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ONEONONE

A publication of the General Practice Section
of the New York State Bar Association

In This Issue

ANNUAL MEETING

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JANUARY 27–31

NEW YORK CITY

2020

NYSBA

NEW YORK STATE BAR ASSOCIATION

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Message from the Chair

It has been my pleasure to serve as your Chairperson for the past year. We have worked together to continue to build the General Practice Section in terms of membership, programs and activities.

The Continuing Legal Education presentation at our Annual Meeting on January 15 was stimulating and well-received. We started out with a CPLR update by Professor Burton Lipshie, followed by an intriguing panel discussion concerning the ethical obligations of a lawyer to learn the true facts. The session was topped off by "Hot Tips from the Experts," which provided the usual rapid-fire presentation of important and interesting information in a number of fields.

I was most pleased that my article, "The Time Has Come to End Mass Incarceration," appeared in the *New York Law Journal*'s Annual Meeting edition. I continue to believe that this is one of the most serious issues facing our country today. The levels of incarceration throughout our country are far above those in other countries and clearly are unacceptable. Fortunately, a movement is building to roll back mass incarceration and bring more fairness and justice to our legal system.

Our Annual Meeting included the presentation of the General Practice Section Award to our past Chair and quintessential Court Street lawyer, Richard A. Klass. I was pleased to honor Richard for his service as a past Chair, a diligent co-editor of this publication, and the moving force behind many of our programs and activities.

Among the activities with which Richard is involved is a spring event that is in the planning stages. Under the leadership of Richard and Elisa Rosenthal, our incoming Chair, we will host an informal event that will include beer tasting and an opportunity to network and learn. We will notify you of details as soon as they are available.

Sadly, I must report that our staff liaison, Stephanie Bugos, is moving on to bigger and better things. She has accepted a position as a data analyst with the NYSBA in connection with the NYSBA's implementation of a new Association Management System and website. We wish her all the best, but at the same time we regret that she will be leaving us. We will miss her pleasant personality and her diligent and wonderful support for the General Practice Section.

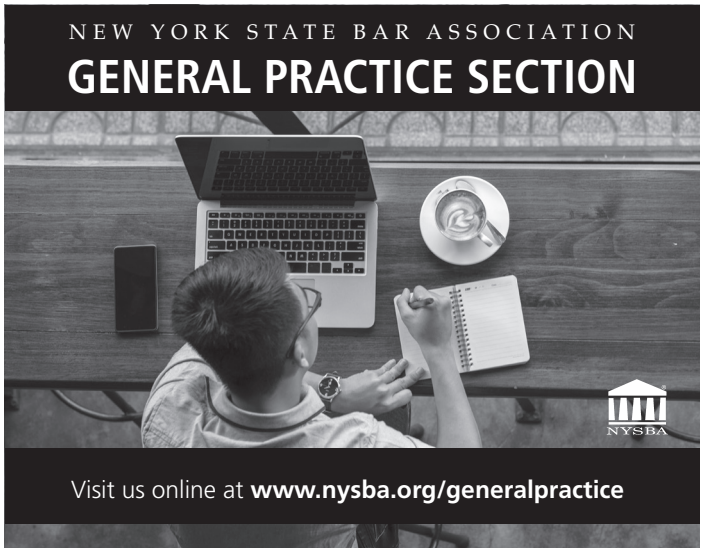
The Section has sponsored the production of an Attorney Wellness video narrated by Robert Herbst. Herbst is a lawyer and a champion powerlifter. He describes how weightlifting has helped him cope with the stresses of life as a lawyer and he provides helpful advice on how to use exercise and diet to improve your life. Details on how to access the video will be available soon.

The Section has added a new District Representative for the Ninth Judicial District. He is Alexander Fear of New Rochelle. In addition, we have a new Co-Chair for the Second Department. He is Richard St. Paul of White Plains. We welcome them both to their new positions and look forward to working with them to continue moving the General Practice Section forward.

Paul T. Shoemaker

I want to close by thanking all of you for your participation and support over the past year and urging all of you to continue your involvement with, and to seek to engage others in, the General Practice 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 N.Y. ethics opinions.

