incorporated verbatim unacknowledged excerpts from


5 See, e.g., Bowen, 194 F. App’x at 402 n. 3 (20 pages copied from case); Lavanture, 74 F. App’x at 224 n. 2 (“more than half” of 5-page section copied from case); Liberty Towers Realty, 569 B.R. at 541 n. 6 (5 pages copied from ABA article); Goza, 2015 WL 4920796, at *2 n. 4 (one paragraph copied from case); Consol. Paving, Inc., 2013 WL 916212, at *6 (5 pages from case); Lohan, 924 F. Supp. 2d at 460 (entire brief copied from articles and blogs); Venesevich, 2008 WL 5340162, at *2 n.2 (5 pages copied from case); Kingvision, 83 F. Supp. 2d at 916 n. 4 (7 paragraphs (and related footnotes) out of 19 paragraph brief copied from treatise).
prior works). But academic writing and litigation writing have very different purposes and norms. As a result, we do not believe that copying without attribution in a brief is necessarily deceitful. Cf. Joy & McMunigal, 26 Criminal Justice 56, at 58 (“[a]ttaching the label of plagiarism to such copying and importing that concept in to the legal ethics arena in our view tends to mask rather than reveal ethical concerns such conduct may raise.”). Two primary differences between academia and litigation drive this conclusion.

First, the purpose of a litigation filing is to persuade the court, not to convey an original idea or to express an idea in an original way. See Shatz & McGrath, Beg, Borrow, Steal: Plagiarism vs. Copying in Legal Writing, California Litigation Vol. 26, No. 3 (2013) (“There are no bonus points for creative writing, rhetorical flourish, or intellectual brilliance. In fact, novel ideas are typically the weakest legal position and the hardest to argue.”). This contrasts with academic works, which aim to present an original idea in the author’s own words.

Second, litigation filings are tailored for clients, who often pay for the lawyer’s time. As a result, clients have an interest in efficiency. If the lawyer can make an effective argument by recycling arguments articulated by others, then the client stands to save money. See, e.g., DuVivier, Nothing New Under the Sun: Plagiarism in Practice, Colo. Law., 32-May Colo. Law 53 at *54 (“The client has nothing to gain from paying an attorney to start from scratch with each new document”).

These goals – persuasiveness and efficiency – lead to acceptance in litigation of many kinds of unacknowledged copying which would require citations in academia:

**Ideas:** Litigators are not obligated to cite sources for their ideas, and typically do not do so unless citing the source strengthens the client’s argument.

To illustrate: suppose that a lawyer finds a section from a treatise, law review article, or other secondary source addressing the client’s legal issue. The secondary source states some propositions which are helpful, and some which are adverse to the client. If the lawyer writes a brief which paraphrases the helpful propositions, and cites the authorities which the secondary source cites (after reviewing them to ensure that the secondary source has characterized them accurately and that they have not been reversed, amended, or abrogated), then the lawyer has no obligation to cite the secondary source itself. Indeed, omitting a citation to the secondary source is routine. See, e.g., DuVivier, supra (many lawyers find it to be “more effective to build the argument in the same way as the source, without specifically referencing the creator of this particular construction.”). Moreover, the lawyer is not required to alert the Court to the unhelpful portions of the source. At most, the lawyer would have a duty under Rule 3.3(a)(2) to alert the Court to the cases cited in the unhelpful portions of the source—though not to the secondary source itself—and even then, only if the underlying cases were controlling, adverse,

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6 Of course, a lawyer who saves time by copying from the work of others must pass the cost savings onto the client or risk discipline for charging an excessive fee. Cf., e.g., Lane, 642 N.W.2d at 301 (lawyer improperly charged eighty hours for copied brief).
and have not been cited by the adversary.\footnote{Rule 3.2(a)(2) provides that a lawyer shall not knowingly “fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” If the brief in question is an opening brief, the lawyer may wait to cite adverse authority until after opposing counsel has filed the opposition brief, because the lawyer has the opportunity to acknowledge the adverse precedent in reply. \textit{See} Roy D. Simon & Nicole Hyland, \textit{Simon’s New York Rules of Professional Conduct Annotated} at 1096-1097 (2017).}

In academia, on the other hand, it is plagiarism to omit a citation for the source of an idea, whether or not the exact words are copied. \textit{See, e.g.}, Columbia Law School Faculty Resolution on Principles of Academic Honesty (defining student "plagiarism" to include "[f]ailure to cite . . . ideas or phrases gained from another source . . .") (emphasis added), \textit{available at www.law.columbia.edu/academic-rules/certifications-academic-integrity} (last visited March 13, 2018).

\textbf{Form books:} Litigators routinely copy without attribution from form books. Forms are published specifically to be mined for ideas, language, and structure. \textit{See} Band and Schruer, \textit{“Dastar, Attribution, and Plagiarism,”} 33 AIPLA QJ 1, at 14 (2005) (“Presumably, few lawyers think twice when duplicating formatting suggested by \textit{Bender’s} Federal Forms, or downloading templates from a court website.”). And forms are not precedential, so a citation to a form book would add no persuasive force to a lawyer’s argument.

\textbf{Reuse of one's own prior work product:} Litigators also routinely recycle their (or their law firm’s) prior briefs. A brief that was successful for one client might be just as successful for another, and the second client would likely prefer not to incur the unnecessary cost of re-inventing that winning brief. Indeed, in \textit{In re Mundie}, 453 Fed.Appx. 9 (2d Cir. 2011), the court did not condemn the lawyer’s admitted practice of using prior briefs as uncited models; this practice only led to discipline when the lawyer neglected to adequately modify the model to fit the facts of the case. \textit{See} 454 Fed.App’x at 18 (lawyer’s other briefs based on the same model were “properly tailored” and “generally well-drafted”).

In academia, on the other hand, self-plagiarism is condemned as a close cousin to plagiarism of others’ work. \textit{See, e.g.,} Columbia Law School Faculty Resolution on Principles of Academic Honesty (defining student “self-plagiarism” to include “[t]he submission of one piece of work in more than one offering or in any two exercises for credit without explicit permission of the instructors involved”); \textit{see also, generally}, Lederman, “A Study of Self-Plagiarism,” \textit{Inside Higher Ed} (Dec. 3, 2010), \textit{available at www.insidehighered.com/views/2010/12/03/zirkel} (last visited March 13, 2018).

\section*{IV. USE OF OTHER LAWYERS’ BRIEFS}

Having reviewed these litigation norms, we turn to the question whether it is a \textit{per se} violation of Rule 8.4(c) for a lawyer to copy without attribution from a brief written by \textit{another} lawyer or law firm (as distinct from copying without attribution from the lawyer’s own prior work product). We do not believe that it is.

The interests in persuasiveness and efficiency discussed in Part III do not apply any differently if
the underlying source is a brief written by another lawyer. Briefs are not precedential, so citing the prior brief would not add persuasive force to the new brief. As a result, the lawyer’s client is not prejudiced if the lawyer omits a citation to a prior brief.

Nor is the original author harmed by the omission of a citation in the new brief. The original author drafted the prior brief to serve the lawyer’s own client’s objectives. Once the brief was filed, those objectives were served. The lawyer was entitled to receive compensation for drafting and filing that brief in accordance with the lawyer’s contractual relationship with the client, and that compensation is not diminished if some other lawyer later copies from the brief.

Nor is the court deceived. A lawyer’s signature on a brief is not a claim of authorship or of exclusive authorship. While procedural rules require that briefs be signed by a lawyer, the purpose of these rules is to identify the lawyer who is subject to sanction if the brief is frivolous, not to identify the author. See, e.g., Rule 11 of the Federal Rules of Civil Procedure; Rule 130-1.1 of the Uniform Rules of the New York Trial Courts; see also Joy & McMunigal, "The Problems of Plagiarism as an Ethics Offense," Criminal Justice, Volume 26, Number 2, Summer 2011 (“Originality, for example, is notably absent from the list of representations Rule 11 states that a lawyer certifies by signing [a brief].”); cf. Fed. Intermediate Credit Bank of Louisville v. Kentucky Bar Ass’n, 540 S.W.2d 14 (Ky. 1976) (“Legal instruments are widely plagiarized, of course. We see no impropriety in one lawyer’s adopting another’s work, thus becoming the ‘drafter’ in the sense that he accepts responsibility for it.”).

In re Ayeni, 822 A.2d 420 (D.C. App. 2003) and In re Farmer, 111 Ohio St.3d 137 (Ohio 2006) both imposed discipline on lawyers who copied without attribution from briefs written by others. But, as discussed in Part I above, both Ayeni and Farmer involved clear evidence of a conscious subjective intent to deceive, above and beyond the mere omission of a citation. In Ayeni, the lawyer overbilled for the copied brief, but then blamed an intern for the misconduct. See 822 A.2d at 421. And in Farmer, the primary nature of the violation was not the recycling of the brief, but rather that the lawyer lied to his own client about the brief. See 111 Ohio St.3d at 141-42. We do not read either case as implying a general rule that lawyers must always provide attribution when they copy from briefs written by others.

A prior opinion by the North Carolina State Bar Association (“NC Bar”) is consistent with our analysis. In Formal Ethics Opinion 2008-14, the NC Bar held that “it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer.” The NC Bar reasoned:

Lawyers often rely upon and incorporate the work of others when writing a brief, whether that work comes from a law firm brief bank, a client's brief bank, or a brief that the lawyer finds in a law library or posted on a listserv on the Internet. By its nature, the application of the common law is all about precedent, which invites the re-use of arguments that have previously been successful and have been upheld. It would be virtually impossible to determine the origin of the legal argument in many briefs. Moreover, the utilization of the work of others in this context furthers the interests of the client by reducing the amount of time required to prepare a brief and thus reducing the charge to the client. See RPC 190 (1994).
It also facilitates the preparation of competent briefs by encouraging lawyers to use the most articulate, carefully researched, and comprehensive legal arguments.

