

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. Judiciary Law Section 470

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

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

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

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

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

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

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

The April 17, 2017 edition of the NYLJ reported:

Now that the legal case is over, New York State Bar Association president Claire Gutekunst said in a statement, a group, chaired by former bar president David Schraver of Rochester, would review the issues and consider recommendations for changing § 470. The working group will be composed of state bar members who live in and outside New York.

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The New Jersey State Bar Association also submitted an amicus brief to the Supreme Court.

"The NJSBA feels New York's bona fide office rule is an anachronism in today's modern world, where technology and sophisticated forms of digital

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

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

The *Arrowhead* court concluded that:

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

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

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

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

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
- (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

* * *

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

Financial Assistance

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

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

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

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X. Issuing Subpoena to Current Client

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

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

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

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

XI. Fee Agreements

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

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

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

(8) whether the fee is fixed or contingent.

* * *

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

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

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

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

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

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

* * *

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

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

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

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

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

(3) a fee based on fraudulent billing;

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

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

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

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

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

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

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

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

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

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

(3) the total fee is not excessive.

* * *

Lawyer Who Refers Matter to Another Lawyer Undertakes Representation of Client

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

Court of Appeals Resolves Disputes Over Fee Splitting Agreements

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

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

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

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

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

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

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

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

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

* * *

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

Comment

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

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

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

Basis or Rate of Fee

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

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

Terms of Payment

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

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

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

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

Prohibited Contingent Fees

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

Division of Fee

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

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

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

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

* * *

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

Section 1215.1. Requirements

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

(1) if otherwise impracticable; or

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

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

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

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

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

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

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

Section 1215.2. Exceptions

This section shall not apply to:

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

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

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

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

* * *

C. Appellate Division Rules

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

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

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

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

SCHEDULE A

- (1) 50 percent on the first \$1,000 of the sum recovered,
- (2) 40 percent on the next \$2,000 of the sum recovered,
- (3) 35 percent on the next \$22,000 of the sum recovered,
- (4) 25 percent on any amount over \$25,000 of the sum recovered; or

SCHEDULE B

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

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

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

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

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

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

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

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

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

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

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

XIII. Misconduct Under Rule 8.4

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

It is professional misconduct for a lawyer to:

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

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Rule 8.4 Misconduct – Comment

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

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

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

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

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

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

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

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

* * *

New York's Rule 8.4(g) provides:

A lawyer or law firm shall not:

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

* * *

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

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

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

South Texas College of Law constitutional law professor Josh Blackman told Bloomberg Law that lawyers “don't forsake all of [their] free speech rights by becoming an attorney.” And the bar doesn't have the same interest in disciplining lawyers for conduct at a bar association dinner or at continuing legal education classes, as it does in disciplining lawyer conduct in a courtroom, deposition or mediation, Blackman said. The rule is a tool “to silence and chill people.”

Blackman was recently protested and heckled by students at CUNY Law School for speaking about free speech. Blackman said those kids will be enforcing 8.4(g) in a few years and “if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like.”

But Rule 8.4(g) has vocal proponents as well. New York University School of Law professional responsibility professor Stephen Gillers advocated for the ABA's adoption of 8.4(g) and said that “[n]o lawyer has a First Amendment right to demean another lawyer (or anyone involved in the legal process).”

...To date, only Vermont has adopted the Model Rule's version of 8.4(g). Many other states have anti-discrimination provisions, but they have been described as being more narrow than 8.4(g).

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

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

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

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

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

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

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

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

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

The opinion states:

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

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

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

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

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

C. “The ABA Overrules the First Amendment”

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

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

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

Topic: Client representation; discrimination

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

Rules: 8.4(g)

FACTS

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

QUESTIONS

2. Is a lawyer ethically required to accept every request for representation?
3. Does the refusal to accept a representation under the facts of this inquiry amount to illegal discrimination?

OPINION

Lawyer's Freedom to Decide Which Clients to Represent

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

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

Prohibition Against Unlawful Discrimination

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

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

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

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

CONCLUSION

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

E. Kellyanne Conway Complaint, February 20, 2017



GEORGETOWN LAW

Abbe Smith
Professor of Law

February 20, 2017

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

To the Office of Disciplinary Counsel:

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

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

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

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

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

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

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

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

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

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

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

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

- On several occasions, including in an interview on MSNBC in early February, 2017, Ms. Conway referred to the “Bowling Green Massacre” to justify President Donald Trump’s executive order banning immigrants from seven overwhelmingly Muslim countries. Not only was there no “massacre” in Bowling Green, Kentucky (or Bowling Green, New York, for that matter), but Ms. Conway knew there was no massacre. Although Ms. Conway claimed it was a slip of the tongue and apologized, her actual words belie her having misspoken: “I bet it’s brand-new information to people that President Obama had a six-month ban on the Iraqi refugee program after two Iraqis came here to this country, were radicalized, and were the masterminds behind the Bowling Green Massacre. Most people don’t know that because it didn’t get covered.” See generally Clare Foran, *The Bowling Green Massacre that Wasn’t*, THE ATLANTIC, February 3, 2017, at <https://www.theatlantic.com/politics/archive/2017/02/kellyanne-conway-bowling-green-massacre-alternative-facts/515619/>. Moreover, she cited the nonexistent massacre to media outlets on at least two other occasions. See Aaron Blake, *The Fix: Kellyanne Conway’s ‘Bowling Green Massacre’ wasn’t a slip of the tongue. She has said it before.* WASH. POST, February 6, 2017, at https://www.washingtonpost.com/news/the-fix/wp/2017/02/06/kellyanne-conways-bowling-green-massacre-wasnt-a-slip-of-the-tongue-shes-said-it-before/?utm_term=.b2de9c3f0582.
- Compounding this false statement, in that same MSNBC interview Ms. Conway also made a false statement that President Barack Obama had “banned” Iraqi refugees from coming into the United States for six months following the “Bowling Green Massacre.” *Id.* However, President Obama did not impose a formal six-month ban on Iraqi refugees. He ordered enhanced screening procedures following what actually happened in Bowling Green—the arrest and prosecution of two Iraqis for attempting to send weapons and money to al-Qaeda in Iraq. The two men subsequently pled guilty to federal terrorism charges and were sentenced to substantial prison terms. See Glenn Kessler, *Fact Checker: Trump’s facile claim that his refugee policy is similar to Obama’s in 2011*, WASH. POST, January 29, 2017, at https://www.washingtonpost.com/news/fact-checker/wp/2017/01/29/trumps-facile-claim-that-his-refugee-policy-is-similar-to-obama-in-2011/?utm_term=.87f35b046de2.

- This was not the first time Ms. Conway had engaged in conduct involving “dishonesty, fraud, deceit, or misrepresentation.” On January 22, 2017, on the NBC television show *Meet the Press*, Ms. Conway said that the White House had put forth “alternative facts” to what the news media reported about the size of Mr. Trump’s inauguration crowd. She made this assertion the day after Mr. Trump and White House press secretary Sean Spicer accused the news media of reporting falsehoods about the inauguration and Mr. Trump’s relationship with intelligence agencies. See Nicholas Fandos, *White House Pushes ‘Alternative Facts.’ Here are the Real Ones*, N.Y. TIMES, January 22, 2017, at <https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html>. As many prominent commentators have pointed out, the phrase “alternative facts” is especially dangerous when offered by the President’s counselor. Moreover, “alternative facts” are not facts at all; they are *lies*. Charles M. Blow, *A Lie by Any Other Name*, N.Y. TIMES, January 26, 2017, at <https://www.nytimes.com/2017/01/26/opinion/a-lie-by-any-other-name.html>.
- Ms. Conway has also misused her position to endorse Ivanka Trump products on February 9, 2017 in an interview on Fox News from the White House briefing room with the White House insignia visible behind her. While this conduct does not fall within DC Rule 8.4, it is a clear violation of government ethics rules, about which a *lawyer* and member of the Bar should surely know. Federal rules on conflicts of interest specifically prohibit using public office “for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives or persons with whom the employee is affiliated in a nongovernmental capacity.” The government’s chief ethics watchdog denounced Conway’s conduct in a letter to the White House. Richard Perez Pena, *Ethics Watchdog Denounces Conway’s Endorsement of Ivanka Trump Products*, N.Y. TIMES, February 14, 2017, at <https://www.nytimes.com/2017/02/14/us/politics/Kellyanne-Conway-ivanka-trump-ethics.html>. See also DC Rule 1.11, Comment 2 (noting that, in addition to ethical rules, lawyers are subject to statutes and regulations concerning conflict of interest and suggesting that, given the many lawyers who work in the federal or local government in the District of Columbia, “particular heed must be paid to the federal conflict-of interest statutes.”)

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

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

Respectfully submitted,

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

Per Curiam.

The respondent, formerly the President of the United States, is an attorney, admitted to the practice of law in the State of New York on December 5, 1963. An investigation of allegations of professional misconduct on the part of respondent was begun by the Grievance Committee of the Association of the Bar of the City of New York in September, 1974.

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

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

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

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

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

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

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

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

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

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

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

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

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

Kupferman, J.

(Dissenting in part).

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

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

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

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

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

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

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

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

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

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

AGREED ORDER OF DISCIPLINE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

