NYSBA FALL/WINTER 2018 | VOL. 39 | NO. 3

ONEONONE

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of the New York State Bar Association

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Message from the Chair

Paul T. Shoemaker

In early November, I attended the NYSBA's House of Delegates and Sections Caucus meetings in Albany. Highlights included a stirring statement from our new President, Michael Miller. Michael referred to our turbulent times and the many serious concerns raised by the divisions and violent outbursts that are taking place in our country. We as lawyers, as a Bar Association, and as members of the General Practice Section, need to consider and discuss these matters and to work together to formulate appropriate responses to them.

Unfortunately, our time and attention have been diverted away from the major injustices in our world today. Among other things, our government and our society are not adequately addressing the high rates of incarceration, that have destroyed so many lives and communities, and the alienation and lack of appropriate social interaction which have resulted in so much anti-social, often violent and destructive, behavior. We need to focus on listening to and understanding each other and on working together to build a better society, a better country, and a better world.

Another highlight of the meetings was a report on the new Women in Law Section of the NYSBA. The Section is a welcome addition to the NYSBA, which is long overdue. I of course urge all of you to maintain your memberships in the General Practice Section and to encourage your colleagues and friends to join the General Practice Section with you. In addition, however, I do not hesitate to suggest that you also consider membership in the new Women in Law Section.

Domenick Napoletano, the Secretary of our Section, was in attendance in his capacity as the new Treasurer of the NYSBA. We congratulate him on his important new role and thank him for his service to the NYSBA.

We are in the midst of planning for our Annual Meeting in January. It will take place at the New York Hilton Midtown on Tuesday, January 15, 2019. The presentations will include a discussion of the ethical obligation of a lawyer to learn the true facts. May a lawyer simply rely on his client's account? What if he thinks his client is lying? It should be an interesting discussion which will enable you to earn credits for ethics-related CLE. I look forward to seeing you there.

I also must thank Marty Minkowitz, Richard Klass and Matthew Bobrow for their dedicated service to our Section Publication, *One on One*. They have devoted countless hours to production of this high quality publication, which is a centerpiece of our Section. Please consider supporting their efforts by writing an article for publication in *One on One*.

There was extensive discussion at the Sections Caucus meeting concerning NYSBA publications. A concerted effort is being made to strengthen the publications and expand their scope and reach. Among other things, the NYSBA is undertaking to sell more advertising in the publications and is considering the extent to which the publications and CLE materials should be made available in hard copy or online or both. I commented that both formats should be available at all times—before, during and after CLE sessions. Our Chair-Elect, Elisa Rosenthal, also attended the Sections Caucus meeting and she commented on the need for careful, timely and complete notifications concerning upcoming CLE programs.

Increasing our membership is important both for the NYSBA overall and for our Section. The members of the Executive Committee of the General Practice Section have been reaching out to colleagues to encourage them to join the Section. I urge all of you to do likewise and to help us to continue to grow as a Section.

Paul T. Shoemaker

Message from the Co-Editors

Richard Klass

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

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

Employment Law Update: Strategies for Preventing Sexual Harassment: Jeffrey S. Klein, Nicholas J. Pappas, and Larsa K. Ramsini provide suggestions regarding how employers assess their workplace cultures, and then offer thoughts regarding common issues leaders should consider in seeking to improve their cultures.

Resolution Alley: Revisiting the Benefits of Appellate Mediation: Theodore K. Cheng describes the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

Ethics Matters: John Gaal answers questions from lawyers on behalf of the Ethics and Professional Responsibility Committee of the Labor and Employment Law Section.

New York Court of Appeals Establishes Lower Threshold for Punitive Damages Under NYCHRL: Anshel Joel Kaplan and Howard M. Wexler review *Chauca v. Abraham*, which decided when punitive damages are appropriate under the New York City Human Rights Law.

Case Study: An Effective Motion in Limine Wins Malpractice Case at Trial: David J. Varriale roadmaps how to properly use a motion in limine as an effective weapon at trial.

Transitioning from Private Practice to the Bench…and Life as a New Judge: Judge Carmen Victoria St. George writes on how she attained her longtime dream to accept a request to serve as an acting Supreme Court justice in the Civil Division of New York County.

A Well-Kept Secret: The Attorney Emeritus Program: Michael Siris and Cora Vasserman lift the veil by telling of the ways pro bono and other lawyer activities can count as CLE credit.

Transitioning from Large Firm Life to Solo Practice: Theresa Marangas outlines steps to help transitioning lawyers.

Effectively Addressing Bank, Brokerage and Real Property Issues in an Article 81 Guardianship Proceeding: Anthony Enea reviews and analyzes multiple Article 81 issues and provides concrete examples.

Compensation for Bullying and Harassmant: Martin Minkowitz surprises and helps us understand how the stress of being bullied or harassed in the course of the employment may be the basis of an award from the Workers' Compensation Board.

Martin Minkowitz

What Do I Say When a Client Asks Me to Serve as a Trustee?: Jay W. Freiberg answers this question and reminds us remaining mindful of beneficiaries, co-trustees and assets will go a long way toward mitigating trustee risk.

Article Submission

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

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

Martin Minkowitz
Richard Klass

Matthew Bobrow
Co-Editors

Compensation for Bullying and Harassment

By Martin Minkowitz

"An injury such as depression, anxiety or insomnia, which is caused by the stress of being bullied or harassed in the course of the employment, may be the basis of an award from the Worker's Compensation Board."

There has been a lot of attention in the press in recent years relating to people being harassed and bullied. It may come as a surprise to some that when an employee suffers harassment or bullying at his or her employment and that activity causes the employee to become mentally incapacitated or disabled, that is an injury which may be compensable under the Workers' Compensation Law. An injury such as depression, anxiety or insomnia, which is caused by the stress of being bullied or harassed in the course of the employment, may be the basis of an award from the Workers' Compensation Board.

In an article I wrote in the Summer 2018 edition of *One on One* on "The Compensable Heart Attack,"[1] I noted that to make a successful claim for mental stress it must be shown that the mental stress was greater than the usual wear and tear of life in the workplace. The work related stress must exceed that which could be expected in the employee's normal work environment.[2] That does make it more difficult to establish a case for mental stress but not impossible, and has been done successfully. The claimant for compensation benefits must prove that the injury from the harassment or bullying arose out of and in the course of the employment, the same criteria for any workers' compensation case. The disability from harassment or bullying could be physical, such as a heart attack caused by the mental stress of having been bullied or harassed.

Bullying and harassment can take many forms. For example, an employee in one case had a compensable case for a mental injury after being subjected to stress when there were rumors spread at work that the employee was a rapist.[3] If such a claim is supported by medical evidence it will be sustained and workers' compensation benefits awarded. There have been mental stress disabilities caused by sexual harassment.

Martin Minkowitz is counsel to Stroock & Stroock & Lavan LLP and practices in the area of Insurance and Workers' Compensation regulation, and an adjunct professor at Brooklyn Law School.

However, if a claim is premised upon an action by the employer it should be noted that if the employer's actions constituted a lawful personnel decision undertaken in good faith it is not compensable as a workers' compensation claim.

It is a question of fact for the Workers' Compensation Board to decide.[4] This provision in WCL § 2 permitting lawful personnel actions has been included in the statute since July 1, 1990 to permit the employer to engage in good faith personnel action without being subjected to an award against it. That is true even if the employee suffers stress as a result of the lawful good faith action by the employer.

This is not intended to suggest that if there is also a basis for a third-party action against someone who is not the employer or a co-employee, that it cannot be brought or pursued in addition to the workers' compensation case.[5] If a third party action is brought in the civil courts and it is successful in recovering damages, the employer or its insurance carrier would have a lien against that recovery for the workers' compensation benefits that it paid to the claimant.[6]

Endnotes

1. Vol. 39, No. 2.
2. *Guillo v. NYCHA,* 115 A.D.3d 1140 (2014); *Novak v. St. Luke's Roosevelt Hosp.*, 148 A.D.3d 1509 (2017).
3. *Smith v. Albany County Sheriff's Dept.*, 82 A.D.3d 1334 (2011), *lv. den.*, 17 N.Y.3d 770.
4. *Mattoon v. NYS Dept. of Labor*, 284 A.D.2d 667 (2001); WCL § 2.
5. *See* WCL § 29.
6. *Id*.

Effectively Addressing Bank, Brokerage and Real Property Issues in an Article 81 Guardianship Proceeding

By Anthony J. Enea

In most Article 81 Guardianship proceedings the assets of the alleged incapacitated person (AIP), specifically title to said assets, is not the primary focus. Generally, the physical and mental incapacities of the AIP and the need for the appointment of an appropriate guardian of the person and property for the AIP is the center of attention. However, the attorney for the petitioner should carefully and thoroughly review all of the assets owned by the AIP and pay specific attention to how title to said assets is held and whether said assets are titled jointly with others and/or have named beneficiaries. The failure to do so may detrimentally impact the AIP as well as the individuals he or she intends to receive those assets.

Additionally, a thorough review of the AIP's assets is critical in formulating the relief to be requested in the petition with respect to how title of the AIP's assets is to be held once a guardian(s) is appointed, and with respect to the potential transfer of the AIP's assets for long-term care (Medicaid) and estate planning purposes.

The following is an example of the information and documents regarding the AIP's assets that should be gathered by the attorney before filing the petition:

(a) Copies of all deeds for real property owned by the AIP with the approximate present fair market value of said property. The attorney should pay particular attention to whether the real property is held jointly with a third party (family/non-family) and whether said joint ownership is with rights of survivorship or as a tenancy in common, the percentage of ownership interest and whether the property is owned in the name of a corporation or other legal entity. It may be necessary to obtain the specifics as to any corporation or other entity, such as copies of documents relevant to the formation of the entity and stock certificates and/or other documents establishing the ownership interest of the AIP and/or others;

(b) Copies of all recent account statements for all bank accounts and investment accounts stating the current value of the accounts. Again, particular attention should be paid as to whether the joint accounts are accounts that bestow rights upon the joint tenants during the life of the AIP (joint with rights of survivorship) or upon the death of a joint tenant, "in trust for" accounts, "for convenience only" accounts, "transfer on death" and/or "payable on death" accounts;

(c) Copies of all recent account statements for any IRAs, 401Ks, 403(b), annuities (whether they be qualified or non-qualified accounts) with copies of all beneficiary designations for said accounts. Remember, if the aforestated IRAs, 401Ks do not have a named beneficiary, upon the death of the account holder, the beneficiary will be his or her estate, thus necessitating the probate of his or her Last Will and Testament or the filing of an administration proceeding. It should also be ascertained as to whether or not the AIP is receiving the "minimum required distributions" from any of the aforestated retirement accounts;

(d) Copies of all life insurance policies owned by the AIP with proof of beneficiary designation for said policies. It is also important to determine if the policies have any cash value;

(e) Copies of all Trust Agreements executed by the AIP and documentary evidence (deeds/account statements) evidencing whether said Trust(s) have been funded with the AIP's assets or the assets of any third parties;

(f) Copies of any copyrights, trademarks and licensing agreements owned by the AIP;

(g) Copies of any mortgages and/or promissory notes due to the AIP with all amortization schedules. If there exists the possibility of recorded mortgages and/or UCC financing statements, it may be advisable to obtain copies of same.

(h) Obtain information as to the AIP's annual income. For example, obtain copies of any W-2's, social security statements and any pension statements if appropriate. If the AIP is receiving any government benefits such as "SSI," "SSD" or Medicaid, obtain the appropriate documentary proof. In order to ascertain the amount of interest and/or dividend income the AIP is receiving, it may be necessary to review the most recent income tax

Anthony J. Enea is a member of Enea, Scanlan and Sirignano, LLP of White Plains, New York. Mr. Enea is the Past Chair of Elder Law Section of the New York State Bar Association (NYSBA). He is the Chair-elect of the Senior Lawyers Section of the NYSBA. Mr. Enea is the Past President and founding member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys. Mr. Enea is the President of the Westchester Bar Foundation and Past President of the Westchester County Bar Association. He can be reached at (914)948-1500 or A.enea@esslawfirm.com.