In the same opinion, the NC Bar also asserted that, if the lawyer knows the identity of the author of the excerpt which he or she intends to use, “it is the better, more professional practice, for the lawyer to include a citation to the source.” In this respect only, we part ways with the NC Bar. We do not believe, as a general matter, that the reader of a brief would expect to see a citation to a prior brief on which the argument is modeled. If the argument was successful in the prior case, the more typical practice would be to draw the new court’s attention to the prior court’s ruling, which is precedential, and presumably would add some persuasive force to the new brief. If the argument was unsuccessful before, then the lawyer might not wish to draw the court’s attention to what the prior court did, and is not required to do so unless the prior opinion is adverse and binding, and has not been cited by opposing counsel. See Rule 3.3(a)(2).

We also find instructive a prior opinion by the New York State Bar Association which discussed whether a lawyer could ethically follow the direction of an insurance carrier to rely on the insurance carrier’s suggested third-party research service and “brief bank.” See NYSBA Ethics Op. 721 (1999). Among other things, the State Bar concluded that the lawyer could ethically draw from the brief bank if the lawyer concluded, “in the exercise of independent professional judgment,” that no additional work was necessary. Notably, the State Bar did not express any reservation about the contemplated undisclosed use of briefs authored by others as a potential violation of Rule 8.4(c) (or DR 1-102(A)(4)).

V. JUDICIAL OPINIONS AND PUBLISHED WRITINGS

Lastly, we consider whether lawyers may copy without attribution from judicial opinions and published writings such as articles, treatises, and blog posts, or whether to do so is inherently deceptive and a violation of Rule 8.4(c).8 We are not aware of any ethics committee which has previously considered this question.

There are certain ways in which published writings and judicial opinions are different from prior briefs written by others. But in our view, these differences still do not lead us to conclude that it is invariably deceptive to lift unattributed language from published writings and opinions.

Published writings: The primary difference between published writings and briefs is that there is arguably a greater risk of harm to the original author if the quoted work is not cited. Published

8 A preliminary question to be addressed is whether there is any non-deceptive reason why a lawyer might want to omit a citation to quoted material from a case or published writing. While the explanation which springs quickest to mind is laziness or inattention (which can in extreme cases amount to a violation of Rule 1.1(a)), we think there are at least three non-deceptive reasons for omitting a citation. First, as in the example discussed in Part II above, the quoted source might include statements that are adverse to the client but not binding precedent. The lawyer might not want to (and has no obligation to) alert the court to those statements. Second, the source might have expressed an idea in a particularly cogent and compelling way, but in service to a conclusion or holding which would be different enough to require explanation, if the lawyer were to cite the source. In such a case the lawyer might conclude that to invoke the source and explain it would distract unduly from the flow of the argument. Third, the lawyer might believe that there is something about the source (perhaps the author or the publication) which would lead the judge to unfairly discount the argument if the judge knew of it.
writings, unlike briefs, are written in a context in which originality is prized and attribution is expected. In legal academia, in particular, authors are rarely compensated directly, and the benefit of publication is reputational. See Band and Schruers, Dastar, Attribution, and Plagiarism, 33 AIPLA Q. J. 1 (2005) (“Because reputational credit is the currency, attribution is essential for the scholar to realize the value of his or her research.”). For legal scholars, it is a mark of influence to be cited in a judicial opinion, and commentators have even ranked the relative influence of scholars based on the rates at which they are cited. See Farris et al., Judicial Impact of Law School Faculties (Aug. 18, 2016), available at SSRN: ssrn.com/abstract=2826048. When a litigator copies material from an article, but does not cite the scholar, the court cannot credit the scholar even if the court finds the reasoning persuasive, and the scholar will not be perceived to be as influential as he or she in fact is.

On the other hand, as discussed in Part III above, lawyers routinely employ paraphrased ideas in legal briefs without citing their sources. And a failure to acknowledge the scholar from whom one learns an idea may be similarly prejudicial to the scholar whether the exact words are borrowed or the paraphrased idea is borrowed. Although arguably a scholar might expect to be cited when his ideas (whether paraphrased or copied verbatim) are used in a legal brief, the central question with respect to Rule 8.4(c) is not what the author expects but, rather, what the court expects. And since courts routinely expect, and accept, copying in legal briefs, we conclude that there may be circumstances where copying text from published writings without attribution in legal briefs is not deceptive and, therefore, that it is not a per se violation of Rule 8.4(c).

Judicial opinions: The concern articulated above relating to the risk that the original authors would suffer concrete harm if their work were quoted without attribution does not apply as strongly when the prior source is a judicial opinion. While some judges develop reputations as influential thinkers and writers, many do not, and it is not commonly required by rules of citation that the individual judge who wrote an opinion be named when the opinion is cited. Cf. The Bluebook (20th Ed. 2015) § 10.4 (suggesting that “every case citation must indicate which court decided the case,” but not requiring identification of the authoring judge). Moreover, judges are salaried public servants whose livelihoods do not depend on their being recognized for the influence of their opinions.

A separate concern potentially applies to the practice of copying without attribution from judicial opinions (and to particularly influential secondary sources such as Restatements of the law). Judges rely on precedent in issuing their rulings. The orderly development of the common law is advanced when a judge is aware of what other judges have said concerning an issue. Judges rely on the lawyers to alert them to these prior pronouncements. Indeed, some judges even copy reasoning from the prevailing party’s brief into their ruling. If a court copied the prevailing party’s argument verbatim, only to learn that the lawyer had copied that argument from a case which would have been readily distinguishable if the court had known of it, the result could be a confusing pair of cases with similar language but different holdings. The same risk is not present when the lawyer copies from a prior brief or other non-precedential document. Despite the

9 As discussed in note 2, supra, this opinion does not address whether copying without attribution constitutes a violation of the copyright laws.
heightened potential for complications where ideas or language are lifted from prior judicial opinions, however, we are not persuaded that copying from a prior judicial opinion without attribution in a brief is always deceptive and therefore a per se violation of Rule 8.4(c).

VI. OTHER RULES, IN ADDITION TO RULE 8.4(C), REGULATE LITIGATION FILINGS

Our opinion that copying without attribution is not per se deceptive is based on our view of the norms of litigation practice and the purposes of litigation filings. Over time, courts will continue to express opinions on the propriety of copying without attribution, and it is possible that these decisions will coalesce into a clear judicial consensus that copying without attribution is per se deceptive for certain kinds of sources or when a certain volume of material is copied. If that consensus emerges (or if courts in New York issue an authoritative rule or ruling), we would need to revisit this opinion. To fail to cite a source, despite having knowledge that the court expects that source to be cited, would constitute a lack of candor and, in all likelihood, an act of deliberate deception in violation of Rule 8.4(c). As of now, however, we do not believe such a consensus exists in New York.10

Instead, we believe that in many of the cases described in Part II, the courts’ condemnation is better understood as a response to extensive and ill-considered copying, which implicates a host of other Rules – in addition to court procedural rules such as Rule 11 of the Federal Rules of Civil Procedure and Rule 130-1.1 of the Uniform rules of the New York Trial Courts.

Rule 1.1(a) requires a lawyer to “provide competent representation to a client,” which entails “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” If the lawyer copies extensively and inaptly from a treatise or prior judicial opinion, the brief may give the court little guidance on how the law applies to the facts of the case and may leave the adversary’s arguments unrebutted. The resulting brief may advocate ineffectively for the client and may therefore violate Rule 1.1(a). See Shatz & McGrath, “Beg, Borrow, Steal” (“[C]ourts are especially concerned not so much with the mere copying of someone else’s work, but rather the act of copying in lieu of customizing a brief to the issues and circumstances of the case.”); Joy & McMunigal (urging courts to focus on competence and diligence in reviewing whether particular instances of copying without attribution rise to the

10 The norms of ghostwriting (a lawyer’s undisclosed drafting of papers on behalf of a supposedly pro se party) show the importance of judicial expectations. Some jurisdictions have historically viewed ghostwriting as a per se violation of Rule 8.4(c). In Lane, for instance, the Iowa Supreme Court asserted that ghostwriting is “akin” to plagiarism, and that “[j]ust as ghost-writing constitutes a misrepresentation on the court, so does plagiarism of the type we have before us.” 642 N.W.2d at 299 (collecting cases condemning ghostwriting). By contrast, this Committee, in Formal Opinion 1987-2, took a more nuanced view, concluding that ghostwriting “may” amount to dishonesty, depending upon whether the lawyer “is rendering active and substantial legal assistance” behind the scenes. More recently, following the enactment of Rule 1.2(c) (which explicitly permits limited-scope representations), the New York County Lawyers’ Association, in Opinion 742, issued an even more permissive opinion, concluding that disclosure of the fact that a brief was “prepared with the assistance of counsel” is required by Rule 8.4(c) only when disclosure is mandated by “(1) a procedural rule, (2) a court rule, (3) a particular judge’s rule, (4) a judge’s order in a specific case,” or when nondisclosure would “constitute a misrepresentation.” We believe a similar standard applies to the question whether omission of a citation is deceptive and a violation of Rule 8.4(c).
Rule 1.3(a) requires a lawyer to “act with reasonable diligence and promptness in representing a client,” and Rule 1.3(b) provides that “[a] lawyer shall not neglect a legal matter entrusted to the lawyer.” A lawyer who copies large sections of a brief at the last minute before a filing deadline, leaving little time to tailor the brief to the facts, may violate Rule 1.3 by neglecting the matter, in addition to violating Rule 1.1(a).

Rule 3.1(a): When the amount of copying is extensive, the failure to tailor the brief to the situation before the court may be so egregious that the brief no longer stands as a good-faith filing made for a proper purpose. Rule 3.1(a) specifically prohibits the lawyer from engaging in “frivolous” litigation conduct. Rule 3.1(b) defines “frivolous” conduct as including the advancement of “a claim or defense that is unwarranted under existing law,” as well as conduct which “has no reasonable purpose other than to delay or prolong the resolution of litigation . . . or serves merely to harass or maliciously injure another.” The Comment to Rule 3.3 states that a filing is not frivolous “merely because the facts have not first been fully substantiated,” but emphasizes that: “Lawyers are required, however, to inform themselves about the facts of their clients’ cases and the applicable law, and determine that they can make good-faith arguments in support of their clients’ positions.” Rule 3.1 Cmt. 2.