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

Still Time to File WTC Claims: *One On One*'s own Martin Minkowitz makes it known why there is not only time to file, but why claims may be expected for years to come.

A Labor Mediator's Perspective on Mediation: Ira B. Lobel examines institutional and procedural differences between labor mediation, court-induced mediation, and mediation in other arenas.

Ten Common Mistakes to Avoid in Arbitration: Joseph P. Zammit distills his suggestions into ten mistakes to avoid in prosecuting or defending.

Kings County's New Pre–Note of Issue Conference: Christie McGuinness focuses on the Note of Issue nuances in Kings County, as Kings County has recently implemented a new Pre-Note of Issue conference.

Defensive Estate Planning with Powers of Attorney: *How to Avoid Mayhem, Chaos and Unintended Consequences*: Daniel J. Reiter explores steps that can be taken to avoid mayhem, chaos and unintended consequences when the attorney is preparing a New York Statutory Short Form Power of Attorney on the client's behalf.

Martin Minkowitz

Shakespeare, the Law & Me: William B. Stock exemplifies how a lawyer could use English literature and become known as the "Shakespeare lawyer."

Article Submission

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

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

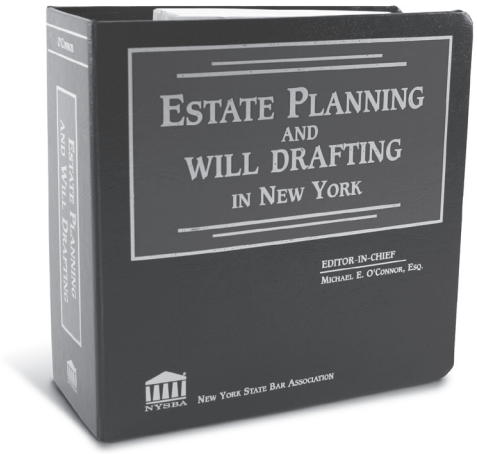
We have reinstated the Letter to the Editor as a way for our readership to express their personal views in our journal. Please address these submissions to matthew.bobrow@law.nyls.edu.

Martin Minkowitz
Richard Klass

Matthew Bobrow
Co-Editors

NEW YORK STATE BAR ASSOCIATION

Estate Planning and Will Drafting in New York



Editor-in-Chief

Michael E. O'Connor, Esq.
Costello, Cooney & Fearon, PLLC
Syracuse, NY

Product Description

Estate planning is a diverse, challenging and sophisticated area of practice that requires the technical skills of a tax attorney; a strong understanding of business, real property and decedents' estate law; and the sensitivity and caring of a personal adviser. Estate planning is much more than will drafting - it is a well-recognized specialty that is a prominent part of the legal profession.

Written and edited by experienced practitioners, this comprehensive book is recognized as one of the leading references available to New York attorneys involved with estate planning. The step-by-step coverage in *Estate Planning and Will Drafting in New York* is a great resource for novice as well as experienced practitioners. Especially useful are many "real world" examples, practice tips and sample forms. **Includes Downloadable Forms.**

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NYSBA

Message from the President

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's General Practice Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

• According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.

• Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.

• Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.

• Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.

• Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads on Diversity

Hank Greenberg

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. (See http://www.nysba.org/diversitychairs)

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hmgreenberg@nysba.org.

Still Time to File WTC Claims

By Martin Minkowitz

Not long after the terrorist attacks on the World Trade Center in New York City, there was concern that heroic people who were involved in the rescue, recovery and clean-up operation might not be able to timely file claims for compensation under the Workers' Compensation Law (WCL). To address that concern the law was amended to add a new article to the WCL. The article was simply entitled "Article 8-A –World Trade Center Rescue, Recovery and Clean-up Operations." This legislation enacted in 2006 was made retroactive and was deemed to have been in full force and effect on and after September 11, 2001. It covered any employee who participated in the rescue, recovery or clean-up operations at the World Trade Center (WTC) site on and after September 11, 2001. It originally was written to end a year later on September 12, 2002 and defined what a site meant.[1] Recovery was later defined to mean someone who was recovering human remains. Coverage was expanded to include people who worked in jobs with tangible connections to certain named job functions in the law.[2] The law also includes people who were volunteers in the rescue, recovery and clean-up operation.[3]