This article also appears in the Winter 2019 issue of the Elder and Special Needs Law Journal.

returns filed by the AIP, if available, and/or obtain copies of 1099s relevant to same.

Once the attorney has gathered the aforestated, the next step is to thoroughly analyze the information and documentary proof to ascertain what impact the assets and title to said assets will have upon the guardianship proceeding and the ultimate relief requested in the petition.

In order to make this analysis pre-petition, it is imperative that the petitioner's attorney have a solid understanding of the relevant laws and legal principles with respect to the ownership of real and personal property and particularly, the impact of the joint ownership thereof.

Common Law Rules for Ownership of Property and Their Codification

The joint ownership of both real and personal property has been recognized for centuries as a valid legal doctrine. At common law three forms of joint ownership were recognized:

(a) tenancy in common, wherein the owner has a divisible fractional share with no right of survivorship in the other tenants' interest;

(b) tenancy by the entirety (applicable to husband and wife and ownership of real property only, wherein each owns an undivided interest with a right of survivorship, but, without the right to unilaterally sever or partition their interests); and

(c) joint tenancy (the joint tenants have an undivided interest which can be unilaterally severed or destroyed) and whereby the tenants have a right of survivorship.

These three common law forms of ownership have been codified in Section 6-2.2 of the New York Estates, Powers and Trusts Law (EPTL).[1] With respect to the authorization of conveyances of an interest in real property by one or more persons, the relevant statutory provisions are found in Section 240-b of the New York Real Property Law (RPL).[2] As to the severance of an interest(s) in jointly held real property the relevant statutory authority is found in Section 240-c of RPL.[3]

Relevant Statutory Provisions for Jointly Titled Bank and Brokerage Accounts

It is important to note that the right to receive assets by operation of law in a joint account upon the death of the joint tenant does not apply to a joint account that is created and held "for the convenience" of the depositor. Accounts "for the convenience" are regulated New York Banking Law § 678.[4] Section 678 provides that accounts held "for the convenience" shall not affect the title to such deposit or shares. The depositor is not considered to have made a gift of one-half the deposit or of any additions or accruals thereon to the other person, and on the death of the depositor, the other person shall have no right of survivorship in the account.[5]

In order for the provision of Banking Law § 678 to apply, the words "for the convenience" or similarly "for convenience only" must appear in the title of the account.[6] If they do not appear, then the presumptions created by Banking Law § 675 will be applied.[7]

Section 675 of the Banking Law provides that the making of a deposit in the name of the depositor and another to be paid to either or to the survivor is prima facie evidence that the depositor intended to create a joint tenancy, and that when such a deposit is made, the burden of proof is upon the one challenging the presumption of joint tenancy. Under § 675 three rebuttable presumptions are created: (i) as long as both joint tenants are living, each has a present unconditional property interest in an undivided one-half of the money deposited; (ii) that there has been a irrevocable gift of one-half of the funds in the account by the depositor to the other joint tenant; and (iii) that the joint tenant has a right of survivorship in the entire joint account upon the death of the other joint tenant.[8]

Section 675(b) of the Banking Law provides that the burden of proof is upon the person challenging the presumption of a joint tenancy.[9]

With respect to securities accounts or brokerage accounts in joint names, the Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12 permit joint securities and brokerage account holders to have the rights and choices that joint bank account holders have.[10] The Transfer-on-Death Security Registration Act was enacted on July 26, 2005 and it amended EPTL by enacting a new part four (4) to Article 13. It is essentially codified in EPTL 13-4.1 through 13-4.12. Under EPTL 13-4.2 a "transfer on death" or "payable on death" securities or brokerage account can only be established by sole owners or multiple owners having a right of survivorship in the account. The owners of a securities or brokerage account held as tenants-in-common are expressly prohibited from creating a "transfer on death" account. Although the creation of a "transfer on death" or "payable on death" securities or brokerage account does not require that any specific language be utilized to create the account, however evidence of its creation is the usage of the phrases "transfer on death" and "payable on death" or their abbreviations "TOD" or "POD."[11] (EPTL 13-4.5) Under EPTL 13-4.4, evidence of the establishment of the account is the account opening documentation that indicates whether the beneficiary is to take ownership at the death of the other owner(s).[12]

The Pitfalls of Jointly Titled, "In Trust For" or Other Accounts Where Property Passes by Operation of Law

The manner in which one holds title to property at the time the commencement of a guardianship proceeding, and at the time of the AIP's demise will have a critical and significant impact upon the relief sought in the guardianship proceeding. With the exception of property (real and/or personal) held jointly as tenants in common, all other jointly held property, "in trust for" accounts, "transfer on death" accounts, IRAs, 401(k)s and life insurance policies that have a named beneficiary (other than one's estate) are accounts that pass by operation of law and are non-probate assets. Thus, they are assets that are not controlled by one's Last Will and Testament. While for many individuals (those with relatively small estates), jointly titled property or having property passing by operation of law may be advisable, however, for many others it can have disastrous and unforeseen consequences if not properly addressed prior to death, and particularly in the guardianship petition.

Because the ownership of real and personal property jointly with another or in a manner that it will pass by operation of law upon the death of a joint tenant is very common, it is important that said joint accounts be specifically identified in the guardianship petition and the impact upon both the AIP and any joint tenant or account/property recipient upon the death of the AIP be specifically addressed.

It requires the attorney to undertake an assessment and review of how and why the joint account(s) was created and who is entitled to notice of the relief being sought, and his or her right to be heard in the guardianship proceeding. The survivorship rights of a joint tenants(s) cannot and should not be terminated or modified in a guardianship proceeding without the joint tenant being given notice of the proposed change and the opportunity to be heard. To accomplish this, it is necessary that the petitioner undertake a thorough investigation of the account(s) at issue and specifically delineate what is being proposed with respect to the joint account(s).

Identifying the Joint Accounts in the Petition

Section 81.08 of the MHL specifically provides for the disclosure of the approximate value of any property or assets held by the alleged incapacitated person in the petition for the appointment of a guardian. It is incumbent upon the petitioner to undertake the necessary investigation to determine which bank or brokerage accounts the AIP has in his name alone or holds jointly with others and/or is the beneficiary of, and to disclose same in the Guardianship petition.[13]

In doing so with respect to any bank or brokerage accounts, the petitioner should specifically identify any jointly held bank or brokerage account(s), and whether said joint account(s) are joint accounts entitled to the presumptions of Banking Law § 675, or are "for the convenience" accounts under § 678 or "transfer on death" accounts with respect to any brokerage account pursuant to the Transfer on Death Security Registration Act and EPTL 13-4.1 through 13-4.12. The petition should specifically identify any person who has an interest in the account, the extent of his or her interest, and whether he or she has a right of survivorship in the account.[14]

In most cases this is not problematic if the joint account holder is the spouse of the alleged incapacitated person (AIP), and he or she has a joint account with the AIP. However, if the joint account holder is a child of the AIP or a third party, the petitioner should obtain copies of the account signature cards and any other bank or financial institution record which may describe whether or not the account is a joint account with rights of survivorship that is entitled to the presumptions of § 675 or is a "transfer on death" account under EPTL 13-4.1 through 13-4.12 or merely a "for the convenience" account under § 678.16.

Specifically Delineate Your Proposal as to Any Joint Account(s) or Jointly Held Real Property in the Guardianship Petition

The guardianship petition should contain a clear and concise description of the relief sought by the petitioner with respect to any joint bank or brokerage account(s) or real property. For example, if a transfer of the title of the joint account or real property from the AIP to the other named joint account holder or to a third party (not a joint tenant) is being sought, it is necessary that same be specifically requested in the petition and notice be given to the party or possible beneficiary under a will, trust or presumptive distribute, whose interest in said account(s) or property may be impacted by the transfer. The petition should also specifically identify the account by its account number, name of bank or brokerage firm as well as the existing title on said account. It should also specify the title of the account to be created once the account or any part thereof has been marshaled by the guardian, or whether an apportionment of the account or outright transfer to the other named account holder or any other party is being sought. Additionally, it is critical to address the survivorship interest of each joint tenant in the petition, and the petitioner's proposal with respect thereto.[15]

If the potential exists that the AIP may need Medicaid (nursing home and/or home care services) and a transfer of the assets in a joint bank or brokerage account is being sought to the spouse, blind or disabled child (exempt transfer(s) for Medicaid eligibility), the court will usually approve a transfer of the AIP's interest in said account(s) to the other named title holder, without any apportionment to the AIP.[16] This is also true if no objection to the proposed transfer is made by any other interested party to the guardianship proceeding, and the AIP's testamentary

scheme as reflected in his or her last will or trust is consistent with the proposed transfer.

Obviously, complications could arise when the proposed transfer is to a joint account holder who is not the spouse of the AIP. If, for example, the joint account holder is a child, family member or friend, there will be issues as to whether or not the child, family member or friend contributed any of the funds in the joint account(s), and whether the proposed transfer will create the five-year look back period for nursing home Medicaid purposes (or does it qualify as an exempt transfer to a spouse, blind or disabled child). There will also be the issue of whether or not the other interested parties to the guardianship will consent to the transfer, and if the account is to be apportioned by and between the account holders, how will title to each apportioned account be held, and what impact will the apportionment have on the survivorship interest of each joint tenant? The protection of the survivorship interest of each joint account holder must be addressed.

For example, if apportionment is not sought and a complete transfer is made to the non-incapacitated account holder, will it be necessary that said account be held "in trust for" the incapacitated person? This could be problematic if the incapacitated person is a candidate for Medicaid benefits, and the prior death of the non-incapacitated person would result in the passage of the funds by operation of law in the account to the incapacitated person. This problem may be obviated if the incapacitated party can be the beneficiary of a Supplemental or Special Needs Trust (SNT). In that event it would be appropriate to title the account of the non-incapacitated party "in trust for" the SNT of the incapacitated party.

Additionally, in order to protect the non-incapacitated account holder, it may be necessary that the account marshaled by the Guardianship be titled "X as Guardian of the property of Y in trust for Z" so as to protect Z's survivorship interest.

Clearly, the title of the asset held at the commencement of the guardianship proceeding and how they will be titled once a guardian has been appointed are important issues that need to be thoroughly analyzed and reviewed pre-petition by the attorney and the client.

Endnotes

1. Estates, Powers & Trusts Law (EPTL) 6-2.2.
2. Real Property Law (RPL) § 240-b.
3. RPL § 240-c.
4. Banking Law § 678.
5. *Id*.
6. *Id*.
7. Banking Law § 675.
8. *Id*.
9. Banking Law § 675.
10. EPTL 13-4.1–13.4.12.
11. EPTL 13-4.2.
12. EPTL 13-4.4.
13. MHL § 81.08.
14. Banking Law §§ 675 and 678; EPTL 13-4.1 and 13-4.12.
15. MHL §§ 81.07(d) and 81.21(c).
16. N.Y. Social Services Law § 366.

What Do I Say When a Client Asks Me to Serve as a Trustee?

By Jay W. Freiberg

You have been asked by your client to serve as a trustee. How should you respond? The short answer is yes. Being asked by a client to serve as a trustee is undoubtedly an honor. The client is placing important assets in your hands to safeguard and manage. These types of services also meaningfully strengthen your relationships with your clients. So, you say yes when a client asks you to serve as a trustee.

But, being a trustee is not a one-way street. It comes with risks. Primarily the risk of being sued by a trust beneficiary for breach of fiduciary duty.