To copy almost an entire brief from a secondary source or prior judicial opinion – as occurred in many of the cases discussed in Part II – suggests that the lawyer did not make a sufficient effort to determine the applicable law or to ensure that it truly supports the client’s position.11 If an inappropriate brief were filed in support of a motion, then the lawyer would seem not to have a good faith basis for seeking the relief. If such a brief were filed in opposition to a motion, then the lawyer would seem not to have a good faith reason to oppose the relief sought. In either case, the purpose of the filing would possibly be frivolous.

Rule 3.3(a)(1) provides that lawyers may not knowingly “make a false statement of fact or law to a tribunal.” By omitting quotation marks, the lawyer is adopting the prior source’s words together with the prior source’s mistakes. See Scott Moise, Rocket Docket: The Joys and Perils of Online Court Documents, 22 S.C. Law. 46, 47 (May 2011) (“[t]he briefs may look good and read well, but they may not be substantively correct. For example, the cases cited in the briefs could have been misquoted, mischaracterized, or even overturned. . . .”). Even when the lawyer copies only a short excerpt, the omission of quotation marks and citations makes the lawyer responsible for the text in a way that the lawyer would not necessarily have been if the lawyer had attributed the text to the prior author.12 The lawyer should review any authorities cited in the copied excerpt to ensure that the excerpt characterizes those authorities accurately and to ensure that those authorities have not been reversed, amended, or abrogated.

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11 This risk is less stark when the prior source is itself a brief rather than a treatise or judicial opinion, since litigation scenarios can recur, and the same arguments that were successful before might be successful again.

12 We also note that Rule 3.3(a)(2), which imposes an obligation on lawyer to bring unfavorable, authoritative precedent to the court’s attention if the opposing party has failed to do so, applies in the same way whether the lawyer is drafting the brief from scratch or copying from prior sources.
Rule 8.4(c): We add that, while we do not believe that copying without attribution is per se deceptive, there are circumstances in which the omission of a citation will violate Rule 8.4(c). For instance, if the lawyer omits a citation to the source material in order to support an inflated fee application, or subjectively intends to mislead the court or opposing counsel, then Rule 8.4(c) would apply.

Each of these rules provides guidance to lawyers drafting litigation filings. The guidance provided by these Rules aligns with the purpose of a litigation filing – to make the best argument possible for the client in an efficient way, while not misstating the law or the facts to the court. We believe that conscientious adherence to these Rules will eliminate almost all of the negative effects that ensue from copying without attribution.

VII. CONCLUSION

This opinion should not be read to suggest that we condone copying source material without attribution in litigation filings. Rather, we simply conclude that copying without attribution in litigation filings does not represent a per se violation of a lawyer’s ethical obligations under Rule 8.4(c).

We close by re-emphasizing that many courts disapprove of extensive copying in briefs. In the era of electronic databases, it is not difficult for a court and (perhaps, more importantly) opposing counsel to learn the true source of any unattributed phrases in the brief which may seem uncharacteristically learned or otherwise suggest that the filing lawyer has deliberately omitted a citation. If and when opposing counsel brings the omission to the Court’s attention, the result could be a material loss of credibility for the drafting lawyer, and a real risk that the client’s interests will be prejudiced, even if the Court declines to award sanctions under court procedural rules like Rule 11 of the Federal Rules of Civil Procedure or N.Y. Supreme Court Rule 130-1.1, and regardless of whether the conduct is a technical violation of Rule 8.4(c). It is beyond our purview to opine whether copying without attribution is sanctionable, but we note that many Courts — including two in the Eastern District of New York — plainly believe that it is. As a result, we strongly urge lawyers not to omit citations when copying, particularly when the underlying source is a published writing or judicial opinion.

In addition, we caution that, when copying from other sources (with or without attribution), lawyers should ensure that they are complying with their obligations under other Rules, including Rule 1.1(a) (competence), Rule 1.3 (diligence), Rule 3.1 (non-meritorious claims and contentions), and Rule 3.3 (conduct before a tribunal).
Lawyers’ Obligations After an Electronic Data Breach or Cyberattack

Model Rule 1.4 requires lawyers to keep clients “reasonably informed” about the status of a matter and to explain matters “to the extent reasonably necessary to permit a client to make an informed decision regarding the representation.” Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

Introduction

Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers. In one highly publicized incident, hackers infiltrated the computer networks at some of the country’s most well-known law firms, likely looking for confidential information to exploit through insider trading schemes. Indeed, the data security threat is so high that law enforcement officials regularly divide business entities into two categories: those that have been hacked and those that will be.

In Formal Opinion 477R, this Committee explained a lawyer’s ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

1 See, e.g., Dan Steiner, Hackers Are Aggressively Targeting Law Firms’ Data (Aug. 3, 2017), https://www.cio.com (explaining that “[f]rom patent disputes to employment contracts, law firms have a lot of exposure to sensitive information. Because of their involvement, confidential information is stored on the enterprise systems that law firms use. . . . This makes them a juicy target for hackers that want to steal consumer information and corporate intelligence.”) See also Criminal-Seeking-Hacker’ Requests Network Breach for Insider Trading, Private Industry Notification 160304-01, FBI, CYBER DIVISION (Mar. 4, 2016).
opinion picks up where Opinion 477R left off, and discusses an attorney’s ethical obligations when a data breach exposes client confidential information. This opinion focuses on an attorney’s ethical obligations after a data breach, and it addresses only data breaches that involve information relating to the representation of a client. It does not address other laws that may impose post-breach obligations, such as privacy laws or other statutory schemes that law firm data breaches might also implicate. Each statutory scheme may have different post-breach obligations, including different notice triggers and different response obligations. Both the triggers and obligations in those statutory schemes may overlap with the ethical obligations discussed in this opinion. And, as a matter of best practices, attorneys who have experienced a data breach should review all potentially applicable legal response obligations. However, compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations. Nor does compliance with lawyer regulatory rules per se represent compliance with breach response laws. As a matter of best practices, lawyers who have suffered a data breach should analyze compliance separately under every applicable law or rule.

Compliance with the obligations imposed by the Model Rules of Professional Conduct, as set forth in this opinion, depends on the nature of the cyber incident, the ability of the attorney to know about the facts and circumstances surrounding the cyber incident, and the attorney’s roles, level of authority, and responsibility in the law firm’s operations.

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6 The Committee recognizes that lawyers provide legal services to clients under a myriad of organizational structures and circumstances. The Model Rules of Professional Conduct refer to the various structures as a “firm.” A “firm” is defined in Rule 1.0(c) as “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” How a lawyer complies with the obligations discussed in this opinion will vary depending on the size and structure of the firm in which a lawyer is providing client representation and the lawyer’s position in the firm. See MODEL RULES OF PROF’L CONDUCT R. 5.1 (2018) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF’L CONDUCT R. 5.2 (2018) (Responsibility of a Subordinate Lawyers); and MODEL RULES OF PROF’L CONDUCT R. 5.3 (2018) (Responsibility Regarding Nonlawyer Assistance).

7 In analyzing how to implement the professional responsibility obligations set forth in this opinion, lawyers may wish to consider obtaining technical advice from cyber experts. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 477R (2017) (“Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.”) See also, e.g., Cybersecurity Resources, ABA Task Force on Cybersecurity, https://www.americanbar.org/groups/cybersecurity/resources.html (last visited Oct. 5, 2018).
I. Analysis

A. Duty of Competence

Model Rule 1.1 requires that “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The scope of this requirement was clarified in 2012, when the ABA recognized the increasing impact of technology on the practice of law and the obligation of lawyers to develop an understanding of that technology. Comment [8] to Rule 1.1 was modified in 2012 to read:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)

In recommending the change to Rule 1.1’s Comment, the ABA Commission on Ethics 20/20 explained:

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to ‘keep abreast of changes in the law and its practice.’ The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.

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10 ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer’s substantive duty of competence: “Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase ‘including the benefits and risks associated with relevant technology,’ would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.”
In the context of a lawyer’s post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission’s thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer’s competency in this regard may be satisfied either through the lawyer’s own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.\textsuperscript{11}

1. **Obligation to Monitor for a Data Breach**

Not every cyber episode experienced by a lawyer is a data breach that triggers the obligations described in this opinion. A data breach for the purposes of this opinion means a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer’s ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.

Many cyber events occur daily in lawyers’ offices, but they are not a data breach because they do not result in actual compromise of material client confidential information. Other episodes rise to the level of a data breach, either through exfiltration/theft of client confidential information or through ransomware, where no client information is actually accessed or lost, but where the information is blocked and rendered inaccessible until a ransom is paid. Still other compromises involve an attack on a lawyer’s systems, destroying the lawyer’s infrastructure on which confidential information resides and incapacitating the attorney’s ability to use that infrastructure to perform legal services.

Model Rules 5.1 and 5.3 impose upon lawyers the obligation to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and staff in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2], and Model Rule 5.3 Comment [1] state that lawyers with managerial authority within a firm must make reasonable efforts to establish

internal policies and procedures designed to provide reasonable assurance that all lawyers and staff in the firm will conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2] further states that “such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.”

Applying this reasoning, and based on lawyers’ obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data and the use of data. Without such a requirement, a lawyer’s recognition of any data breach could be relegated to happenstance --- and the lawyer might not identify whether a breach has occurred, whether further action is warranted, whether employees are adhering to the law firm’s cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties, and how and when the lawyer must take further action under other regulatory and legal provisions. Thus, just as lawyers must safeguard and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information.

While lawyers must make reasonable efforts to monitor their technology resources to detect a breach, an ethical violation does not necessarily occur if a cyber-intrusion or loss of electronic information is not immediately detected, because cyber criminals might successfully hide their

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14 MODEL RULES OF PROF’L CONDUCT R. 1.6(c) (2018); MODEL RULES OF PROF’L CONDUCT R. 1.15 (2018).
15 See also MODEL RULES OF PROF’L CONDUCT R. 5.1 & 5.3 (2018).
16 The importance of monitoring to successful cybersecurity efforts is so critical that in 2015, Congress passed the Cybersecurity Information Sharing Act of 2015 (CISA) to authorize companies to monitor and implement defensive measures on their information systems, and to foreclose liability for such monitoring under CISA. AUTOMATED INDICATOR SHARING, https://www.us-cert.gov/ais (last visited Oct. 5, 2018); See also National Cyber Security Centre “Ten Steps to Cyber Security” [Step 8: Monitoring] (Aug. 9, 2016), https://www.ncsc.gov.uk/guidance/10-steps-cyber-security.
intrusion despite reasonable or even extraordinary efforts by the lawyer. Thus, as is more fully explained below, the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach.