As claims continued to be filed, the statute of limitations to file a claim under this provision of the WCL was extended several times. Currently, to apply for benefits a claimant is required to file a sworn written statement with the Workers' Compensation Board (WCB) on a prescribed form by September 11, 2022. The form tells the board with who the employer was and the time and location of the claimant when participating in the covered activity that caused the disability.[4]

Without this, Article 8-A claims for Workers' Compensation benefits would have been barred by either § 18 WCL (time notification to the employer of an accident), or § 28 WCL (timely filing of a claim with the board).[5]

In a recently reported case the board concluded that a claimant's back injury claim was time barred by § 28 WCL.[6] In that case claimant's job was asbestos handling and his employer assigned him to do dust and debris clean-up at the site after the terrorist attack. He began working the following day (September 12, 2001) and continued doing it until December 24, 2001. Almost five years later, in 2006, he developed respiratory, gastroesophageal and other physical disabilities including a back injury. He filed a claim for workers' compensation benefits, which was disputed by the insurance carrier on behalf of the employer. A decision of the board's law judge at the time ruled that the claim was compensable, finding prima facie medical evidence of the disabilities of asthma and other internal injuries. However, at a subsequent hearing the argument was successfully made that the back injury was not part of the 8A qualifying conditions, and as such was not given an extension of the filing time. It was therefore held time barred by § 28 WCL. The board panel upheld the law judge and claimant appealed to the Appellate Division, Third Department.[7]

Martin Minkowitz

The appellate court reversed, finding that the back claim was a result of claimant's hazardous exposure at the site. It was a musculoskeletal disease, which is a qualifying condition under the law.[8] The court specified the purpose of the law in its decision. It wrote: "Initially we note that the Worker's Compensation Law Article 8-A is to be afforded liberal construction as it was enacted to remove statutory obstacles to timely claim filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or clean-up operations following the [WTC] September 11, 2001 attack."[9]

> *"The decision in* Chrostowski *illustrated that we have not, and probably will not be seeing an end to World Trade Center claims for a long time."*

It then went on to make clear that if a claimant has a qualifying condition under Article 8-A that claim is not subject to the time limitations for filing that is contained in § 28 WCL.[10]

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

The decision in *Chrostowski* illustrated that we have not, and probably will not see an end to World Trade Center claims for a long time. If longer than September 11, 2022, we may see an additional extension added to the law. Article 8-A is far from being insignificant, especially for those whose latent disabilities are first revealing themselves. For these claimants there is still time to file a WTC claim.

Endnotes

1. See § 161 WCL.
2. *Williams v. City of NY,* 89 A.D.3d 1182 (2011).
3. § 167 WCL.
4. *Id*.
5. There are still claims being filed.
6. *Chrostowski v. Pinacle Environmental Corp*., ___AD3d___ (2019).
7. § 23 WCL.
8. § 161(3)(e) WCL
9. Citing *Hazen v. WTC Volunteer Fund* ,120 A.D.3d 82 (2014), *Regan v. City of Hornell Police Dept.,* 124 A.D.3d 994 (2015), and *Martin Minkowitz Practice Commentaries,* McKinney's Cons. Laws of NY, Book 64, Workers' Compensation Law § 161 at 71.
10. C*hrostowski v. Pinnacle Environmental Corp*., ___A.D.3d___ (2019).

Kings County's New Pre-Note of Issue Conference

By Christie McGuinness

The filing of the Note of Issue is a significant point in a case's procedural posture. It signifies that the case is nearing its standards and goals date, discovery is almost complete in the case, and the case is approaching its readiness to be tried. A Plaintiff is required to file a Note of Issue by a date provided by the court, and that filing triggers two significant deadlines. A party wishing to vacate the Note of Issue has 20 days to vacate the Note of Issue upon its filing, and the filing of the Note of Issue triggers a deadline to move for summary judgment. This article will focus on the Note of Issue nuances in Kings County, as Kings County has recently implemented a new Pre-Note of Issue conference.