To be sure, breach of fiduciary duty claims come in all shapes and sizes. But simply by remaining mindful of your beneficiaries, your co-trustees and your assets, you will go a long way toward mitigating trustee risk.

A. Know Your Beneficiaries

This is likely the surest way to avoid trustee litigation. Allegedly wronged or ignored beneficiaries are always a ripe source for fiduciary disputes. As a fiduciary, you want to learn about the family situations of your beneficiaries. And you want to encourage your beneficiaries to share this information with you.

Several relatively common family situations should raise red flags for you. Examples include second or third spouses, family estrangement and, simply, quirky family members.

Second and third spouses can easily become an issue because of the inherent tension between the current spouse and the children of prior spouses. Typically, the current spouse wants more immediate income from the trust. Conversely, the children from prior spouses have an interest in preserving as much trust corpus as possible, which will usually flow to them at the death of the current spouse.

Family estrangement is also a stress point. Certain family members advocate for one thing. Income distributions or income-producing asset allocations, for example. The other side advocates for the opposite, oftentimes just as a knee-jerk reaction to what is advocated by their enemy.

What about quirky family members? In one trust case that I litigated, the husband of one of the beneficiaries was a litigious type. He sued the cable company, the car leasing company, etc. It was only a matter of time before he trained his sights on his wife's trustee. In another, we had a beneficiary who had a laundry list of non-typical ailments, including chemical sensitivity and numerous accidents. Sometimes this foretells substance abuse problems. And, in any event, folks like these invariably look to a trustee to blame for their unpleasant life situations.

All families have some level of dysfunction. Indeed, oftentimes you as trusted counsel are being brought on board as a trustee precisely because an extra steady hand and good judgment are needed to manage the family and its assets. But as an intelligence gatherer you can be aware of the landmines. A full vetting at the outset of the appointment should occur, but also insist upon regularly scheduled updates. Encourage your beneficiaries to communicate with you. Acknowledge their communications. And do not be afraid to ask pointed questions.

B. Know Your Co-Trustees

Trustees are easily tarred with the same brush as a bad acting co-trustee. If your co-trustee self-deals or otherwise breaches their fiduciary duty, you too will be sued. And unless you can demonstrate that you properly dissented from the complained of acts, you too may be liable.

In New York, we have a statutory dissent statute when there are three or more acting trustees: EPTL 10-10.7. In other jurisdictions it is pursuant to common law. In any circumstance, however, if a co-trustee has the power and is acting contrary to your directions, or you simply have been outvoted by your co-trustees, timely record your dissent from the action in writing delivered to your co-trustees. This should effectively limit your liability for the complained-of act.

Note, however, that if the action rises to the level where significant trust assets are in jeopardy, consider commencing a court action. You do not want to be in a situation whereby you stood idly by while the trust's assets were frittered away, even if you have formally dissented from the act.

Several common examples of co-trustee tension will help you recognize the dangers here. One is serving alongside a family member of the trust's settlor. Another

Jay W. Freiberg is a partner at Elman Freiberg PLLC in New York City and an adjunct professor of law at Fordham School of Law.

is serving alongside a trustee who also works in a business owned by the trust.

When you serve with a family member, you are starting off right from your appointment in a situation where the non-fiduciary family beneficiaries are annoyed, embarrassed or otherwise upset that an apparently more favored family member was put in charge. Try and turn this uncomfortable situation to your advantage, by explaining to the non-fiduciary beneficiary that you are in place precisely to speak on their behalf. Earn their trust and you will alleviate this co-trustee pressure point.

When you serve with a co-trustee who also serves in a business owned by the trust you walk a fine line. As co-trustees you are co-equals. But, you are also this person's boss as the equitable owner of the business. Your co-trustee wears two hats—trustee and business manager—and has fiduciary obligations in both roles. Your role is to carefully manage this situation. Indeed, as co-trustee you are ultimately on the hook for any bad acts of your co-trustee as co-trustee, as discussed above, and for their bad acts as business manager, as discussed below.

C. Know Your Assets

A trustee need not know how to manage any asset. But every fiduciary must ensure proper care and maintenance of all assets in the trust.

Trustees overseeing a traditional basket of stocks and bonds can exercise their fiduciary obligations by engaging and monitoring appropriate asset allocators and managers.

While value fluctuation is not avoided, nor should it be, wild valuation swings are typically avoided. Moreover, costs are relatively stable and, important to your beneficiaries, so is the income stream.

Trusts that do not own stocks and bonds, however, do not have the same stability and therefore require heightened supervision by trustees. Consider businesses owned by trusts, or real estate, art and alternative assets placed in trust. Non-traditional assets such as these are often placed in trust and raise the risk profile for a trustee.

The use of trusts to own businesses, large and small, has been growing. These businesses are often placed in trust for both tax and succession planning purposes. But questions and risk abound for trustees. How does the business cash flow affect distributions to beneficiaries? What about valuation? A trustee can be surcharged for holding a wasting asset. And liability at the business level, including for sexual harassment, data breaches or negligence, is also a liability at the trust level.

Similar issues arise with real estate. Questions regarding distributions, capital contributions and buy/sell decisions need to be considered and answered. And all risks associated with owning property are also potential trustee risks.

Special risks are also present in art owned by trusts. Art is expensive to store and insure. Great price fluctuations are not uncommon. The wise trustee will remain cognizant of these concerns.

Finally, alternative assets—which can run the gamut from royalty streams to a cattle ranch to cryptocurrency—require specialized expertise. At bottom, know your trust assets and place each in expert hands. This too will go a long way to avoiding breach of fiduciary litigation, an important goal for all trustees.

A Well-Kept Secret: The Attorney Emeritus Program

By Michael Siris and Cora Vasserman

If you are a practicing New York attorney, you know what it is like to scramble at the end of the two-year biennial registration period: One needs 24 hours of Continuing Legal Education (CLE) credits to complete one's registration. Many of those attorneys looking for CLE courses at the 11th hour are unaware that the New York State CLE Board provides that you may partially fulfill your CLE requirements by doing pro bono work though an approved provider (although on a two-for-one basis, i.e., two hours of approved pro bono work for one free CLE hour's credit up to a maximum of 10 credits in any two-year reporting cycle). Likewise, many of those attorneys are unaware of the Attorney Emeritus Program (AEP), which acts as a liaison between attorneys—retired or not—and approved AEP host organizations or court-sponsored programs.

Founded in 2010 by former Chief Judge Jonathan Lippman, AEP's original purpose was to match retired attorneys with low-income New Yorkers in need of civil legal assistance. Retired attorneys, who are exempt from the $375 biennial registration fee and CLE requirements, may still continue to practice law with an approved AEP host organization or court-sponsored program. AEP helps those retirees match their skills and interests with an approved pro bono opportunity and makes sure that the provider offers the retiree malpractice insurance (some pro bono providers do not). AEP, in effect, functions as a clearinghouse between attorneys—retired or not—who wish to donate their legal services to New Yorkers in need in civil legal matters.

After AEP's creation, it became apparent that there was another category of attorneys who might benefit from AEP's services: those "senior" attorneys (55 or older) in practice for at least 10 years who were phasing down but not yet ready to check the "retired" box on their registration form. Such attorneys may choose "Emeritus" on their registration form and similarly match their skills and interests with an approved pro bono provider and not have to worry about malpractice insurance which the AEP makes sure is in place for you.

On your New York State Attorney Registration Form in Box "B" ("Registration"), after you check Option 1 (manner of payment of your registration fee), there is for non-retired attorneys a box entitled "Attorney Emeritus Program." The box states that you "wish to enroll…as an Attorney Emeritus and volunteer to perform pro bono services in New York State under the auspices of a qualified legal provider [screened by AEP]." One of the authors should know because he (guess who) checked that box and can attest to the AEP's value.

Another benefit of AEP is an increase in the number of free CLE credit hours one can obtain for pro bono work if you're an active, non-retired attorney. If one is volunteering under the auspices of AEP, the CLE Board's Regulations allow a maximum of 15 free CLE credits (for 30 hours of pro bono work) in any reporting cycle—an increase over the 10-credit limit if one is not working through AEP. Attorneys should consult the Regulations because more specific requirements apply. In any event, a classic example of serendipity if there ever was one.

"This service is critical, assisting low-income New Yorkers in essential matters including but not limited to housing, family, and education."

Fordham University's School of Law's Feerick Center for Social Justice provides programmatic and administrative support for AEP. Feerick Center staff organize information sessions and assist attorneys in finding pro bono opportunities that best suit their interests, background, and schedule. Emeritus Attorneys have proved to be an integral force in New York State's fight for access to justice, with volunteers (there are approximately 1,000 Emeritus attorneys enrolled in the program) contributing an average of 150 hours of pro bono service annually. This service is critical, assisting low-income New Yorkers in essential matters including but not limited to housing, family, and education.

If you wish to enroll as an Emeritus attorney, you can do so by either going to NYcourts.gov/attorneys/volunteer/emeritus/index, checking the appropriate box on your biennial registration form or contacting the Feerick Center for Social Justice. If you wish to navigate through the various pro bono providers without the assistance of AEP, you are free to do so but AEP will make things a whole lot easier for you.

Michael Siris is of counsel to Solomon and Siris, PC, of Garden City, New York, a member of the board of directors of New York County Lawyers Association and Chair of its Senior Lawyers Committee. **Cora Vasserman** is an AmeriCorps VISTA Member at Fordham Law School's Feerick Center for Social Justice (FCSJ). As indicated above, FCSJ administers the AEP.

Resolution Alley

Providing for Neutrals with Industry, Legal, and Business Expertise

By Theodore K. Cheng

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

Imagine that you are the Human Resources manager at a record label and you have just received a copy of a federal court complaint filed by a recently terminated employee who is now claiming that her firing was discriminatory. The court has also automatically referred the case to mediation. Although there are any number of potential mediators with expertise in the employment field, you wonder whether someone with knowledge of the music industry might better understand the context of the employment situation.

Or maybe you negotiate agreements for the purchase of artwork for your museum's own collection. Allegations have surfaced that your most recent acquisition from a private gallery may be a counterfeit. Your agreements with galleries always contain a standard, generic arbitration clause, but you now wonder whether having an arbitrator with knowledge, training, or expertise in art history might better understand both the background of the dispute, as well as appreciate the technical information that might be adduced at the evidentiary hearing.

Or perhaps your company licenses the logo of a professional basketball team and makes and sells various articles of clothing and other merchandising on which that logo appears. Recently, the team's in-house director of intellectual property and licensing contacted you and is upset about the quality of the apparel being made by your overseas manufacturer, which she contends is damaging the brand. She is threatening to terminate the licensing agreement, pointing to some arguable language in the agreement as a basis for doing so. You wonder whether you might suggest that the parties try mediating the dispute using someone with knowledge of sports merchandising and licensing in the apparel industry.

In each of the above scenarios, the characteristics of the person being selected as the arbitrator or mediator could make a difference in how (and sometimes whether) the dispute is resolved, how quickly a resolution is achieved, and how cost-effective the process will likely be. As alternative dispute resolution mechanisms like arbitration and mediation are voluntary and consensual in nature, they are processes detailed in dispute resolution clauses that are (outside of the mandatory, adhesion context) customizable by the parties, in that the parties have broad flexibility to design a dispute resolution mechanism that best fits the dispute in question. One of the aspects of this customization is the ability of the parties to select neutrals who are "experts" familiar with the subject matter of the dispute, the industry or background business norms in which the dispute arises, or the legal framework governing the dispute itself. Exercising this flexibility is something often overlooked by many parties.

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Arbitration is seen as having a number of significant advantages over litigation. One of these advantages is that the parties have the ability to choose their own decision maker. That decision maker can be someone who is an acknowledged expert in the subject matter of the dispute, such that an arbitration should (at least in theory) be conducted more quickly and efficiently than having it heard and decided by a randomly assigned and, most likely, generalist judge, who has no special expertise, knowledge or insight into the dispute, the relevant industry, or the business context.