2. Stopping the Breach and Restoring Systems

When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach. The decision whether to adopt a plan, the content of any plan, and actions taken to train and prepare for implementation of the plan, should be made before a lawyer is swept up in an actual breach. “One of the benefits of having an incident response capability is that it supports responding to incidents systematically (i.e., following a consistent incident handling methodology) so that the appropriate actions are taken. Incident response plans help personnel to minimize loss or theft of information and disruption of services caused by incidents.” While every lawyer’s response plan should be tailored to the lawyer’s or the law firm’s specific practice, as a general matter incident response plans share common features:

The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm’s network.

Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported; and

18 See ABA CYBERSECURITY HANDBOOK, supra note 11, at 202 (explaining the utility of large law firms adopting “an incident response plan that details who has ownership of key decisions and the process to follow in the event of an incident.”).
define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response.20

Whether or not the lawyer impacted by a data breach has an incident response plan in place, after taking prompt action to stop the breach, a competent lawyer must make all reasonable efforts to restore computer operations to be able again to service the needs of the lawyer’s clients. The lawyer may do so either on her own, if qualified, or through association with experts. This restoration process provides the lawyer with an opportunity to evaluate what occurred and how to prevent a reoccurrence consistent with the obligation under Model Rule 1.6(c) that lawyers “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.”21 These reasonable efforts could include (i) restoring the technology systems as practical, (ii) the implementation of new technology or new systems, or (iii) the use of no technology at all if the task does not require it, depending on the circumstances.

3. Determining What Occurred

The Model Rules do not impose greater or different obligations on a lawyer as a result of a breach involving client information, regardless of whether the breach occurs through electronic or physical means. Just as a lawyer would need to assess which paper files were stolen from the lawyer’s office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A competent attorney must make reasonable efforts to determine what occurred during the data breach. A post-breach investigation requires that the lawyer gather sufficient information to ensure the intrusion has been stopped and then, to the extent reasonably possible, evaluate the data lost or accessed. The information gathered in a post-breach investigation is necessary to understand the scope of the intrusion and to allow for accurate disclosure to the client consistent with the lawyer’s duty of communication and honesty under

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21 We discuss Model Rule 1.6(c) further below. But in restoring computer operations, lawyers should consider whether the lawyer’s computer systems need to be upgraded or otherwise modified to address vulnerabilities, and further, whether some information is too sensitive to continue to be stored electronically.
Model Rules 1.4 and 8.4(c). Again, how a lawyer actually makes this determination is beyond the scope of this opinion. Such protocols may be a part of an incident response plan.

**B. Duty of Confidentiality**

In 2012, amendments to Rule 1.6 modified both the Rule and the commentary about a lawyer’s efforts that are required to preserve the confidentiality of information relating to the representation of a client. Model Rule 1.6(a) requires that “A lawyer shall not reveal information relating to the representation of a client” unless certain circumstances arise. The 2012 modification added a duty in paragraph (c) that: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Amended Comment [18] explains:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client 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 subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a “reasonable efforts” determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and

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22 The rules against dishonesty and deceit may apply, for example, where the lawyer’s failure to make an adequate disclosure --- or any disclosure at all --- amounts to deceit by silence. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. [1] (2018) (“Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”).

23 MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2018).

24 Id. at (c).
the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).\textsuperscript{25}

As this Committee recognized in ABA Formal Opinion 477R:

At the intersection of a lawyer’s competence obligation to keep “abreast of knowledge of the benefits and risks associated with relevant technology,” and confidentiality obligation to make “reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,” lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.

As discussed above and in Formal Opinion 477R, an attorney’s competence in preserving a client’s confidentiality is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable.\textsuperscript{26} Rather, the obligation is one of reasonable efforts. Rule 1.6 is not violated even if data is lost or accessed if the lawyer has made reasonable efforts to prevent the loss or access.\textsuperscript{27} As noted above, this obligation includes efforts to monitor for breaches of client confidentiality. The nature and scope of this standard is addressed in the ABA Cybersecurity Handbook:

Although security is relative, a legal standard for “reasonable” security is emerging. That standard rejects requirements for specific security measures (such as firewalls, passwords, or the like) and instead adopts a fact-specific approach to business security obligations that requires a “process” to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in response to new developments.\textsuperscript{28}

\textsuperscript{25} MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [18] (2018). “The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available.” ABA COMMISSION REPORT 105A, supra note 9, at 5.

\textsuperscript{26} ABA CYBERSECURITY HANDBOOK, supra note 11, at 122.

\textsuperscript{27} MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. [18] (2018) (“The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.”)

\textsuperscript{28} ABA CYBERSECURITY HANDBOOK, supra note 11, at 73.
Finally, Model Rule 1.6 permits a lawyer to reveal information relating to the representation of a client if the disclosure is impliedly authorized in order to carry out the representation. Such disclosures are permitted if the lawyer reasonably believes that disclosure: (1) is impliedly authorized and will advance the interests of the client in the representation, and (2) will not affect a material interest of the client adversely. In exercising this discretion to disclose information to law enforcement about the data breach, the lawyer must consider: (i) whether the client would object to the disclosure; (ii) whether the client would be harmed by the disclosure; and (iii) whether reporting the theft would benefit the client by assisting in ending the breach or recovering stolen information. Even then, without consent, the lawyer may disclose only such information as is reasonably necessary to assist in stopping the breach or recovering the stolen information.

C. Lawyer’s Obligations to Provide Notice of Data Breach

When a lawyer knows or reasonably should know a data breach has occurred, the lawyer must evaluate notice obligations. Due to record retention requirements of Model Rule 1.15, information compromised by the data breach may belong or relate to the representation of a current client or former client. We address each below.

1. Current Client

Communications between a lawyer and current client are addressed generally in Model Rule 1.4. Rule 1.4(a)(3) provides that a lawyer must “keep the client reasonably informed about the status of the matter.” Rule 1.4(b) provides: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Under these provisions, an obligation exists for a lawyer to communicate with current clients about a data breach.

30 This opinion addresses only obligations to clients and former clients. Data breach, as used in this opinion, is limited to client confidential information. We do not address ethical duties, if any, to third parties.
31 Relying on Rule 1.4 generally, the New York State Bar Committee on Professional Ethics concluded that a lawyer must notify affected clients of information lost through an online data storage provider. N.Y. State Bar Ass’n Op. 842 (2010) (Question 10: “If the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information,
Our conclusion here is consistent with ABA Formal Ethics Opinion 95-398 where this Committee said that notice must be given to clients if a breach of confidentiality was committed by or through a third-party computer vendor or other service provider. There, the Committee concluded notice to the client of the breach may be required under 1.4(b) for a “serious breach.”

The Committee advised:

Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).

A data breach under this opinion involves the misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer’s ability to perform the legal services for which the lawyer was hired is significantly impaired by the event. Each of these scenarios is one where a client’s interests have a reasonable possibility of being negatively impacted. When a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach. As noted in ABA Formal Opinion 95-398, a data breach requires notice to the client because such notice is an integral part of keeping a “client reasonably informed about the status of the matter” and the lawyer should provide information as would be “reasonably necessary to permit the client to make informed decisions regarding the representation” within the meaning of Model Rule 1.4.

The strong client protections mandated by Model Rule 1.1, 1.6, 5.1 and 5.3, particularly as they were amended in 2012 to account for risks associated with the use of technology, would be compromised if a lawyer who experiences a data breach that impacts client confidential information is permitted to hide those events from their clients. And in view of the duties imposed by these other Model Rules, Model Rule 1.4’s requirement to keep clients “reasonably informed about the status” of a matter would ring hollow if a data breach was somehow excepted from this responsibility to communicate.
Model Rule 1.15(a) provides that a lawyer shall hold “property” of clients “in connection with a representation separate from the lawyer’s own property.” Funds must be kept in a separate account, and “[o]ther property shall be identified as such and appropriately safeguarded.” Model Rule 1.15(a) also provides that, “Complete records of such account funds and other property shall be kept by the lawyer . . . .” Comment [1] to Model Rule 1.15 states:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer’s business and personal property.

An open question exists whether Model Rule 1.15’s reference to “property” includes information stored in electronic form. Comment [1] uses as examples “securities” and “property” that should be kept separate from the lawyer’s “business and personal property.” That language suggests Rule 1.15 is limited to tangible property which can be physically segregated. On the other hand, many courts have moved to electronic filing and law firms routinely use email and electronic document formats to image or transfer information. Reading Rule 1.15’s safeguarding obligation to apply to hard copy client files but not electronic client files is not a reasonable reading of the Rule.

Jurisdictions that have addressed the issue are in agreement. For example, Arizona Ethics Opinion 07-02 concluded that client files may be maintained in electronic form, with client consent, but that lawyers must take reasonable precautions to safeguard the data under the duty imposed in Rule 1.15. The District of Columbia Formal Ethics Opinion 357 concluded that, “Lawyers who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained and (2) to guard against the risk of unauthorized disclosure of client information.”

The Committee has engaged in considerable discussion over whether Model Rule 1.15 and, taken together, the technology amendments to Rules 1.1, 1.6, and 5.3 impliedly impose an obligation on a lawyer to notify a current client of a data breach. We do not have to decide that question in the absence of concrete facts. We reiterate, however, the obligation to inform the client does exist under Model Rule 1.4.
2. Former Client

Model Rule 1.9(c) requires that “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 . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.”\(^{35}\) When electronic “information relating to the representation” of a former client is subject to unauthorized access, disclosure, or destruction, the Model Rules provide no direct guidance on a lawyer’s obligation to notify the former client. Rule 1.9(c) provides that a lawyer “shall not . . . reveal” the former client’s information. It does not describe what steps, if any, a lawyer should take if such information is revealed. The Committee is unwilling to require notice to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice.\(^{36}\)

Nevertheless, we note that clients can make an informed waiver of the protections in Rule 1.9.\(^{37}\) We also note that Rule 1.16(d) directs that lawyers should return “papers and property” to clients at the conclusion of the representation, which has commonly been understood to include the client’s file, in whatever form it is held. Rule 1.16(d) also has been interpreted as permitting lawyers to establish appropriate data destruction policies to avoid retaining client files and property indefinitely.\(^{38}\) Therefore, as a matter of best practices, lawyers are encouraged to reach agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client’s electronic information that is in the lawyer’s possession.