In Kings County, a party must make their summary judgment motion within 60 days after the filing of the Note of Issue or 120 days after the filing of the Note of Issue in cases where the City of New York is represented by Corporation Counsel. Under this backdrop comes the significance of the new Pre-Note of Issue conference in Kings County and the considerations for the litigant following the filing of the Note of Issue.

Recently, Kings County implemented a new Pre-Note of Issue Conference Part. This conference is scheduled by the court prior to the date for Plaintiff to file the Note of Issue. This is an extremely useful conference, as the court has added this additional conference for the parties to come together to discuss outstanding discovery. In that aspect, the conference acts much like a compliance conference where the parties can enter into a discovery order outlining the remaining discovery. However, what is extremely significant about these pre-Note of Issue conferences is that the Court will also set a date for the filing of the Note of Issue, and those dates are not being extended in Kings County. Therefore, where the litigants enter into an order following this conference that requires the Note of Issue to be filed shortly thereafter, typically insufficient time is left to complete the outstanding discovery.

So, the question remains, what is a litigant to do? If significant discovery remains outstanding, in particular depositions and paper discovery, then a party should typically move to vacate the Note of Issue, as that is the sure way to protect the parties' rights. After the time has passed to vacate the Note of Issue, a party isn't entitled to post-Note of Issue discovery without demonstrating "unusual or unanticipated circumstances" (*see* 22 N.Y.C.R.R. § 202.21(d)), which is a high burden to meet. Moreover, if the discovery, such as a deposition, is needed in order for a party to move for summary judgment, then timely vacating the Note of Issue is extremely important because it is the best way to ensure a party's ability to take that deposition. Recently, what has been occurring in Kings County is that following the motion to vacate the Note of Issue, the court is not vacating the Note of Issue but instead extending time for parties to move for summary judgment. If a litigant finds that his or her case is not one in which he or she may be able to move for summary judgment without additional discovery, it is unclear what extending the time for summary judgment will accomplish. There will already be an order, pre-Note of Issue, outlining all outstanding discovery, and the court does not seem inclined to vacate the Note of Issue or extend the time for Plaintiff to file its Note of Issue. As a party can move to compel the discovery or move to dismiss for failure to comply, it appears that a party will be able to obtain the necessary discovery through those means.

Christie McGuinness

This situation appears to be unique to Kings County, and parties should always consult the rules of their particular county. In Kings County, the Pre-Note of Issue Conference is a very useful conference that allows parties to come together to resolve discovery issues without a party making a motion. Parties will need to evaluate what discovery is outstanding, whether that discovery is necessary for a summary judgment motion, whether a summary judgment motion is appropriate in their case, and the time frame by which they have to move for summary judgment, bearing in mind that the time to file the Note of Issue is not being extended at that pre-Note of Issue conference.

Christie McGuinness is an associate at London Fischer, LLP, and a 2017 graduate of Brooklyn Law School.

This article originally appeared in the Summer/Fall 2018 issue of the NYSBA Commercial and Federal Litigation Section Newsletter*, a publication of the Commercial and Federal Litigation Section.*

Shakespeare, the Law & Me

By William B. Stock

It was many years ago that I had a choice of going to graduate school in English literature or studying law. I chose the latter, largely because I was assured by my best friend who already had his Ph.D. that there were no jobs to be had in teaching.

Nevertheless, I seemed to have unconsciously mixed my love of literature—especially Shakespeare—with the law throughout my career, and I feel it has made me a better lawyer. If nothing else, it gave me a unique way to approach judges and other lawyers. I even at one point had the nickname "The Shakespeare lawyer" in some circles.

Here is an example of how it worked.

It was back in 80s (I mention the era only because technology plays a role in the tale) when I came back from lunch to my first legal position. We were a defense firm in midtown, and I was looking forward to a quiet afternoon doing work at my desk. But before I could sit down, the office manager ran up to me.

"You're the first one back," she said, completely out of breath. "Great. You've got to run down to Supreme New York and get an adjournment. We just got a call from Judge _____'s part. We had an appearance on today and we didn't know it. (This was years before e–law and e–courts.)