A mediator who is an acknowledged expert in the industry or the business norms underlying the dispute could assist in helping the parties to furnish or uncover creative and innovative solutions. A mediator who is an acknowledged expert in the subject matter of the dispute could also add a helpful, perhaps more evaluative, perspective for the parties, oftentimes offering a different kind of reality testing—not a reality testing of the legal contentions, but the practicalities of implementing certain proposals.

Theodore K. Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and labor/employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, FINRA, Resolute Systems, the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals, and several federal and state courts. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at tcheng@theocheng.com.

This article originally appeared in the Fall/Winter 2018 issue of the Entertainment, Arts and Sports Law Journal*, a publication of the Entertainments, Arts and Sports Law Section.*

Delineating the qualifications and/or credentials of the arbitrator or mediator can also lead to increased savings in both time and cost. The parties do not need to expend additional time and energy educating the neutral as much about the underlying industry, business norms, or legal framework applicable to the dispute, as so often is important in entertainment, arts, and sports disputes.

The parties can begin thinking about this option when they first draft and enter into a dispute resolution provision. Here is an example of an arbitration clause that requires a certain level of subject matter experience:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules before a single arbitrator. The arbitrator shall have at least 10 years of experience in intellectual property licensing matters. Judgment on any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Or, for employment matters in a particular industry, the clause might read something like this:

> If a dispute arises out of or relates to this employment contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration. The mediator shall be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Any arbitration shall be administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures before a single arbitrator, who shall also similarly be currently employed at either a record company or a music publisher, neither of which is affiliated with the parties to the contract. Judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

Depending upon the circumstances, some degree of expertise can matter. Why not provide for it upfront in the dispute resolution clause?

For the situation where a court has automatically referred or mandated the dispute to be resolved, in the first instance, through one or more alternative dispute resolution mechanisms, many courts maintain rosters of individuals with varying degrees of industry, business, and legal backgrounds. Parties can choose someone from those rosters with the appropriate background for that dispute. And if the practice is for the court to assign a neutral, the rules usually permit parties to opt out of that selection and choose a replacement—someone who would be a better fit.

One cautionary note is to exercise some restraint in drafting such specificity into the clause. Being too specific can inadvertently limit the pool of arbitrators or mediators from which the parties can make their selection. For example, a clause that mandates that "the mediator shall possess a Ph.D. degree in the field of experimental plasma physics and/or quantum particle acceleration" would obviously result in few available candidates because, even if the pool of such Ph.D. degree recipients is large, the likelihood that they also possess the requisite mediation skills (or can even conduct anything approaching a mediation process) is undoubtedly low. Thus, over-specifying the qualifications and/or credentials of the arbitrator or mediator may inadvertently lead to situations where very few suitable neutrals can be identified (or, in some cases, none), thereby thwarting the original intent of the parties in trying to design a more cost-effective and efficient process.

If the parties had not exercised this flexibility to insert the qualifications and/or credentials of the neutral into the dispute resolution clause before the dispute arises, all is not lost. Although the parties may disagree on the merits and preferred outcome of the dispute, it is conceivable that they will each recognize the benefits of agreeing, after the dispute has arisen, to select a neutral who has certain industry, business, or legal expertise. In matters administered by a provider such as the AAA, the CPR Institute, or Resolute Systems, the parties may be afforded an opportunity, after the case is filed, to articulate any preferences they may have for the neutral, particularly in situations where the dispute resolution clause is generic or silent as to the neutral's qualifications and/or credentials. Such an opportunity is another time when the flexibility and customization of alternative dispute resolution mechanisms can be leveraged to ensure that the neutral might have a better understanding of the industry, business norms, and/or legal framework in which the dispute has arisen and appreciate any technical information that might be adduced at the evidentiary hearing.

The ability to provide for, and ultimately select, the neutral with the right background and experience for the dispute in question is one of the hallmarks of a voluntary, consensual alternative dispute resolution process. It distinguishes arbitration and mediation, for example, from the traditional litigation model for resolving disputes and is well worth considering, not only at the moment when dispute resolution clauses are being drafted and entered into, but also when disputes actually arise.

Strategies for Preventing Sexual Harassment

By Jeffrey S. Klein, Nicholas J. Pappas, and Larsa K. Ramsini

For many years, employers have sought to prevent sexual harassment in the workplace by implementing anti-harassment policies, training, grievance procedures, and monitoring systems. However, the effectiveness of these measures has been called into question in recent months by the litany of news reports of sexual harassment and assault by public figures at a number of large and sophisticated employers,[1] suggesting that, notwithstanding these practices, sexual harassment continues to occur at higher rates than previously had been acknowledged. Employers rightfully have turned to the employment bar seeking advice on what more they can do, beyond what the law may require, to further the goal of preventing sexual harassment in the workplace.

A starting point for any employer would be a loud and clear statement from senior leadership that establishes or bolsters the employer's dedication to the core value of respect for the individual. By establishing or bolstering that core value, employers can then choose from a toolkit of options appropriate to the employer's particular circumstances that promote a workplace culture focused on merit and individual performance, rather than on prohibited criteria such as sex. By promoting a respectful and performance-based culture, we believe employers are best able to identify and quickly address behaviors that constitute or may lead to sexual harassment (or bullying, or any other inappropriate conduct for that matter), and ideally before such behaviors become severe or pervasive.

In this article, we provide some suggestions regarding how employers might want to assess their workplace cultures, and then we offer thoughts regarding common issues leaders should consider in seeking to improve their cultures.

Fact Gathering

There is no "one-size-fits-all" solution to the problem of sexual harassment in the workplace. But experience shows that every employer has strengths and weaknesses in how it addresses the issue, and employers should seek to build upon their strengths and aggressively address their weaknesses. Towards that end, employers should gather as much data as reasonably possible and seek advice from counsel and consultants to further expand the base of knowledge and understand the particular problems they face and possible solutions. For example, employers may wish to conduct interviews of select employees, focus groups, upward reviews, or an employee survey to gain diverse perspectives on how the organization could improve. If available, employers should review the results of exit interviews of departing employees and, if not already included, add to the list of questions posed whether the employee had any concerns with how the company addressed misconduct in the workplace. Employers who offer severance benefits may wish to include in their separation agreements a clause stating that the departing employee has disclosed all improper conduct of which the employee is aware. Such a clause may prompt departing employees to disclose potentially valuable information not previously reported.

Another important source of information is the corporation's human resource records. Employers should review existing records of employee complaints to assess whether they expose any weaknesses in specific offices or of specific individuals who may be causing disproportionate levels of grievances. To the extent an employer has not formulated a regular practice of monitoring and acting upon such weaknesses, it should consider having a senior HR manager periodically conduct such an internal self-assessment. Employers also should review existing complaint channels—for example, complaints received by supervisors, by HR, and through a hotline—to confirm that the organization documents and investigates all complaints consistently and timely.

After obtaining the relevant data from one or more of the above sources, employers should focus carefully on anecdotes of inappropriate behavior and seek to identify weaknesses, perceived or actual, in the employer's practices for responding to such behaviors. However, employers should be mindful of the possibility of creating potentially discoverable documents and, prior to implementing any proposal outlined above, be committed and prepared to act on the information learned to make this process worthwhile.

Implementing Change

Following whatever fact-gathering process is appropriate for a particular employer, the employer should carefully assess, ideally with counsel, what steps it should take to improve existing practices and/or to remedy any actual or perceived weaknesses. What follows are a few issues that arise with some frequency, and which we believe em-

This article originally appeared in the Summer 2018 issue of the NY Business Law Journal*, a publication of the Business Law Section.*

ployers should carefully consider as they determine what changes they believe will prove most effective.

A significant challenge in preventing workplace harassment is the misperception that different standards apply to different individuals depending on the perceived value someone brings to the organization. Some employees, including managers, may come to believe that the employer will excuse inappropriate behavior by a "friend of the CEO" or a "rainmaker" who produces a significant amount of business for the company. The touchstone here is the company culture, because the type of culture fostered by senior management will dictate how employees interact in the workplace. Leaders need to reflect thoughtfully with their senior HR colleagues on questions such as: Are any senior executives perceived to be untouchable? How has the organization responded in the past to the "superstar harasser"? These are the types of culture issues that create risks, even if not rising to the level of a violation of law. Candid self-assessment and honest answers to these questions are an important predicate to corrective action.

"If senior leaders tolerate misconduct by a top performer, that single act can significantly hamper an employer's efforts to build a culture of meritocracy and respect, regardless of other measures the employer has taken to prevent workplace harassment."

Of course, if senior leaders tolerate misconduct by a top performer, that single act can significantly hamper an employer's efforts to build a culture of meritocracy and respect, regardless of other measures the employer has taken to prevent workplace harassment. If employees, correctly or incorrectly, perceive that management tolerates inappropriate workplace behavior from certain individuals, they may become reluctant to report misconduct, thus causing inappropriate behavior to persist or become more pervasive. Leaders committed to making his or her workplace one in which everyone thrives based on their own merits must make clear that everyone is governed by the same rules, regardless of any individual's position, tenure, or economic contributions to the organization.

Sometimes speaking up about misconduct in the workplace is easier said than done, particularly when an employee is concerned about the potential negative consequences that reporting could have on his or her career. For example, if a senior leader hears someone engaging in so-called "locker-room banter" or telling inappropriate jokes, instead of acknowledging or addressing the issue on the spot, or soon thereafter in a confidential setting, she or he may be inclined to simply let the moment pass to avoid the potential for conflict. Employers should encourage leaders to take action in response to inappropriate behavior in the moment to dispel any fear of negative repercussions. However, this type of behavior may not come easily to all managers. Companies should therefore consider including in their training programs a specific focus on bystander intervention. If, after a manager has received sufficient training, she or he repeatedly declines to address workplace misconduct, the employer should consider whether counseling is appropriate, or, if the behavior persists, taking disciplinary action. The behavior of senior leaders as cultural beacons to promptly identify and report on incidents of inappropriate behavior is one of the most critical lines of defense and protection against legal claims. In a truly healthy workplace culture, all employees, and especially leaders, must believe that they have an obligation to stand up and do the right thing, and that senior management will support them for doing so.

There may be times when an employer's goal of establishing a culture of respect appears to conflict with other important goals, such as maintaining valuable client relationships. For example, a customer may not appreciate being asked to refrain from making inappropriate comments to female employees, so bringing this to his attention may result in a deterioration of that relationship. In such cases, an employer may seek the advice of outside counsel and/or consultants for recommendations on addressing the potentially many competing interests at play to ensure its leaders take actions consistent with the organization's obligations as well as its guiding principles. But regardless of the many factors at play in determining how best to address inappropriate workplace behavior, for the employer to reach that point, senior leaders must be role models for the organization by raising the misconduct as an issue to be addressed.

Employers also should be attentive to any backsliding by leaders in mentoring, sponsorship, or mere interaction in the workplace between men and women. The Chief Judge of the U.S. District Court for the Southern District of New York cautioned an audience in December about what is sometimes known as the "Graham Rule"—"that a man should make sure he is never alone in a room with any woman other than his wife for any reason—including perfectly legitimate business reasons."[2] Judge McMahon said such a rule denies opportunities to women "for mentoring, for networking, [and] for assignment to the best deals."[3] Given the profound ramifications a lack of mentoring, networking, and sponsorship can have on women's careers, avoiding interactions with women undercuts the goal of establishing a culture of respect and equal opportunity.

This behavior also may inhibit an employer's goal of preventing sexual harassment. Women today continue to have disproportionately fewer leadership roles in business.[4] Commentators have suggested that having more women in power would reduce the instances of sexual harassment.[5] Of course, many employers have recognized and sought to rectify the imbalance in senior leadership, and it has proven to be a difficult challenge. Companies should continue working to find ways to promote more women into leadership roles, including by encouraging those currently in leadership to be equally open to working with and sponsoring both men and women.