Absent an agreement with the former client lawyers are encouraged to adopt and follow a paper and electronic document retention schedule, which meets all applicable laws and rules, to reduce the amount of information relating to the representation of former clients that the lawyers retain. In addition, lawyers should recognize that in the event of a data breach involving former client information, data privacy laws, common law duties of care, or contractual arrangements with

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\(^{35}\) MODEL RULES OF PROF’L CONDUCT R. 1.9(c)(2) (2018).

\(^{36}\) See Discipline of Feland, 2012 ND 174, ¶ 19, 820 N.W.2d 672 (Rejecting respondent’s argument that the court should engraft an additional element of proof in a disciplinary charge because “such a result would go beyond the clear language of the rule and constitute amendatory rulemaking within an ongoing disciplinary proceeding.”).


the former client relating to records retention, may mandate notice to former clients of a data breach. A prudent lawyer will consider such issues in evaluating the response to the data breach in relation to former clients.\textsuperscript{39}

\textbf{3. Breach Notification Requirements}

The nature and extent of the lawyer’s communication will depend on the type of breach that occurs and the nature of the data compromised by the breach. Unlike the “safe harbor” provisions of Comment [18] to Model Rule 1.6, if a post-breach obligation to notify is triggered, a lawyer must make the disclosure irrespective of what type of security efforts were implemented prior to the breach. For example, no notification is required if the lawyer’s office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach.

The disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything. In a data breach scenario, the minimum disclosure required to all affected clients under Rule 1.4 is that there has been unauthorized access to or disclosure of their information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed. If the lawyer has made reasonable efforts to ascertain the extent of information affected by the breach but cannot do so, the client must be advised of that fact.

In addition, and as a matter of best practices, a lawyer also should inform the client of the lawyer’s plan to respond to the data breach, from efforts to recover information (if feasible) to steps being taken to increase data security.

The Committee concludes that lawyers have a continuing duty to keep clients reasonably apprised of material developments in post-breach investigations affecting the clients’

\textsuperscript{39} Cf. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 482 (2018), at 8-10 (discussing obligations regarding client files lost or destroyed during disasters like hurricanes, floods, tornadoes, and fires).
information. Again, specific advice on the nature and extent of follow up communications cannot be provided in this opinion due to the infinite number of variable scenarios.

If personally identifiable information of clients or others is compromised as a result of a data breach, the lawyer should evaluate the lawyer’s obligations under state and federal law. All fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have statutory breach notification laws. Those statutes require that private or governmental entities notify individuals of breaches involving loss or disclosure of personally identifiable information. Most breach notification laws specify who must comply with the law, define “personal information,” define what constitutes a breach, and provide requirements for notice. Many federal and state agencies also have confidentiality and breach notification requirements. These regulatory schemes have the potential to cover individuals who meet particular statutory notice triggers, irrespective of the individual’s relationship with the lawyer. Thus, beyond a Rule 1.4 obligation, lawyers should evaluate whether they must provide a statutory or regulatory data breach notification to clients or others based upon the nature of the information in the lawyer’s possession that was accessed by an unauthorized user.

III. Conclusion

Even lawyers who, (i) under Model Rule 1.6(c), make “reasonable efforts to prevent the .. unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,” (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data

42 Id.
43 Id.
44 ABA CYBERSECURITY HANDBOOK, supra note 11, at 65.
45 Given the broad scope of statutory duties to notify, lawyers would be well served to actively manage the amount of confidential and or personally identifiable information they store beyond any ethical, statutory, or other legal obligation to do so. Lawyers should implement, and follow, a document retention policy that comports with Model Rule 1.15 and evaluate ways to limit receipt, possession and/or retention of confidential or personally identifiable information during or after an engagement.
breach under Model Rule 1.4 in sufficient detail to keep clients “reasonably informed” and with an explanation “to the extent necessary to permit the client to make informed decisions regarding the representation.”
TOPIC: Conduct Before a Tribunal

DIGEST: Where a supervising lawyer misrepresents a client’s compliance with a court order in response to a direct inquiry from the Court, the lawyer is required to correct the misrepresentation to the Court. If the supervising lawyer refuses to correct the record, the supervised lawyer who was in court with the supervising lawyer and aware of the misrepresentation must take steps to correct the record, which may include consulting with the General Counsel or other appropriate supervisor at the firm to urge that the firm correct the record. If the firm fails to take action, the supervised lawyer must inform the Court of the misstatement.

RULES OF PROFESSIONAL CONDUCT: 3.3, 5.1, 5.2

OPINION

1. Associate A recently joined the ABC law firm. She has been asked by Partner P to assist in the defense of NewMed, a medical device manufacturer that has been sued by Med-D.¹ Med-D claims that one of its former employees, who now works at NewMed, stole proprietary code used in Med-D’s medical device inventory software, COUNT, and used it in NewMed’s medical device inventory software, WARECOUNT. Med-D’s lawyers obtained a preliminary injunction prohibiting NewMed from further use of its WARECOUNT software pending the conclusion of expedited discovery, an evidentiary hearing, and the court’s decision on Med-D’s claims. NewMed was to be in full compliance with the Court’s order by the next status conference.

2. A accompanied P to the status conference in this matter. The Judge asked P if NewMed had complied with the preliminary injunction, and P replied that it had. In fact, the prior evening P spoke to the Chief of Operations at NewMed, and he explained that NewMed needed another week to fully take down the WARECOUNT software and install other software. A was present for the call with the Chief of Operations, and after the status conference asked P why she said NewMed was in compliance when it would not complete the takedown for another week. P said NewMed had partially complied, the week delay was not material and, most important, NewMed would be in full compliance weeks prior to the evidentiary hearing, so there was no need to inform the court of the delay. P also directed A that she was “duty-bound” to heed P’s instructions not to disclose NewMed’s partial compliance to the Court or opposing counsel.

3. Several rules in the New York Rules of Professional Conduct (“RPC”) govern the conduct of P and A in this scenario. RPC 3.3(a) provides that “[a] lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of

¹ The companies and product names used in this hypothetical are all fictitious, and are being used solely to aid discussion of the underlying issues herein.
material fact or law previously made to the tribunal by the lawyer.” Here, P will have violated RPC 3.3(a)(1) by misrepresenting NewMed’s compliance with the injunction to the Court, and has a duty under that same rule to correct the misrepresentation. Indeed, had P stated truthfully that NewMed had not fully complied and explained the logistical barriers to full compliance, the Court may simply have modified the order consistent with NewMed’s truthful representation about when full compliance could be achieved.

4. In addition, RPC 8.3(a) provides 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 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” If P does not correct the misrepresentation to the Court, A has an independent obligation to report P’s misrepresentation to the Court or some other disciplinary authority. Further, A is not relieved of her independent duty to report P’s misrepresentation even if she was directed by P or the ABC firm not to do so. See RPC 5.1, Cmt. 8 (supervisory duties imposed under RPC 5.1 on supervising lawyers “do not alter the personal duty of each lawyer in a firm to abide by these rules”); RPC 5.2(a) (“A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person”).

5. Importantly, the RPC provides a safe harbor for supervised lawyers whose conduct is deemed to be in violation of the RPC if, and only if, the supervised lawyer “acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” RPC 5.2(b). In the instant scenarios, for example, P, in addition to telling A she is “duty bound” not to disclose the client’s noncompliance, may inform A that the misrepresentation to the Court regarding the client’s compliance is in the client’s best interest and is not material because the client will have complied prior to the evidentiary hearing, which is the date on which full compliance will matter. Associate A should understand that making intentional misrepresentation to the Court can never be deemed a reasonable resolution of an arguable question of professional duty, and therefore she will not be protected by RPC 52(b)’s safe harbor if she fails to report the misrepresentation.

6. It remains unclear, however, whether the lack of candor before the Court becomes moot a week later when NewMed purportedly will be in full compliance. At that point, arguably there no longer is “a false statement of material fact” to be corrected. We believe that NewMed’s compliance one week later (and before the evidentiary hearing) does not cure the issues raised by P’s misrepresentation to the Court. At the status conference the Court relied on the fact that NewMed was in compliance as reason to keep the current injunction order in place without modification. Learning that NewMed was not in full compliance might have caused the Court to take action, ranging from granting a permanent injunction to merely extending the date for compliance by one week. The status of NewMed’s compliance plainly was “material” to the Court. Moreover, the Court relied on the truth of the P’s representations regarding NewMed’s compliance. Thus, P’s misrepresentation of NewMed’s compliance was a false statement of a material fact that required correction under RPC 3.3(a); we do not interpret RPC 3.3 to suggest that there is no longer an obligation to correct the record because NewMed complied shortly after the date of the status conference. In addition, P’s intentional misrepresentation to the Court about NewMed’s compliance and actions to conceal the misrepresentation subsequently demonstrates that his conduct raises a substantial question as to the P’s honesty, trustworthiness
or fitness as a lawyer. Accordingly, if A tries to convince the P to correct the misstatement to the Court and the P refuses, Associate A will have an obligation under Rule 8.3(a) to report the lawyer.

7. The Committee appreciates that a supervised attorney – such as an associate in a law firm – may feel that she has been put in an impossible position where she has knowledge of misconduct by a supervisor and either believes that revealing the misconduct may be career-ending or has been implicitly or explicitly told that disclosing will have an adverse effect on her career. While difficult, the lawyer must remember her duty to comply with the RPC, and her duties to the Court, clients, adversaries, and the administration of justice. In this regard, it may be helpful to consider interim measures that may be available to her. For example, if P does not agree to correct the court record, A may consult with her supervisor at the ABC firm (if this is someone other than the P) or the General Counsel or ethics counsel for the ABC firm regarding P’s misrepresentation and the need to correct the record. If the ABC firm still refuses to act, then A may be left with no alternative other than to inform the Court of the misrepresentation, leaving to the Court to determine if it wishes to take any action with respect to the P’s misrepresentation and failure to correct the record. Because the Court is “a tribunal or other authority empowered to investigate or act upon such violation,” A’s report to the Court would discharge any duty she may have under RPC 8.3(a).