"But what's it on for? Can't I look at the file for a minute?"

"We can't find the file," she said. "But you can't tell them that. Look, what are you waiting for? Go now!"

Twenty minutes later, panting from running, I found myself in New York Supreme in front of an angry judge at his desk and beside an even angrier opposing counsel. "Sit down," the judge directed. Then he turned to my adversary and asked him to explain the case.

It turned out that what was on that day was a motion for sanctions for delaying in discovery. The other attorney talked on and on, explaining that defense firms represented a lower order of life and that my firm in particular compared unfavorably to one-celled animals. He then described his version of the case which made my firm look very bad indeed.

When he concluded, the judge turned to me and asked me to explain how my firm had handled the case. I could hardly say that I never heard of the case until 30 minutes ago and I knew nothing about it, so I used what every attorney does in a similar situation: righteous indignation. I explained that my adversary was completely exaggerating the facts and that my firm was no better and no worse than any other law firm in New York. I implied that my opponent should lie down until he felt better but did not stress this argument. However, I knew that specific questions would be coming in a moment and I would have no way to answer them. What to do?

William Stock

But then a miracle happened. Sticking out of my adversary's file at an angle was part of a letter with a postscript I could read. I knew the time had come for desperate remedies so I grabbed the letter with a flourish and said to the judge, "I'll show you how he's exaggerating."

> The letter, which was directed to my firm, was a fairly long one filled with insults. It concluded with a P.S. that read, "The lady doth protest too much methinks. (*Hamlet*, Act II, scene iii). [1]

After I read it, I turned to the other attorney and said, "You like *Hamlet*, here's more: 'Use every man after his worth and who shall escape whipping?'" Then I leaned in closely and added, "I'll get you the line cite if you need it."

The judge chuckled and I began to sense a change in the wind. But the other attorney was not done yet. He reached into his file and pulled out a time-flow chart showing how we had delayed in discovery. I must admit there were long gaps between the time items were demanded and the time they were received. But I was on a roll now.

"Your Honor," I said, "that is prejudicial visual evidence. I never saw it before. It wasn't exchanged and I had no chance to prepare a response. However, (here I reached into my briefcase and pulled out a book I had been reading, Dickens' *Hard Times*) here is *my* visual evidence. And all I can tell you is we do practical today a lot better than they did in his time and you know what he said about lawyers."

Now the judge broke into a big smile and said in a happy voice, "Hey, I know that book. It's great!" Then he

William B. Stock practices in Manhattan, where he concentrates on civil appeals and motions. He can be contacted at wbstock27@gmail.com.

really lost it. He put his head down on his desk, folded his arms and laughed. When he was finished, he picked his head up and happily said, "Both of you get out of here." Then he went back to laughing.

I ran down the hallway as fast as I could but the other lawyer caught up with me. I expected a tongue lashing but instead he said to me in a very polite voice: "Counselor, I want you to know I'm impressed. It took my secretary all afternoon to find that quote; you just knew it."

Shakespeare , Dickens and the like have helped me throughout my career: usually they come to my assistance when I cannot find a particular way to say something in a motion or brief. If I want a poetic flourish, I turn to the authors I just mentioned. When I want to express myself with crystal clarity, I turn for inspiration to someone like George Orwell. (If you haven't read his famous essay, "Politics and the English Language," do so at once.) If I want both poetry and precision in my writing I turn to Cardozo.

Why Cardozo, you ask? The three words I most remember from my first year of law school are "danger invites rescue." These three words convey an idea that might take the average lawyer a paragraph to equal in meaning, but in economy of expression and sheer beauty of execution they have no peer.

I have published several articles in the *New York Law Journal* on appellate practice, but of my legal writings the ones I am must proud of are three articles in the *New York State Bar Journal*: two were on Shakespeare and the law and one was on Dickens's *Bleak House*. These last three articles could not have been written if I did not have strong interests besides the law.