One strategy could be seeking to promote gender parity at all networking, business development, and other business-related social events. Senior leaders could take the same approach when creating teams, committees, or any other group tasked with a particular project or assignment. Actions like this taken by an organization's senior leadership demonstrate to the workforce at large that the goal of establishing a culture of respect is one of leadership's top priorities. And if it is a priority for leadership, it will hopefully become a priority for all employees.

Endnotes

1 *See e.g.*, Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME (Jan. 26, 2018, 4:21 PM), http://time.com/5015204/harvey-weinstein-scandal/.

2 Colleen McMahon, SDNY Chief Judge Colleen McMahon Takes on Sexual Harassment, N.Y.L.J. (Dec. 12, 2017, 8:39 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/12/sdny-chief-judge-colleen-mcmahon-takes-on-sexual-harassment/.

3 *Id*.

4 *See, e.g.*, Madeline Farber, *Board Diversity at Fortune 500 Companies Has Reached an All-Time High*, FORTUNE (Feb. 6, 2017), http://fortune.com/2017/02/06/board-diversity-fortune-500/ (noting that, despite an increase in diversity, men held almost 80% of the board seats of Fortune 500 companies in 2016).

5 *See, e.g.*, Claire Cain Miller, *Sexual Harassment Training Doesn't Work. But Some Things Do.*, N.Y. TIMES (Dec. 11, 2017), https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html ("Research has continually shown that companies with more women in management have less sexual harassment."); Frank Dobbin & Alexandra Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, HARVARD BUS. REV. (Nov. 15, 2017), https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will ("We already know how to reduce sexual harassment at work, and the answer is actually pretty simple: Hire and promote more women.").

Ethics Matters

By John Gaal

Q I have been asked by a former law school classmate from out of state to serve as "local counsel" on a litigation matter that she is handling. It involves an area of the law that I am not really familiar with, but I don't really expect to have any substantive responsibility and am only "lending" my name to her pleadings so that she can satisfy the requirement for local counsel involvement. Given these circumstances, do I need to have any ethical concerns in helping her out?

A You sure do, although if you set up the arrangement appropriately you can certainly limit your exposure. For starters, lawyers who serve as "local counsel" are subject to all of the same ethics rules that apply to any other lawyers. In other words, you do not get a pass simply because you are designated as "local counsel." However, as outlined in a 2015 ethics opinion issued by the Committee on Professional Ethics of the Association of the Bar of the City of New York ("Committee"), Formal Opinion 2015-4, there are steps you can, and should, take to protect you and your firm in these circumstances.

The most important step is to enter into an explicit agreement, preferably directly with the client, which limits the scope of your representation in accordance with everyone's expectations, rather than simply rely on the ambiguous designation of "local counsel." Indeed, it is your obligation to communicate clearly with the client any limitations on the scope of your representation. To be effective, those limitations must be both reasonable and agreed to by the client through an informed consent. In the absence of doing so, you are at risk of sharing full responsibility with your former classmate for the conduct of the matter (e.g., responsibility for the substance of pleadings, meeting discovery and other deadlines, etc.), even though you are not expecting to play any substantive role in how the matter is handled. (Of course, in addition to entering into an explicit, written agreement with the client outlining your responsibilities, you must comply with any requirements imposed on local counsel by applicable court rules.)

John Gaal is Of Counsel at Bond, Schoeneck & King, PLLC and Co-Chair of the Section's Committee on Ethics and Professional Responsibility.

This article originally appeared in the Spring 2018 issue of the Labor and Employment Law Journal*, a publication of the Labor and Employment Law Section.*

Ethics Matters is provided by the Ethics and Professional Responsibility Committee of the Labor and Employment Law Section. The Committee is pleased to mark the return of this column after a several year hiatus and we hope to continue it on a quarterly basis. Specific columns are authored by various members of the Committee. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact either Co-Chair of the Committee, John Gaal at jgaal@bsk.com, or Jae Chun at jchun@friedmananspach.com.

Limited scope representations, such as "local counsel" arrangements, are permitted under Rule 1.2(c) of New York's Rules of Professional Conduct ("Rules"). While these arrangements do not allow a lawyer to avoid their ethical obligations, as explained by the Committee, they can "narrow the universe within which those ethical obligations apply, by limiting the lawyer's role in the matter and specifying the tasks she is expected to perform." Needless to say, in connection with those tasks, which are identified as falling to you in your local counsel role, you are expected to act competently and diligently, and to communicate appropriately with the client about relevant developments (see Rules 1.1, 1.3 and 1.4).

The Comments to Rule 1.2 recognize a number of reasons why a client may wish to limit the scope of representation, not the least of which is to control costs. Specifically in the context of a local counsel arrangement, the Committee recognized that a limited representation approach can satisfy the client's interest in having the bulk of legal services provided by the non-admitted, out-of-state lawyer of their choice without incurring the cost of duplicating the role of lead counsel with a locally admitted lawyer.

As noted, to be effective, a limited scope arrangement must carry the client's "informed consent." Informed consent, generally, requires making sure that the client understands the material advantages and disadvantages of the proposed course of action. See Rule 1.0(j) and Comment 6. In the context of a limited scope arrangement, this more specifically means "disclos[ing] the limitations on the scope of the engagement and the matters that will be excluded," as well as the "reasonably foreseeable consequences of the limitation." Rule 1.2, Comment 6A. Formal Opinion 2015-4 highlights some of the client risks that may need to be explained. For example, while an agreement that limits local counsel's role to only appearing at routine status conferences may result in cost savings for the client, the client is not getting a second pair of eyes to substantively monitor lead counsel's conduct. Similarly, if local counsel is only reviewing the legal analysis contained in lead counsel's work, and not independently verifying the underlying facts, the client is again losing the benefit of that second pair of eyes. In the particular circumstances, those may be reasonable offsets to the cost savings, but a lawyer entering into a limited scope engagement with a client has an obligation to make sure that the client understands those trade-offs.

John Gaal

While the preferable way to secure this informed consent is through communication directly with the client, the Committee has concluded that "given the long-standing, customary practice of lead counsel acting as intermediary between local counsel and the client, we believe a written agreement between local counsel and lead counsel may fulfill the requirements of Rules 1.2(c) and 1.5(b), provided lead counsel obtains the client's 'informed consent' to that arrangement."

Although the Rules provide substantial latitude in allowing limitations on the scope of representation, those limitations must nonetheless be reasonable. "[A]n agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation." Rule 1.2, Comment 7. The Committee's Opinion goes on to provide some examples of reasonable, and unreasonable, limitations:

- It may be reasonable for local counsel to file a pro hac vice motion on behalf of an out-of-state lawyer in a large litigation and not perform any other work on the case once that out of state lawyer is admitted;
- Local counsel may reasonably limit her representation to reviewing the legal argument in a summary judgment motion prepared by lead counsel, assuming all factual representations to be accurate, and exclude any obligation to verify factual information (although even then local counsel may not ignore obvious factual inaccuracies);
- Local counsel may not agree to sign her name to a complaint prepared by lead counsel and file it with the court, even though she believes the claims are not supported by the facts, because she may not "exclude by agreement" her ethical obligation to not file frivolous claims;
- Local counsel may not agree to circumvent ethical rules requiring candor to the court or third parties, nor other relevant court rules (e.g., if court rules require counsel appearing at a court conference to have "knowledge" of the case, local counsel appearing at those conferences must have sufficient knowledge to satisfy that court rule, regardless of the terms of any limited scope engagement).

Also, because a lawyer has an obligation to keep a client informed of any developments relating to that representation, Rule 1.4(a)(3), a limited scope engagement by local counsel should be clear on who will have the communication obligation with respect to the covered tasks. While the Opinion recognizes that local counsel can rely, generally, on lead counsel's representation that relevant information is communicated with the client, local counsel may not completely abdicate that communication responsibility and, at a minimum, if local counsel knows or has reason to know, that lead counsel is not providing required communications to the client, local counsel must take steps to remedy that situation.

Serving as "merely" local counsel does not, in itself, absolve you of considerable ethical obligations. If you are considering serving as local counsel in a matter, you should carefully review Formal Opinion 2015-4. Not only do you have an ethical obligation to understand what you may and may not do in the context of such an engagement, but you should adequately understand, and appropriately limit, your own exposure.[1]

Endnote

1. If your involvement in the matter will result in a fee share arrangement with other counsel, instead of your own direct fee arrangement with the client, you must make sure you understand the requirements of Rule 1.5(g), which imposes very specific obligations in the context of fee sharing arrangements.

New York Court of Appeals Establishes Lower Threshold for Punitive Damages Under NYCHRL

By Anshel Joel "AJ" Kaplan and Howard M. Wexler

Introduction

AJ Kaplan

Punitive damages are appropriate under the New York City Human Rights Law where the defendant's actions amount to recklessness or willful or wanton negligence, or where there is "a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." So held the state's Court of Appeals in *Chauca v. Abraham*,[1] resolving a long-undecided issue at the request of the Second Circuit.

Background

In November 2010, after being terminated while on maternity leave from her role as a physical therapy aide, Veronika Chauca (Chauca) sued her former employer, Park Management Systems, LLC., and two supervisory employees, in the Eastern District of New York for pregnancy discrimination under Title VII, the New York State Human Rights Law, and the New York City Human Rights Law (NYCHRL).[2] At trial, over Chauca's objection, the district court declined to provide a punitive damages instruction, finding that Chauca had failed to introduce any evidence that the employer had intentionally discriminated with "malice" or with "reckless indifference" to her protected rights—the standard under Title VII.[3]

After receiving a jury award of $60,500 in compensatory damages, Chauca appealed, arguing that, with respect to her NYCHRL claim, the district court erred in using the Title VII standard for punitive damages. She argued that the City law, which mandates that its provisions be "liberally" construed and analyzed "separately and independently" of federal law, calls for a more lenient, pro-plaintiff approach—specifically, that a punitive damages jury instruction is appropriate and necessary upon any finding of liability, regardless of whether the employer discriminated with malice or reckless indifference.[4]

The defendants argued, on the other hand, that the district court was correct, and that the standard for punitive damages under NYCHRL mirrors that of Title VII, just as the Second Circuit held in *Farias v. Instructional Sys., Inc*.[5]

In November 2016, the Second Circuit, after concluding that neither the statute nor case law provided sufficient guidance as to the appropriate standard, certified the following question to the New York Court of Appeals: "What is the standard for finding a defendant liable for punitive damages under the [NYCHRL]?"[6]

Howard M. Wexler

New York Court of Appeals Analysis

On certification, the New York Court of Appeals, in a 6-1 decision,[7] took a middle ground. Regarding Chauca's argument, it noted that punitive damages and compensatory damages are conceptually different, finding that the former, unlike the latter, are intended to address "gross misbehavior" or conduct that "willfully and wantonly causes hurt to another."[8] As a result, the court held, there must be some heightened standard for punitive damages, and a finding of liability cannot by itself automatically support a jury charge pertaining to punitive damages.[9]

As to the defendants' argument, the court explained that during the intervening years since *Farias*, New York City had twice amended the NYCHRL out of concern that the statute was being too strictly construed, cautioning courts that similarly worded federal statutes may be used as interpretive aids only to the extent that they are viewed "as a floor below which the City's Human Rights Law cannot fall, rather than a ceiling above which the local law cannot rise," and only to the extent that those decisions may provide guidance as to the "uniquely broad and remedial purposes of the local law."[10] Against this backdrop, the Court of Appeals held that the punitive damages standard must be less stringent than the one imposed by Title VII.