CONCLUSION

8. A supervising lawyer who misrepresents her client’s compliance with a court order has a duty to correct the misstatement. If the supervisory lawyer does not correct the misstatement, and a supervised lawyer knows of the supervisory lawyer’s misrepresentation, the supervised lawyer must take reasonable remedial measures to correct the record. If the supervised attorney remonstrates with the supervisor to correct the record and the supervisor refuses, the supervised attorney may consult with the firm’s General Counsel or some other appropriate supervisor at the firm and urge that the firm correct the record. If the firm does not act on the supervised lawyer’s report, the supervised lawyer should report the misrepresentation to the court.
Say No to Nonlawyer Ownership (NLO)

The law is a treasured legacy. The bar is heir to that legacy. And we attorneys are custodians of that inheritance. It is our awesome privilege to preserve that bequest as we received it, autonomous, passionate and committed to the public interest. The solutions we forge today will paint the picture of what our profession is to become and what our legacy will be. Let then our bequest to the next generation of attorneys and to society be an independent profession, improved but undiminished, free and unfettered, respected and renewed.

NYSBA President Thomas O. Rice to ABA House of Delegates, August 1999

Early in my career, I had the good fortune and privilege of serving as the NYSBA Young Lawyers Section delegate to the American Bar Association House of Delegates. As a young attorney, I was given the opportunity to be part of discussions on important issues affecting our profession on a national level and to work with and learn from the great leaders in our New York delegation. Although my involvement with the bar association required taking precious time away from my new law practice and family, I returned from these meetings rejuvenated and proud of my profession, and excited about my career in the law.

Around that time, the ABA appointed a Commission on Multidisciplinary Practice (MDP) to study the issue of professional service firms owned by nonlawyers (NLOs) adding the provision of legal services to their mix. The ABA Commission issued a report proposing that entities owned or controlled by nonlawyers be allowed to engage in multidisciplinary practice with lawyers and that appropriate changes be made to the rules of ethics and professional responsibility. In response, NYSBA’s House of Delegates adopted a resolution opposing such changes in the absence of a sufficient demonstration that these were in the best interests of clients and society and would not undermine or dilute the integrity of the delivery of legal services by the legal profession.

When the MDP report was submitted to the ABA House at its 1999 annual meeting, the New York State Bar Association, led by its then-President Thomas O. Rice, voiced its opposition to the proposal. President Rice addressed the ABA House, simply and eloquently stating that long-term independence of our profession should not be compromised for short-term financial gain. He had laid out his case in his first President’s Message, published in the July-August Journal. In it he noted that proponents of business expansion plans cannot be permitted to make market-based proposals that allow businesses to dictate how law is practiced. Claimed increases in efficiency cannot be allowed to preempt a lawyer’s duty to a client. Our highest priority must be to advance the profession’s duties to society by preserving uncompromised loyalty to client interests. NYSBA and other likeminded bar associations around the country voted down the ABA Commission’s MDP proposal.

Our Association also undertook a study of the issue. In 2000, the NYSBA Special Committee on the Law Governing Firm Structure and Operation, chaired by Robert MacCrate, former president of both the ABA and the NYSBA, issued its comprehensive report. The report concluded,

Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forgo this opportunity.

Twelve years later, the ABA Commission on Ethics 20/20 proposed a limited form of nonlawyer ownership of law firms and the sharing of fees with firms that have offices in jurisdictions where nonlawyer ownership is permitted. After substantial opposition from many state bar associations, including ours, the proposal was withdrawn. Again our Association studied the issue, when then-President Vincent Doyle III formed a committee, chaired by past President Stephen Younger, to take a fresh look; the committee

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affirmed the findings of the MacCrate Report. Yet, the ABA continues to pursue nonlawyer ownership of law firms. The ABA Commission on the Future of Legal Services has asked ABA delegates to adopt proposed model regulatory objectives at the ABA House of Delegates Meeting in February 2016, to “identify and implement regulations related to legal services beyond the traditional regulation of the legal profession.”

If approved, the Commission would likely propose amendments to Model Rule 5.4 to allow lawyers and law firms to share legal fees with nonlawyers, who could hold a financial interest in the practice, in the delivery of both legal and nonlegal services.

We have some evidence of how nonlawyer ownership can work from a regulatory standpoint. Australia, whose practitioners are primarily small firms and solo practitioners, has set up a structure called incorporated legal practices, with each state setting up rules governing the practices in its jurisdiction. Each entity’s legal practitioner director is ultimately responsible for managing the legal services provided and for reporting any misconduct by the practice, its employees or directors. It is difficult to see how well this self-reporting works because of the legal practitioner director’s vested interest in the entity.

In the U.K., change came about because of a perceived lack of competition among firms and what had been called a crisis of confidence in the legal system. The U.K. established a national non-governmental regulator of all groups that regulate the legal profession. There are concerns about the top-down structure of legal regulation and the layers of bureaucracy it creates. Also, the regulations permit law shops in shopping areas, similar to tax preparation shops that proliferate in the United States during tax season.

In our own country, only the District of Columbia has allowed nonlawyer ownership of law firms. For 25 years, D.C.’s version of Model Rule 5.4 has allowed nonlawyers to hold a financial or managerial interest in a partnership with a lawyer. The nonlawyer may perform services that help the firm provide legal services to clients and must abide by the Rules of Professional Conduct. However, it is not widely used because a lawyer practicing outside of D.C. would almost certainly run afoul of rules in other states.

The ABA’s latest proposal regarding nonlawyer ownership of law firms cites the need to improve delivery of and access to legal services and driving forces such as technology, globalization and market pressures. The ABA has proposed a series of “Model Regulatory Objectives” to create a framework within which the variety of types and delivery methods of legal services can be regulated.

It has been argued that any attorney with a bank loan is beholden to corporate interests, but an attorney’s banker doesn’t control the clients accepted or the cases pursued. Nonlawyer ownership of law firms creates a whole new set of fiduciary responsibilities, which have nothing to do with clients or their interests. Investors want to see a profit; shareholders are owed a fiduciary duty. Of course all attorneys need to make a living, but professional judgment should not be compromised by the need to hit certain quarterly goals.

The MacCrate Report still rings true. It noted that any nonlegal entity likely to be attracted to making such an investment would want to be financially dominant in the law firm, and it is reasonable “to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership.” Such investment would impose a duty on the principals of the law firm to operate it for the “financial benefit of the investors.” Outside investment would create a minefield for lawyers, between legal ethics and independence on the one hand, and investors on the other.

As the MacCrate Report noted, “this financial aspect of nonlawyer control of legal practice presents considerable risks to the legal system and the justice system,” urging “the greatest caution” about permitting a “dominant nonlegal participant to influence the professional judgment of lawyers and to pass on matters of legal professional ethics.” Even so-called passive investment in law firms is problematic. Nonlawyer owners might view “their” law firm as yet another profit center and would be less likely to encourage pro bono or public interest work because there would be no return. The financial objectives of nonlawyer management would be in perpetual competition with lawyers’ professional ethics and independent judgments, which are in the best interests of legal clients and the legal system.

First and foremost, lawyers have a duty and responsibility to serve their clients. The attorney-client relationship forms an inviolable bond, and the attorney-client privilege, the hallmark of that relationship, is a seal that under the Rules of Professional Conduct cannot be broken. There simply is no such connection, no such code of professional responsibility in the business world.

We are a proud, strong, and noble profession; we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. Yes, our profession will change, but change should not be determined by profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It is incumbent upon us as attorneys and as representatives of the organized bar to remain guided by the Rules of Professional Conduct in our pursuit of ethical and responsible ways to use the new technologies to help us better connect with and serve our clients.

Of course we charge for our services; it’s how we make a living, pay our employees, support our families, fund access to justice programs, and so on. That doesn’t mean the law is just another business – nor should it be.
Lawyers Must Protect the Public We Serve

“Do the Public Good.”

– Motto of the New York State Bar Association

The Real Justice Gap

When we discuss the lack of availability of legal services to those who need them, often referred to as the “justice gap,” we generally think of it in the context of providing pro bono legal services to the poor. However, the public, lawyers and the organized bar are faced with another, perhaps more difficult, gap – non-lawyer entrepreneurs attempting to make a profit on the backs of solo and small firm attorneys seeking work, and a public that wants easy answers to legal issues.

Increasingly our profession and the public we serve are threatened by non-lawyer “legal services” businesses that not only demean the profession, but also diminish the complexity and nuances of providing competent and effective legal services and reduce the attorney-client relationship to an online form that needs to be completed. Although these services claim to be innovative, they subvert the fundamental principles of our profession.

The New York State Bar Association and our profession have worked hard to help address the real justice gap for the poor and underserved. We make great efforts, working with our sister bars, pro bono legal service organizations and the courts to help address legal needs of the poor in this state. Our Association has three new staff members whose responsibilities include the promotion and coordination of pro bono activities, and we’re partnering with the ABA to provide a justice portal to find new ways to deliver limited scope pro bono legal services via the Internet and email. We have taken the lead in looking to establish a statewide justice center in Albany to help coordinate and facilitate pro bono activities statewide. We also continue our longstanding and steadfast advocacy for increases in our state’s budget to fully fund the judiciary and for legal services initiatives.

But there is also the second “justice gap” for lower and middle income New Yorkers with some resources to pay for legal services. This gap is frustrating because many attorneys, especially those who are newly admitted or who practice as solos or in small firms, report difficulty finding new ways to connect with clients. Along with other bar associations, NYSBA is working on enhancing our lawyer referral service to provide support to all attorneys, focusing on solo and small firms.

The legal profession and the organized bar must use the collective strength of their resources and expertise to address this issue. We must work together to support struggling attorneys and connect them with a public that seeks access to affordable legal services. Some argue we should let our profession be co-opted by the influx of venture capitalists and internet entrepreneurs purporting to “market” legal services without being encumbered by rules of professional conduct or the various laws that apply to our profession. Each year hundreds of millions of dollars of venture capital are poured into non-lawyer legal service technology companies; well over 1,000 legal tech start-up companies are selling legal services to the public, and their numbers are growing.