Turning to statutory construction to interpret the appropriate standard, the Court of Appeals noted that the "starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" and "when a word having an established meaning at common law is used in a statute, the common law meaning is generally followed."[11]

Howard M. Wexler is a Partner and **Anshel Joel "AJ" Kaplan** is an Associate in Seyfarth Shaw LLP's New York City office and are members of the firm's Labor & Employment Law Practice Group.

This article originally appeared in the Spring 2018 issue of the Labor and Employment Law Journal*, a publication of the Labor and Employment Law Section.*

The Court then held that "punitive damages" is a legal term of art that has an established meaning under New York common law,[12] under which punitive damages are appropriate in cases with "conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard," as proclaimed in its decision in *Home Ins. Co. v. Am. Home Prods. Corp*.[13] Explaining that this standard requires neither a showing of malice nor awareness of the violation of a protected right, the Court concluded that it therefore adhered to the New York City's liberal construction mandate while at the same time remaining consistent with the language of the NYCHRL.[14]

"The decision thus serves as a further reminder that employers in New York City should adopt and enforce strong anti-discrimination policies, train their employees on avoidance of discriminatory and harassing behaviors, thoroughly investigate internal complaints of such behavior, and swiftly discipline those who transgress."

Closing the Loop

In March 2018, having received definitive guidance from New York's highest court on its certified question, the Second Circuit issued a brief, four-paragraph, per curiam decision. Vacating the district court's judgment and remanding the matter for further proceedings, the Second Circuit held that because the Court of Appeals had "expressly rejected the application of the [Title VII] standard for punitive damages … the district court did not apply the proper standard in declining to submit the question of punitive damages to the jury."[15]

Implications

The Court's decision now makes clear that the standard for punitive damages under the NYCHRL is broader, and more plaintiff-friendly, than under Title VII. (The New York State Human Rights Law does not permit punitive damages at all.) While punitive damages will not be available in every NYCHRL case where an employee prevails, the plaintiff will be entitled to a jury instruction on punitive damages whenever there is evidence that the defendant acted with "malice" or with "reckless indifference" to the plaintiff's protected rights, or when the defendant's actions amount to "a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard."

As a practical matter, the standard foreshadows that trial courts may issue punitive damages charges more frequently than in the past. As argued by the New York City Law Department in its amicus brief, which urged the court not to tie the standard to Title VII's: "[T]he very same evidence that establishes liability in a given case may well warrant punitive damages. For example, if a jury finds that an employee has been fired because of his or her race, it will be quite difficult for a defendant acting in the year 2017 to claim that there is no basis to conclude that it was acting with at least reckless disregard or gross negligence toward the employee's rights or toward the possibility that it was causing harm based on a protected characteristic."

The decision thus serves as a further reminder that employers in New York City should adopt and enforce strong anti-discrimination policies, train their employees on avoidance of discriminatory and harassing behaviors, thoroughly investigate internal complaints of such behavior, and swiftly discipline those who transgress. Juries throughout the five boroughs will be waiting to punish them through damages awards if they fail to do so.

Endnotes

1. 30 N.Y.3d 325 (2017) [hereinafter, *Chauca Certification*].
2. *Chauca v. Abraham*, 841 F.3d 86, 88-89 (2d Cir.), *as amended* (Nov. 8, 2016) [hereinafter, "*Chauca I*"], *certified question accepted*, 28 N.Y.3d 1108, 68 N.E.3d 76 (2016), and *certified question answered*, 30 N.Y.3d 325, 89 N.E.3d 475 (2017).
3. *Chauca I*, at 89.
4. *Chauca I*, at 88.
5. 259 F.3d 91 (2d Cir. 2001).
6. *Chauca I*, at 95.
7. The one dissenting justice argued that the NYCHRL entitles a prevailing plaintiff "to a punitive damages charge whenever liability is proved, unless an employer has adopted and fully implemented the antidiscrimination programs, policies, and procedures promulgated by the Commission on Human Rights, as an augmentation to compensatory damages." *Id*. at 333.
8. *Chauca Certification*, at 331.
9. *Id*. at 332.
10. *Id*. at 332-33.
11. *Id*. at 330-31.
12. *Id*. at 331.
13. 75 N.Y.2d 196, 203-04 (1990).
14. *Id*. at 333.
15. *Chauca v. Abraham*, No. 15-1720, 2018 WL 1352351, at *1 (2d Cir. Mar. 16, 2018).

Case Study: An Effective Motion in Limine Wins Malpractice Case at Trial

By David J. Varriale

Introduction

A motion in limine, when properly used, can be an effective weapon at trial. A successful motion can preclude anticipated testimony or evidence, and in some cases it can result in a complete dismissal of an opponent's case.

David J. Varriale

A motion in limine is made at the start of trial. It is an evidentiary motion, and its purpose is to exclude the admission of testimony or evidence for noncompliance with evidentiary rules, witness qualifications, foundation, or relevance. The subject testimony or evidence can be precluded if the trial court finds that its probative value is outweighed by its prejudice to a party. The motion is designed to resolve evidentiary issues before the trial, so the jury does not hear inadmissible or prejudicial evidence, which can result in reversible error on appeal. The motion, and its supporting memorandum of law, is simple. The goal is to identify the questionable evidence, and include it in the motion. The applicant should describe the purpose for which the evidence will be introduced, cite the applicable statutes or rules or applicable case law, and then explain why the evidence should be excluded.

Case Discussion

In the instant Westchester County Supreme Court case, *Rabasco v. Westchester County Health Care Corporation, et. al.*, the plaintiff alleged that the defendant-surgeon had been negligent in failing to properly utilize hardware in an open reduction internal fixation surgery to plate the plaintiff's bilateral mandibular fractures. Additionally, the plaintiff alleged that the surgeon and the hospital staff failed to timely diagnose a bone infection at one of the fracture sites.

"A motion in limine is an evidentiary motion. It is not a substitute for summary judgment, especially after the dispositive motion deadline."

At trial, the defense filed a motion in limine with the trial court judge seeking preclusion of the plaintiff's experts' opinions on the basis that no written reports were disclosed regarding any of the physical exams conducted of the plaintiff by the experts pursuant to N.Y.C.R.R. 202.17. The defense further argued that the experts should not only be precluded from referring to any and all opinions and observations derived from these exams, but on that same basis the plaintiff would be left without any supporting experts and the underlying malpractice case should be dismissed with prejudice. In further support of this argument, the defense highlighted that a review of both experts' affirmations submitted in opposition to the defendants' summary judgment motion, as well as their expert witness disclosures, revealed that all of their opinions necessary to support liability and causation were derived from the physical exams of the plaintiff. The trial court agreed with the defense, and precluded the experts' opinions and testimonies at trial. As such, without any experts left to criticize the defendant, the plaintiff was unable to proceed with his case sounding in medical malpractice, and the trial court dismissed the action with prejudice.

"A well-executed motion can result in a preclusion order from the trial court, which can ultimately result in a complete dismissal, as was the outcome in the instant case."

Advice and Results

First, draft the motion as concisely as possible. A motion in limine is an evidentiary motion. It is not a substitute for summary judgment, especially after the dispositive motion deadline. This is true, even though the practical effect of a granted motion in limine could make it impossible for a plaintiff to prove his or her claim's essential elements.

Second, a motion in limine is not a further discovery motion. The motion should not be used as a substitute for a motion to compel, or to exclude evidence as a discovery sanction. Article 31 of the New York Civil Practice Law and Rules governs discovery, and the preliminary or compliance conference order will likely contain certain deadlines for discovery motions. The trial court will likely not allow a late discovery motion filed as a motion in limine at trial.

Third, the trial court is busy. The court will not appreciate long, argumentative motions, including long factual

statements of your case without any reference to your opponent's position, which will be a disservice to your motion. Indeed, the trial court may view your otherwise well founded motion as a one-sided overstatement, and simply deny it. So, be brief and concise, and get to the point.

Similarly, you should choose your motions in limine prudently. In other words, file only those motions that have a reasonable chance of being granted. It will be a disservice to your client if you inundate the trial court with multiple motions, some of which are unlikely to succeed, and which may lead the court to deny them all. Keep in mind, you can always reserve argument on the weaker issues and object to questionable evidence during the trial.

If the trial court denies your motion in limine, be sure that your exception is placed on the record for appellate purposes. Also, the trial court may defer ruling on your motion until the end of the case, in order to further evaluate the proffered evidence in the context of other evidence at trial. However, your motion will have sensitized the trial judge to the evidentiary issues. When the evidence surfaces during the trial, be sure to re-assert your motion and obtain a ruling from the trial judge before the evidence is introduced.

Finally, if the trial court grants your motion in limine, it can result in successfully barring the proof of essential elements of a case and have the ultimate effect of a dispositive motion. Therefore, trial counsel should strongly consider the advantages of seeking an order from the trial court precluding inadmissible or irrelevant evidence from interfering with an otherwise fair and impartial trial. A successful motion in limine also eliminates the risk of prejudice to the jury as a result of exposure to such evidence. The motion in limine further allows the trial judge to consider the issues of a challenging evidentiary question while avoiding disruption of the trial. The most effective strategy is one that is focused on a specific item of prejudicial evidence rather than an overly broad approach designed to simply obstruct your opponent's case. A well-executed motion can result in a preclusion order from the trial court, which can ultimately result in a complete dismissal, as was the outcome in the instant case. Trial counsel should definitely consider and be prepared to file appropriate motions in limine because their efforts can make all the difference and result in positive outcomes for their clients at trial.

David J. Varriale is a partner with Kaufman Borgeest & Ryan LLP, whose practice focuses on the defense of professional liability claims brought in the state and federal courts of New York, New Jersey, Connecticut, and Pennsylvania. David also represents clients in the hotel and hospitality industry, in the state and federal courts of New York, New Jersey, Connecticut, and Pennsylvania. David is also a trial attorney who has defended clients in high exposure cases from inception to trial.

This article originally appeared in the Summer 2018 issue of the Trial Lawyers Section Digest*, a publication of the Trial Lawyers Section.*

Transitioning from Private Practice to the Bench…and Life as a New Judge

By Judge Carmen Victoria St. George

Working as a judge has been a long-standing dream of mine. Last year, I was appointed by Governor Andrew Cuomo and sworn in as a New York State Court of Claims judge. Immediately, I accepted a request to serve as an acting Supreme Court justice in the civil division in New York County. I consider it such an honor to serve the people of the State of New York and I absolutely love the work and the challenges thus far.

Judge Carmen Victoria St. George

"Especially as a woman, as a new judge, and as a relatively young jurist, I want to make a good impression and earn the respect of the Bar and of my colleagues on the bench."

I have been fortunate to have great job experiences throughout my legal career. After I graduated from Fordham Law School in 1997, I went to work in the Queens District Attorney's office as an Assistant District Attorney. I was affectionately dubbed a "whippersnapper," eager to take advantage of every opportunity. My fluency in Spanish served me well, as I was called in early in my career there to work on what was often referred to as the Zodiac Killer case. After that, I handled serious felonies with a tremendous record of success. Although I was very happy there, after a little over six years there I took a position at Levy Phillips & Konigsberg LLP where I had the opportunity to work on a class action case in which Latino and African American Police Officers claimed they were discriminated against in the NYPD. That was a hugely rewarding and high-profile case, which we settled successfully. After that, I was assigned to the asbestos department, and I remained in asbestos litigation on the plaintiffs' side throughout my years at Levy Phillips & Konigsberg LLP and, later, at Weitz & Luxenberg.

As much as I loved working at Weitz, after several years in asbestos litigation I became impatient to realize my dream of becoming a judge. Over the past several years I worked hard to get this job, with the full support of my family, friends, and my colleagues at Weitz.

Since last July, there have been a lot of "firsts": the first time I heard oral arguments on motions, signed an Order, presided over a trial, worked with my law clerks on a motion, made an evidentiary ruling, and many more. I prepared for each of these firsts, and, being determined to do well, it has been a surprisingly, heartening-ly, smooth transition each time. It feels natural and truly rewarding to be able to realize this personal and professional dream of mine. I have also found that my prior work experience has come in handy. My work as a woman, both at the DA's office and as a mass tort litigator, taught me the need to be strong and confident. The strong organizational skills I developed have helped me to keep up with my workload. My experience settling asbestos cases for my clients has given me the tools to settle many of the cases that come before me, including some that began with a "no pay" position.

"I preside over a 'general' Part, which means a wide variety of cases comes before me, and in addition, I have proceedings that challenge government decisions."

One thing I learned is that even the parts of a judge's job that look easy from the outside require a lot of preparation and hard work. For example, as an attorney I watched judges listen to oral arguments but didn't appreciate the effort it takes to be prepared for those arguments. Especially as a woman, as a new judge, and as a relatively young jurist, I want to make a good impression and earn the respect of the Bar and of my colleagues on the bench. This involves a lot of prep work—reading the papers, looking up pertinent case law, jotting down my questions and comments. I have a court reporter on hand to create a transcript for every argument, which is extremely helpful when it comes to writing the decisions. I have learned, too, to decide as many motions as possible from the bench and on the record. This helps to keep up with the high workload in my busy part.

Of course, there have been challenges. I have had to adjust to the smaller budgets afforded to public servants, compared to private law firms—leaner staffs, shared

printers, different aesthetics, no fax machine—and the extra layers of bureaucracy which are inevitable in a system as large as the New York State Court System. Readjust, that is, as I started out in public service. Fortunately, I have found a good team to assist me, and found many helpful court employees along the way who have helped me assemble the various "amenities," equipment, and materials I need to run my Part smoothly.

Another challenge is balancing my many roles—something I faced in my former job, but not to this extent. Working in the Supreme Court in downtown Manhattan is a thrill, but it also comes at the cost of an approximately four-hour-plus roundtrip commute. As the mother of two young daughters, I have learned to juggle my schedule—coming in early so I can share some quality time with my girls at night.

Currently, there is a challenging, lengthy personal injury trial before me, with excellent litigators and a hard-working jury. It is an absolute honor to preside over the case and a treat to watch such fine lawyers ply their trade. In addition, we have a full day of motions and conferences each week. I preside over a "general" Part, which means a wide variety of cases comes before me, and in addition, I have proceedings which challenge government decisions. I have always loved learning, and when I prepare for the motions and trials I always learn something new. In addition, I have the privilege of helping the parties before me achieve a just result, such as a recent proceeding in which the parties worked out an equitable arrangement that kept the petitioner in his home. The position keeps me busy, which is my natural state, and thankfully the transition has been smooth. I balance the hectic days with my daily practice of bikram hot yoga, and my constant belief and faith in God. My instincts were right; this is the job I was meant to have, and I look forward to all that will flow from it.

In sum, the transition from private practice to the bench brings challenges and inevitable stress, but the rewards are immeasurable, gratifying, and priceless! May we all strive to achieve that which is in our hearts, for it is within this drive that we all excel and succeed, changing ourselves and our future selves—one person, one vision, and one dream at a time!

Judge Carmen Victoria St. George was appointed by Governor Andrew Cuomo and sworn in as a New York State Court of Claims judge in 2017. She graduated from Fordham Law School in 1997 and went to work in the Queens District Attorney's office as an Assistant District Attorney. After that, she took a position at Levy Phillips & Konigsberg LLP and later, at Weitz & Luxenberg.

This article originally appeared in the Summer 2018 Trial Lawyers Section Digest*, a publication of the Trial Lawyers Section.*

Transitioning from Large Firm Life to Solo Practice

By Theresa Marangas

Congratulations on making the decision to open your own practice. This can be one of the most exciting and scariest times of your life. Now that you're determined to leave the large firm life or corporate America to spread your wings on your own, let's talk about the practical aspects of running your own business.

This month marks my 33rd year as an attorney and what a wonderful career it's been. I've had the honor of working as in-house counsel for fortune 500 companies, a large international firm with 850 attorneys, smaller firms, as well as my own practice, which I opened in 2015.

"Open an IOLA account and Operating Account with overdraft checking at a bank that allows businesses to use mobile checking. Determine what corporate structure you wish to create through the New York State Division of Corporations."

Whether you have clients who will transition with you or need to build a practice from scratch, you may wish to consider the following steps:

1. Create a new CV and start sharing it by email with fellow attorneys, former and current clients, mentors and contacts.
2. Spend some time thinking about what your new practice will look like. Will it be a combination of flat fee and billable hours? What areas of law will you concentrate on? Is there an area of law that you enjoyed learning about in law school but didn't pursue?
3. How will clients find you? Do you want to create a website or focus on LinkedIn or both?
4. What systems do you need to have in place? Do you want to subscribe to a time and billing software package and/or a research database?
5. What equipment do you need? Do you want to purchase a refurbished printer and/or computer?
6. Where will your office be located? Is shared space with other attorneys or professionals of interest to you or do you prefer to keep costs at a minimum and use your home to launch your new practice?

From my experience, I highly recommend speaking to other solo practitioners, including those who have been in practice for at least three years. Fellow attorneys are willing to help and will gladly share their insight into what has worked best and what mistakes they made along the way.

Theresa Marangas

The New York State Bar Association is another resource that is well worth exploring. From malpractice insurance to CLEs that specifically address many practical aspects of being a sole practitioner, the New York State Bar Association offers myriad assistance.

Be patient. Although you want your practice up and running as quickly as possible to serve your clients and generate income, going slow and being strategic are important in order to avoid mistakes that can cost you time and money. You may wish to consider hiring professionals to help with your website, LinkedIn profile and accounting system. Ask about which banks offer SBA loans if you need financial support to ease the transition from steady paycheck. Open an IOLA account and Operating Account with overdraft checking at a bank that allows businesses to use mobile checking. Determine what corporate structure you wish to create through the New York State Division of Corporations.

"I hope that you flourish during this exciting time in your career, recognize the importance of focusing on your mental and physical health, and remain open to seeking guidance from others who have successfully navigated the transition from big firm life to solo practice."

Creating strategic alliances with other solo practitioners is also extremely important, especially if you have

decided to expand into areas of the law that you previously have not focused on. Think about how you will handle your work flow. If you previously worked with an associate and/or paralegal, find a freelance attorney and/or paralegal who is open to assisting you on a project basis.

Personally there are certain aspects of running my own law practice that I'm very good at and other aspects that consume an inordinate amount of my time. This has led me to consider what are my strengths and weaknesses, what value do I bring to clients and what can others do to assist me? I hope that you flourish during this exciting time in your career, recognize the importance of focusing on your mental and physical health, and remain open to seeking guidance from others who have successfully navigated the transition from big firm life to solo practice.

Theresa Marangas is a certified Article 81 Guardian and a Guardian Ad Litem through the New York State Unified Court System. She is well versed in estate planning, trusts, and administration, and experienced in litigating estate matters in Surrogate's Court. She is also an experienced outside general counsel for minority and women-owned business enterprises (M/WBE), family-owned businesses, and homeowners associations. Theresa is versed in contracts, employee severance agreements and handbooks, corporate formation and buy/sell agreements, discrimination and real estate issues.

Theresa has more than 30 years of experience representing clients in a variety of civil litigation, employment, and regulatory compliance matters and has represented governmental entities, non-for-profits, financial organizations, management companies, educational institutions, and international corporations. She is also a certified National Institute for Trial Advocacy (NITA) instructor. She can be reached at 518.605.6476 or www. theresamarangaslaw.com.

This article originally appeared in the Summer 2018 Trial Lawyers Section Digest*, a publication of the Trial Lawyers Section.*

New York State Bar Association Committee on Professional Ethics

Opinion 1155 (08/27/18)

Topic: Dual practice as lawyer and financial planner

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

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

FACTS

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

QUESTIONS

2. A. May a lawyer provide stand-alone financial services under a financial planning agreement to clients of the law firm and also to persons who do not receive legal services from the lawyer?

   B. May the lawyer provide legal and financial services to the same client simultaneously?

   C. May the lawyer include information about financial planning services in the lawyer's newsletter and website, as long as the lawyer makes clear that these are non-legal services and do not create a lawyer-client relationship?

   D. May the lawyer refer financial planning clients to an asset management or insurance firm (an "investment firm") that pays the lawyer a referral fee for products purchased from the company, as long as the referral relationship is non-exclusive and the company or the lawyer discloses to the client that the lawyer will receive a commission? Must the disclosure be in writing?

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

OPINION

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

The Potential Conflict of Interest

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

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

6. Some conflicts are deemed to be so serious that client consent is not possible. In a series of opinions, we

have found that, in certain cases, the conflict between the legal and nonlegal services is so severe that it cannot be cured by consent. Most of these opinions involve acting as a lawyer and a real estate broker in the same transaction. See N.Y. State 752 (2002) (after adoption of the predecessor to Rule 5.7, the conflict provisions of the Code of Professional Responsibility still prohibited a lawyer from acting as a lawyer and a real estate broker in the same transaction, even with the consent of the client); N.Y. State 208 (1971); N.Y. State 919 ¶ 3 (2012); N.Y. State 933 ¶ 7 (2012); N.Y. State 1013 ¶ 5 (2014); N.Y. State 1015 ¶ 7 (2014). The nonconsentable conflict identified in these opinions is that the broker's personal financial interest in losing the brokerage transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. See also N.Y. State 595 (1988); N.Y. State 621 (1991); N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Are the Services Distinct?

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

15. When a patron of the nonlegal services business uses only that service and not legal services, there is no integrated whole and the nonlegal services are by definition distinct. When, however, the patron of nonlegal financial planning services is also using or has received related legal services of the lawyer, whether the legal and nonlegal services are distinct will depend on the nature of the legal

and nonlegal services. When the legal services involve estate planning and the financial planning services include planning investments that would affect the size and composition of the estate or the educational or retirement plan, even if the nonlegal services are provided from a separate entity and at times are not overlapping, we believe the services would be nondistinct. Therefore, the provisions of the Rules will apply to the nonlegal services.

Information About Investment Services in the Lawyer's Newsletters and Website

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

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

Referring Financial Planning Clients to a Third-Party Investment Firm

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

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

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

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

22. When these narrow circumstances do not exist, we have opined that receipt of a commission creates a nonconsentable conflict. See, e.g., N.Y. State 682 (1996) (lawyer may not accept a fee from an investment adviser for

referring a client under predecessor to Rule 1.7 because disclosure and consent would not cure the lawyer's direct and substantial conflict); N.Y. State 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y. State 619 (1991) (where estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) [business transaction with client] because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

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

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

25. Rule 1.8(f) provides that:

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

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

Does It Matter That the Referral Relationship Would Be Non-Exclusive?

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

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

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

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

CONCLUSION

29. Whether a lawyer may provide both legal services and nonlegal services consisting of financial planning to a

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

(10-18)

Opinion 1156 (11/1/2018)

Topic: Securing fee obligation with mortgage against divorce client's property

Digest: For a lawyer to take a mortgage against a client's property to secure a fee in a divorce matter, the lawyer must comply with all the requirements of Rules 1.5(d)(5) and 1.8(a), including approval by the court.

Rules: 1.0(f) & (g); 1.5(a) & (d)(5), 1.8(a)

FACTS

1. The inquirer represents a client in a domestic relations matter that resulted in a judgment of divorce. The inquirer's legal services for the client are almost complete, although the representation continues. The client owes the inquirer legal fees for the services provided to date.

2. The client is not readily able to make timely payment of the fees owed to the inquirer. The client is sole owner of a house in New York State which the client intends to sell as soon as possible, a transaction consistent with the client's rights under the divorce judgment. The client has requested that the inquirer defer payment of the outstanding legal fees until the client sells the house, with the fees to be paid from the sale proceeds.