These companies started on the fringe of what might be considered legal services by offering legal forms that customers could purchase and complete themselves, or easy-to-use electronic databases where listings of attorney contact information could be found. They have attracted millions of dollars of venture capital, not to help close the justice gap for the poor, but to profit from consumers who can afford to pay for legal services. Operating mostly unfettered, they have blossomed into marketing machines for legal services and legal advice, furnishing attorneys for legal services. Two of the most aggressive and well-funded of these companies are LegalZoom and Avvo.

LegalZoom began as a legal forms service and is now offering attorney consultations and legal plans. For about $10 a month, consumers can sign a contract for unlimited 30-minute attorney consultations on new or “unique” legal matters. It also offers fixed-rate services.

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such as a $39 living will with review by a “document specialist” or a $149 estate plan bundle that includes a year’s worth of “attorney advice.” It is not a law firm, but it has thousands of attorneys willing to pay for the referrals they receive.

Avvo started as an attorney directory and rating service. It now furnishes lawyers for a fee. Lawyers who agree to work to Avvo’s terms and conditions will be referred to perform document review or start-to-finish services. Avvo has recently launched a free legal forms service, with the option to click a button and chat for a fee with a practicing attorney. The consumer pays Avvo directly; Avvo holds the money until the work is completed and Avvo then deposits the money into the attorney’s Avvo account, taking back what it calls a “marketing fee.”

These new practices raise many concerns: compliance with laws regulating legal advertising; the line drawn between “marketing” and “fee-splitting”; can a non-lawyer corporation provide legal services; is it permissible for a business to act as a referral service; can a business charge fees to refer clients to lawyers?

**Businesses Advertising Legal Services**

The well-funded marketing campaigns of non-lawyer legal service businesses employ a tone that is both bold and deliberately vague. They offer legal services. They are simply facilitators so attorneys and clients can find each other. They furnish legal help. They do not furnish legal help. They give legal advice. They do not give legal advice. They create one impression to an unknowing public. They include disclaimers for the regulators.

LegalZoom provides a small-print disclaimer on its site, “We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.” Its marketing campaign aims to create a very different impression: “Whatever your legal need, we have an answer. Let us help you protect all that matters easily and affordably” and “LLC Documents Created by Top Attorneys – Up-to-Date Legal Documents. Our attorneys continually maintain our documents to be up to date with the latest legal requirements in each state.”


This advertising if used by a lawyer, or to market a law firm, might put the lawyer on the wrong side of the Rules of Professional Conduct.

For example, Rule 7.1(a) “Advertising” states: “(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading.” Thus, advertising that is not false violates this Rule if it is deceptive or misleading.

Rule 8.4(a), entitled “Misconduct,” states: “A lawyer or law firm shall not: (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.” Consequently, if advertising is deceptive or misleading, responsibility falls on the attorney.

These businesses claim the Rules of Professional Conduct do not apply to them because they are non-lawyer corporations, not law firms. However, even if they are correct, New York’s Judiciary Law § 495, prohibiting non-lawyer corporations from furnishing legal services, clearly applies.

**Judiciary Law § 495**

**No Corporation Shall Furnish Attorneys or Counsel**

There is some debate about whether these businesses are doing constitutes the unauthorized practice of law. By their own account, they have licensed attorneys that perform the legal work. They purport to maintain an arm’s length distance from the actual attorney performing the actual representation, but their business collects the fee and controls its distribution.

Several options for fixed-fee services are offered: document provision only; document service with review by a non-lawyer “document specialist” of unknown experience; more expensive attorney review. However, as noted above, these businesses imply in their advertising and promotions that they are offering legal services.

Even if these businesses are not in violation of our ethics rules, they may be in violation of N.Y. Judiciary Law § 495(1) which provides:

No corporation or voluntary association shall . . . (c) . . . render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, . . . nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

If these businesses are found to be “rendering legal services or advice” or “furnishing attorneys or counsel,” then they would be in violation of this section. If not, it would seem that New York’s broader false advertising laws would be implicated.

**Fee Splitting with Non-lawyers**

These businesses often offer fixed-rate, flat-fee consultations and services, as well as hourly based fee plans. For example, consumers seeking services through Avvo go to the company website and are steered toward a list of attorneys in their geographic and practice area.

After an introductory discussion between the consumer and the lawyer, if the lawyer is hired, the company immediately collects the fee, retaining the entire fee until the representation is completed. Pricing depends on the service the client wants, and the company’s cut depends on the cost of the legal service. After the representation has ended,
the company transfers the balance of the payment into the attorney’s assigned account and, at the same time, directly withdraws its “marketing” fee.

A lawyer may pay a business for advertising; however, fee-splitting violates Rule 5.4, entitled “Professional Independence of a Lawyer.” This Rule states: “A lawyer or law firm shall not share legal fees with a non-lawyer.”

A recent NYSBA Ethics Opinion, No. 1081, from January of this year, discussed the topic, where lawyers were employed as the non-lawyer company:

Rule 5.4 contains a number of provisions intended to ensure the professional independence of a lawyer. . . . Rule 5.4(a) provides that a lawyer “shall not share legal fees with a nonlawyer”. . . . If the Company’s clients are paying the Company for legal services rendered by the inquirers, then the inquirers would be violating Rule 5.4(a).

Avvo and other companies reject the idea that they are engaging in fee-splitting, claiming that they are merely charging a marketing fee.

For example, Avvo claims it “is not referring people to a particular lawyer”; the client makes the choice. However, the choices are limited to those attorneys in a particular geographic area who have agreed to pay Avvo’s “marketing” fee if they take on a representation. However, since Avvo rates all lawyers, regardless of whether any individual lawyer consents to the service, there is an implication that all lawyers are on the list of available attorneys.

There are two important factors when considering the ethics of fee-splitting in New York. First, does the marketing fee increase depend on the dollar value of the representation? Second, are these fees more like referral fees than marketing fees?

NYSBA Ethics Opinion No. 976 discussed the issue regarding an arrangement between a law firm and a non-legal service provider in relation to mortgage related referrals, where the fee paid, at least in part, would be based on success: The firm may legitimately provide benefits to the Company for marketing and lien services, but if the benefits are also to reward referrals, then it is difficult to harmonize the arrangement with Rule 7.2(a).

Rule 7.2(a), cited in the opinion, states: A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . .

Significantly, Comment [1] to this Rule adds:

[1] [L]awyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer.

The opinion also notes the existence of Judiciary Law § 482, which states: It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services.

This law survived a challenge in People v. Hankin, 182 Misc. 2d 1003 (Sup. Ct., App. Term 1999), where the court ruled the statute did not unconstitutionally restrict commercial speech.

NYSBA Ethics Opinion No. 887 also clarified Rule 7.2, stating that the Rule prohibits a lawyer from offering bonus compensation to an employee who is a non-lawyer marketer “based on referrals of particular matters . . . [or] . . . the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee’s marketing efforts.” In other words, marketing fees cannot be paid based on the dollar value of a representation or per representation that an attorney gets through the marketer. As for referrals, Rule 7.2(b) limits approved lawyer referral programs, including legal aid, public defender office or military legal assistance office; or a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule. Notably, for-profit corporate entities are not included among authorized law referral providers.

Impact on the Public and the Profession

The Rules of Professional Conduct are in place not to protect lawyers, but the public from unscrupulous lawyers who fail to meet the highest standards that we expect from officers of the court and defenders of justice. The Judiciary Law is in place to prevent unregulated non-lawyers from preying on an unknowing public.

Non-lawyers are not required to adhere to the Rules of Professional Conduct or the core principles of our profession. They are not bound by our ethics rules. They do not check for conflicts of interest. They do not have a duty of competent advocacy. They do not go to law school or pass the bar exam. They are not officers of the court.

Our Rules of Professional Conduct reflect the core values of our profession and they are designed to protect the public we are all privileged and licensed to serve. As attorneys we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. In our country, lawyers must complete a rigorous education just to be permitted to sit for a bar exam. Our system of examination to test knowledge and competency, determination of character and fitness, and adherence to a prescribed set of rules of professional conduct throughout an attorney’s tenure not only serves to protect the public from untrained and unscrupulous would-be practitioners, but also far surpasses what is required to start a business.

Change to our profession should not come from profit-seeking entrepreneurs unencumbered by rules of ethical conduct and responsibility. It remains incumbent on us as attorneys and the organized bar to remain guided by rules of professional responsibility to find ethical and responsible ways to use new technologies to help attorneys better connect with and serve their clients.
Influencing the Future

Everyone here has the sense that right now is one of those moments when we are influencing the future. – Steve Jobs

As part of our initiative to involve law students in our Association, I often have the honor of addressing students at law schools throughout our state, talking about the truly noble career path they have chosen and the importance of bar association involvement in their professional careers. The students I speak to will be entering a job market that is vastly different from the one I entered more than two decades ago. Recent law graduates, in New York and throughout the nation, are not just competing with each other for work; they are competing with those who have already graduated and who are still seeking work. New lawyers, burdened by student loans and trying to make their own way in a market that no longer promises high-paying jobs upon graduation, will face a tough road ahead of them.

The sentiment shared by Steve Jobs when he predicted the explosion of laptops and how the Internet would change how our nation does business is now equally applicable to how we practice law. Today we are faced with “legal services” companies that purport to enhance your exposure on their promoted attorney websites, where a lawyer’s performance and expertise is assigned a numerical value, the same as one might rate a pizza delivery guy; and legal form services, where the law is reduced to a form that just needs to be completed. Change is coming to our profession from profiteering entrepreneurs unencumbered by rules of ethical conduct and responsibility. Even in the face of change, it remains incumbent upon us as attorneys to remain guided by the rules of professional responsibility as we use new technologies.

As a legal community, both at law schools and bar associations, we spread the word on the importance of resume building, networking, and giving back to our communities while gaining valuable experience at the same time. We must work to prepare all lawyers to adjust to – and to influence – the new legal marketplace. We must encourage a thoughtful focus on navigating the decisions that promise to make a major impact on the future of our profession, like participating in and lending credibility to online services that promise to find potential clients using questionable methodologies; or worse, standing by while websites that promise to do all the legal work for consumers, without sharing the credentials of their so-called legal practitioners, continue to flourish while skirting ethics rules or waiving responsibility altogether.

Our Association, long opposed to attorney rankings, is currently studying the issue of ratings, and has found that the methodologies and results of attorney advertiser services can often be misunderstood by the general public. Search terms alone can pose a problem. If potential clients search for counsel with imprecise words describing the kind of legal bind they are concerned about, they could miss equally qualified practitioners listed under a more generic or commonly used term. That missed click would not just affect potential clients, it could have a disproportionately negative impact on a generalist lawyer with a broad practice. Worse are those services that purport to rank attorneys based on an algorithm that only the service is aware of, where attorneys can pay the service to help them “master” the system. These services proudly boast their rankings are not “pay to play” when, in reality, if you pay the services, they will “advise” you on how to “play” their system. Often, attorneys who pay for the most “advice” are ranked highest, which influences the decisions of an unknowing public. Bar associations, including ours, are increasingly receiving complaints from the public, and attorneys, about the methods used by such services.

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While attorneys at larger firms benefit from the higher profiles of their workplaces and firm websites, which are often bolstered by greater public relations resources, lawyers at solo and smaller firms are easy prey for the promises of well-funded attorney advertisers. Solo and small firm lawyers, and lawyers who work outside of major metropolitan areas, may have a much harder time penetrating the online marketplace. They are promised easy access to high-profile marketing by legal services companies that can purchase expensive Internet and media advertising due to an influx of venture capital from investors seeking a return on their investment. Venture capital is going to these companies because investors intend to make money on the backs of lawyers desperate for work and a public starving for easy answers.

The New York Rules of Professional Conduct state that attorney ratings must be unbiased and nondiscriminatory. Rule 7.1, Comment 13 states that ratings “must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service’s economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated.”

The burden of discovering which ratings are legitimate and which ones are inflated, or paid for, unfairly falls on the shoulders of unsuspecting consumers. While these services refer to themselves as innovators, they may end up subverting the very premise of the profession they claim to be promoting. If ratings are the result of a pay-to-play scheme, where more money means a higher ranking, the profession and the public will suffer.

Equally troubling is the proliferation of sites that promise to do all the work a lawyer can do, for a small fee. It’s true that some legal work may require filling out a relatively simple form and asking a competent person to review it. But if, for example, business partners find out they set up their small business the wrong way, with a form for the wrong type of entity or with the wrong information, they may not know until it’s too late to recover from the damage. Knowing the right form to complete and the nuances of the information contained in it is crucial. Or if, for example, a power of attorney form used in a transaction is outdated or incorrect, the entire underlying transaction could be null and void. A consumer saving a few dollars by downloading a form could be out hundreds of thousands of dollars. Consumers have no recourse to hold accountable the company they paid for the legal service, as many of these online outfits claim to not provide legal advice.

Our Association is taking action to protect our profession and the public that we serve. Our Committee on Attorney Professionalism, and a new working group I recently appointed, are reviewing these issues to provide guidance to attorneys whose experience and expertise are independently recognized by third parties, or their peers, in accordance with the Rules of Professional Conduct. Meanwhile, we are embracing evolving technology and maximizing traditional communications, as we recognize just how crucial it is for our members to increase efficiency in both how they work and how they make meaningful connections with clients.

To enhance the work of our members, NYSBA offers tools such as Surrogate’s Forms online, powered by HotDocs®. The service offers a fully automated, and vetted, set of official probate forms, as promulgated by the Office of Court Administration (OCA) and used by various Surrogate’s Courts throughout the state. To connect licensed attorneys with potential clients in an efficient and accessible way, we offer the Lawyer Referral and Information Service (LRIS), which serves 44 counties in New York. Our non-attorney LRIS counselors do not offer legal advice but direct callers to real lawyers or the most appropriate community organizations or resources to address their situation.

The preamble to the New York Rules of Professional Conduct states that as lawyers we share a responsibility to “further the public’s understanding of and confidence in the rule of law and the justice system” because our “legal institutions depend on popular participation and support to maintain their authority.” For our system of law to maintain its integrity, and its authority, we must be a part of the solution, individually as practitioners and as an Association. We cannot leave the job of informing the public and addressing its legal problems to companies, staffed and funded by nonlawyers, that have only a financial stake in the transaction. The Rules of Professional Conduct tell us that we have a moral and ethical obligation toward the client in need and the future of our profession itself. When we reduce the law to nothing more than an easy download with no guidance, it is not just the profession that loses. It is the consuming public – people with real problems who need real help – that stands to lose the most of all. Our Bar Association, and our 74,000 members, must use the collective strength of our voices to influence the future of our profession.
Faculty Biographies

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Anne graduated from the State University of New York at Albany in 1978. She graduated magna cum laude with a BA in political science. She then graduated from Albany Law School of Union University with JD in 1981.

Anne was admitted to the bar in New York in 1982 and is also admitted to practice in the United States Supreme Court and the state courts in Vermont. She is a member of the American Bar Association, New York State Bar Association, American Academy of Adoption Attorneys, Capital District Women's Bar Association, Adirondack Women's Bar Association, Vermont Bar Association, and Rensselaer County Bar Association.

Anne was a partner in the law firm of Martin, Shudt, Wallace, DiLorenzo, Copps & Johnson from 1984 until 1995 when she opened her own office in Albany, New York.

Anne has been the recipient of several community and professional awards including the Distinguished Member Award and the Kimberly A. Troisi-Paton Leadership Award from the Capital District Women's Bar Association, the Attorney Professionalism Award, and the Pro Bono Award from the New York State Bar Association, the "Straight but not Narrow" Award from the Capital District Pride Center, and the Kate Stoneman Award from Albany Law School.

Anne is active in community affairs, currently serving as the Chair of the New York State Bar Association (NYSBA) Real Property Section’s subcommittee on Not-For-Profit Entities, President of New York Attorneys for Adoption and Family Formation (NYAAFF), the Treasurer of Friends of the Rensselaer County Family Court Children's Center, the Treasurer of Adoptive Families of the Capital Region, and also serving The Legal Project and the community of Mechanicville in a monthly free legal clinic.

Anne has previously served as NYSBA’s Chair of the Real Property Section, Children and the Law Committee and Legal Specialization Committee, the Vice-President of Child's Canterbury Foundation, the chair of the Committee on Professional Standards (attorney discipline committee), and on the Board of Directors of The Legal Project.
David P. Miranda, a Partner with the firm, is an experienced trial attorney whose intellectual property law practice includes trademark, copyright, trade secret, false advertising, and patent infringement, as well as licensing, and internet related issues. He has litigated cases in federal district courts, state courts, the International Trade Commission, and the Trademark Trial and Appeals Board; and has successfully appeared before the Federal Circuit, Second Circuit, Ninth Circuit and New York Court of Appeals.

In June 2015 Mr. Miranda began his one year term as President of the New York State Bar Association, with 74,000 members, the largest voluntary state bar association in the nation.

In 2006 Mr. Miranda obtained a $7.8 million jury verdict in a copyright infringement and trade secret misappropriation case in U.S. district court. Since 2007, Mr. Miranda has been selected by his peers as a “Super Lawyer” by Thompson Reuters, in the area of Intellectual Property Litigation. Mr. Miranda commenced some of the first domain name dispute proceedings before the World Intellectual Property Organization and was counsel in one of the first New York cases determining the enforceability of online agreements.

He previously served as President of the Albany County Bar Association, Secretary of the New York State Bar Association and in the House of Delegates for the ABA and NYSBA. He also served as General Counsel and on the Board of Directors of the Rensselaer County Chamber of Commerce, and is a recipient of the Capital District Business Review’s “40 Under Forty” award for community service and professional achievement. In 2009, Mr. Miranda was appointed to the Independent Judicial Election Qualification Commission for the Third Judicial District of the State of New York. In 2002, Mr. Miranda was appointed by Hon. Judith Kaye, then Chief Judge of New York’s Court of Appeals, to the statewide “Commission on Public Access to Court Records.”
Mr. Miranda serves as an arbitrator of intellectual property law disputes with the American Arbitration Association, and National Arbitration Forum and has rendered decisions regarding disputes involving such famous trademarks as McDonald’s, Amazon.com, Bausch & Lomb, Target, 3M, US News, Citigroup, and ChevronTexaco. He has served as mediator, arbitrator and early neutral evaluator for the U.S. District Court for the Northern District of New York.

Mr. Miranda received his Juris Doctor degree from Albany Law School and Bachelor’s degree from the State University of New York at Buffalo. He is admitted to practice in New York, U.S. District Courts for New York’s Northern, Southern, Eastern and Western Districts, Massachusetts, the Federal Circuit, Second Circuit and Ninth Circuit Court of Appeals, and the U.S. Supreme Court.

Member: American Bar Association (House of Delegates, Intellectual Property Law Section); New York State Bar Association (President 2015-16, Executive Committee, House of Delegates); Albany County Bar Association (Past-President).
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James Walker concentrates in regulatory proceedings, internal investigations and representing law firms and lawyers in professional liability matters. He represents audit committees, directors, senior executives, law firms, lawyers and other professionals in government and internal investigations of potential criminal, regulatory and/or professional misconduct, and in civil litigation and regulatory proceedings. He has extensive experience in the representation of senior executives in employment disputes and negotiating employment and separation agreements.

Mr. Walker has been active in city and state bar associations, including his service on the Association of the Bar of the City of New York Professional Discipline, Professional and Judicial Ethics, Professional Responsibility, and Securities Regulation Committees, and on the New York State Bar Association Committee on Professional Ethics, where he has been a member since 1996. In addition to drafting responses to ethics inquiries, he helped draft reports issued by the New York City Bar Association regarding proposed rules to govern the conduct of attorneys who practice before the Securities and Exchange Commission.

Mr. Walker is a frequent lecturer on legal ethics, and has written articles on attorney-client privilege, professional ethics, internal investigations and issues arising under the securities laws. Recently, he has partnered with AltaClaro to provide custom e-learning solutions for in-house counsel across various industries. Mr. Walker also serves as general counsel to Richards Kibbe & Orbe LLP.