3. Discussions between the client and the inquirer have led to a tentative understanding, which the inquirer would like to incorporate into a written agreement, to be signed by both parties as a revision of the original retainer agreement. The proposed revision would provide: (1) that the inquirer would accept a specified amount—significantly less than the amount currently owed—in full payment of the fee obligation; (2) that the inquirer would take a mortgage against the house in the amount of the reduced fees; and (3), recognizing that the client may not be able to sell the house immediately, the inquirer would charge no interest on the fee balance for approximately seven months, after which interest at a low rate would start to accrue.

QUESTION

4. In a divorce matter in which there is a judgment, may an attorney and a client, without court approval, amend the retainer agreement to give the attorney a mortgage against property of the client in order to secure the client's obligation to pay accrued legal fees in that matter?

OPINION

5. Legal fees are always subject to certain general provisions of the New York Rules of Professional Conduct (the "Rules"), among them Rule 1.5(a), which prohibits fees that are excessive. The conduct proposed in this inquiry is subject to those general provisions, but also to two more specific ones as discussed below.

Business Transactions with Clients Under Rule 1.8(a)

6. Rule 1.8(a) is triggered when three conditions are met: (i) there is a "business transaction" between lawyer and client; (ii) they have "differing interests therein"; and (iii) the client "expects the lawyer to exercise professional judgment therein for the protection of the client."

7. When those conditions are met, then Rule 1.8(a) requires that the transaction be "fair and reasonable to the client"; that the terms of the transaction be fully disclosed in writing in a manner that can be reasonably understood by the client; that the client be advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and that the client, in a signed writing, give informed consent to the essential terms of the transaction and the lawyer's role therein, including whether the lawyer is representing the client in the transaction.

8. The facts of the current inquiry meet the three conditions that trigger application of Rule 1.8(a). First, the proposed agreement would constitute a "business transaction." An amendment to a retainer agreement, made during the course of representation, can constitute a business transaction in some circumstances, as we have previously discussed. See N.Y. State 910 ¶¶ 19-26 (2012) (listing factors bearing on whether a retainer amendment constitutes a business transaction).

9. Moreover, "[w]hen a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a)." Rule 1.8, Cmt. [16]; see Rule 1.8, Cmt. [4C] ("The requirements of the Rule ordinarily must be met...when

the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee"); N.Y. State 1104 ¶ 4 (2016); N.Y. State 910 ¶ 16 (2012); ABA Op. 11-458; ABA Op. 02-427; N.Y. City 1988-7 (interpreting predecessor provisions). Hence, the proposed revision is a business transaction between a lawyer and a client governed by Rule 1.8(a).

10. The second condition of Rule 1.8(a) is met also. In reaching their agreement, the inquirer and the client will have occasion to negotiate terms that may be more favorable to one or the other. For example, the provisions for interest on unpaid balances may be more or less stringent. There could also be terms relating to possible foreclosure on the mortgage. Thus, the parties have "differing interests" in the transaction, as that term is defined in Rule 1.0(f).

11. The final condition is that client expects the lawyer to exercise professional judgment therein for the protection of the client. The client may well be an unsophisticated party not versed in contracts or negotiations over legal fees. Under these circumstances, it is foreseeable that the client will expect the inquirer to act in the client's interest. See N.Y. 1104 ¶ 6 (2016) ("Here, the client may be looking to the lawyer's professional judgment to understand the significance of the proposed mortgage and promissory note to the services for which the lawyer is being engaged."); N.Y. City 1988-7 ([I]t would be unrealistic to conclude that a client would not expect his or her lawyer to exercise professional judgment for the client in drafting the mortgage agreement.").

12. Because the three conditions are met, the inquirer is subject to the requirements of Rule 1.8(a). The first requirement is that the transaction be fair and reasonable to the client. The inquiry does not include the text of the proposed agreement. As summarized to us, the proposed agreement does not sound obviously unfair in any way, but the inquirer would have to consider all the terms – such as the details relating to interest and possible foreclosure—to determine that the transaction is fair and reasonable to the client.

13. Similarly, the inquirer would need to consider the entire text to assess compliance with the requirement that the agreement be written in a manner that can be reasonably understood by the client. As discussed above, it is also necessary that the written agreement include certain specific provisions. It must describe not only the essential terms of the transaction but also the inquirer's role therein, and whether the inquirer is representing the client in the transaction. Finally, the writing must advise the client of the desirability of seeking, and the client must be given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction.

Security Interest in a Domestic Relations Matter Under Rule 1.5(d)(5)(iii)

14. In a "domestic relations matter," a lawyer may not take any fee if "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." Rule 1.5(d)(5)(iii).

15. This rule applies to the current inquiry even though a judgment has already been entered. "Domestic relations matter" means "representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce" and certain other subject matters, "or to enforce or modify a judgment or order in connection with any such claim, action or proceeding." Rule 1.0(g). If the representation had terminated, then applicability of the rule could have terminated as well. But if the representation continues past entry of the judgment, then there continues to be a "domestic relations matter" subject to the Rule. Ordinarily, questions about the existence and termination of an attorney-client relationship are questions of law beyond our purview. But here, the inquirer advises us that the inquirer still represents the client in connection with the divorce proceedings.

16. Because the proposed agreement includes a security interest, under this rule there must be notice to the client in a signed retainer agreement, notice to the adversary, and approval by the court. Rule 1.5(d)(5)(iii); see N.Y. State 910 (2012). "The requirements of this rule are similar to those of the applicable court rules." N.Y. State 910 ¶ 15 & n.1 (citing section 202.16 of the Uniform Rules of the Supreme Court and County Court and section 1400.5 of the Joint Rules of the Supreme Court, Appellate Division, 22 N.Y.C.R.R. § 1400.5).

17. The proposed agreement would be a signed retainer agreement, satisfying one requirement of Rule 1.5(d)(5)(iii). The remaining requirement is that there must be approval by the court after notice to the adversary—the client's ex-spouse. The need for such notice and approval may be less sharp given the existence of a judgment in the matter; however, as discussed above, the representation continues, and based on the text and policies of the rule, we believe that its requirements continue to apply.

18. We have no occasion to discuss any ethical considerations with respect to possible execution on the mortgage. See N.Y. State 1104 ¶ 8.

CONCLUSION

19. If a lawyer representing a client in a divorce matter agrees with the client that the lawyer will take a mortgage on the client's house to secure the legal fees, the lawyer may do so only upon compliance with the requirements of Rules 1.5(d)(5)(iii) and 1.8(a), such as fairness, proper advice to the client, a sufficient writing signed by the client, notice to the adversary, and approval by the court.

(13-18)

General Practice Section Committees and Chairpersons

Business Law
Lewis F. Tesser
Tesser, Ryan, & Rochman, LLP
509 Madison Avenue, 10th Floor
New York, NY 10022
ltesser@tesserryan.com

Election Law and Government Affairs
Jeffrey T. Buley
Brown & Weinraub LLC
50 State Street, 4th Floor
Albany, NY 12207
jeffbuley@hotmail.com

Steven H. Richman
Board of Elections, City of New York
32 Broadway, 7th Floor
New York, NY 10004-1609
srichman@boe.nyc.ny.us

Intellectual Properties
Zachary J. Abella
401 East 65th Street, Apt. 13A
New York, NY 10065-6938
zabella@gmail.com

Membership and Member Service Issues
Lynne S. Hilowitz-DaSilva
DaSilva & Hilowitz LLP
120 N. Main Street
New City, NY 10956
dhm11@verizon.net

John J. Roe III
Egan & Golden LLP
96 South Ocean Avenue
Patchogue, NY 11772
pauline.mcternan@gmail.com

Publications
Martin Minkowitz
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038-4982
mminkowitz@stroock.com

Second Department Chapter
Emily Franchina
Franchina Law Group, LLC
1050 Franklin Avenue, Suite 302
Garden City, NY 11530
efranchina@elderlawflg.com

Elisa Strassler Rosenthal
Franchina Law Group, LLC
1050 Franklin Avenue, Suite 302
Garden City, NY 11530
erosenthal@elderlawflg.com

Solo and Small Firm Practice
Domenick Napoletano
351 Court Street
Brooklyn, NY 11231-4384
domenick@napoletanolaw.com

Third Department Chapter
Sarah E. Gold
125 Wolf Road, Suite 509
Albany, NY 12205-1251
sg@goldlawny.com

J. Gerard McAuliffe Jr.
Johnstown Professional Office Complex
55 East Main Street, Suite 310
Johnstown, NY 12095
jgmjresq@frontiernet.net

Trusts and Estates Law
Paul J. O'Neill Jr.
Law Office of Paul J. O'Neill, Jr.
1065 Lexington Avenue
New York, NY 10021
pauljoneilljr@msn.com

Lynne S. Hilowitz-DaSilva
DaSilva & Hilowitz LLP
120 N. Main Street
New City, NY 10956
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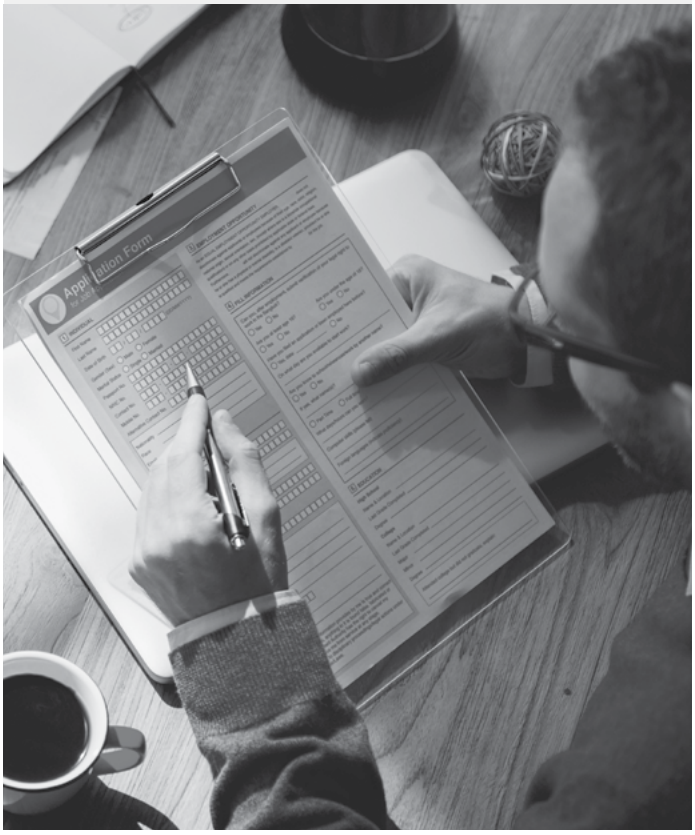

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ISSN 0733-639X (print) ISSN 1933-8422 (online)

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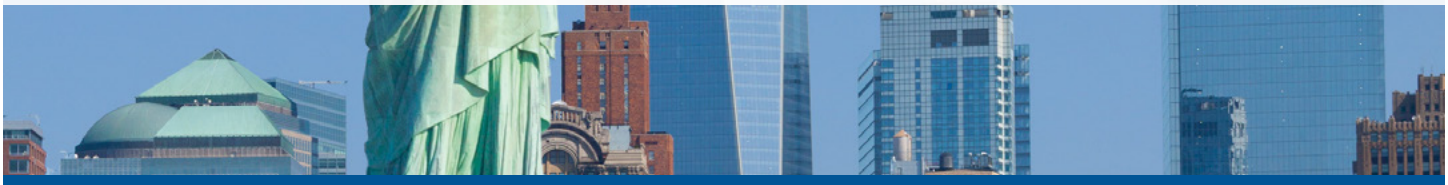

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