My love of literature has had a practical side as well. Last year I was downsized from a firm where I had worked for more than fifteen years. I then started my own practice concentrating in research and writing and I can honestly say that two of my best clients were acquired with at least some connection to Shakespeare–tinted networking.

We are all unique and have our own ways of approaching the law and life, but I have found that if you combine something that is beautiful to you with the law, you will be enriching yourself, those around you, and the law itself.

Endnote

1. Reader, please don't hold me to this cite. I don't have the play at hand.

Defensive Estate Planning with Powers of Attorney: How to Avoid Mayhem, Chaos and Unintended Consequences

By Daniel J. Reiter

I. Introduction

The most powerful legal document currently in force in the United States is its Constitution. The Durable Power of Attorney your client executed last Tuesday comes in a close second.

Durable Powers of Attorney are far-reaching legal instruments. Born from the theories and principles of agency and substituted judgment, the Durable Power of Attorney gives an adult (the "principal") the ability to give another adult (known as an "agent") authority to make financial decisions and control resources on the principal's behalf in the event the principal becomes mentally incapacitated. The Durable Power of Attorney can give the agent the authority to transfer assets out of the principal's estate, and, arguably, may even give an agent the power to make personal, intimate, decisions on the principal's behalf, including deciding where the principal will reside, or even choosing who may visit the principal.

This article explores steps that can be taken to avoid mayhem, chaos, and unintended consequences when the attorney is preparing a New York Statutory Short Form Power of Attorney on the client's behalf.

II. Use of the Statuary Short Form Power of Attorney

In the context of estate planning, elder law, and special needs law, New York's Statutory Short Form Power of Attorney should almost always be utilized.[1] Absent extraordinary circumstances, the *Short Form* has two primary and very important advantages over a custom power of attorney or an out-of-state document.

First, in a practical sense, the *Short Form* is widely used and recognized by banks, financial institutions, elder care professionals, and other third parties. These third parties are familiar with the *Short Form*, and this smooths the process of acceptance and use.

It is widely reported among practitioners that many banks and financial institutions will reject the *Short Form* and "require" use of their own form of power of attorney, but (a) this is not universal and (b) this is not authorized by statute, which brings me to my second point – third parties are generally *required by law* to accept a *Short Form*, but are not legally required to accept a custom power of attorney. Pursuant to N.Y. General Obligations Law § 5-1504 (GOL), no third party located or doing business in New York State shall refuse, without reasonable cause, to honor a statutory short form power of attorney that is properly executed.[2] A special proceeding may be brought by the agent to remedy the violation.[3]

As an aside, you should not let banks push you around. Demand Letters citing relevant authority, with a firm but respectful tone, can go a long way in rectifying issues of nonacceptance.

Daniel J. Reiter

> *"It is widely reported among practitioners that many banks and financial institutions will reject the* Short Form *and 'require' use of their own form of power of attorney, but (a) this is not universal; and (b) this is not authorized by statute."*

III. Make Sure the Principal Actually Initials Inside the Brackets

This is a simple, but important point. The principal must initial inside the brackets in the *Short Form* to give authority to the agent. An "X" does not suffice. A check mark is equally useless. Initials are required, and they are required *inside* the bracket. *In re Hoerter*, the court applied a literal interpretation of the statute: "The execution requirement is quite explicit; the statute requires that the blank space must be initialed or no authority is granted."[4]

Daniel J. Reiter, Esq. is an attorney admitted to practice in New York. Mr. Reiter focuses in the areas of trust and estate litigation, and adult guardianship. He also practices in the areas of estate planning, elder law, and special needs law. He is an instructor at the National Law Institute where he teaches continuing legal education courses on Mental Hygiene Law Article 81 and defensive estate planning practices. His articles on mistake as an objection to probate and the use of powers of attorney to avoid guardianship are published in the NYSBA's *Trusts and Estates Law Section Newsletter,* and *Elder and Special Needs Law Journal*, respectively. Mr. Reiter, a sole practitioner, works and lives in New York City.

III. The Modifications Section

The modifications section should almost never be left blank. First, what I refer to as "language of convenience" should be considered by the practitioner. For example, a properly executed *Short Form*, even without any modification, authorizes the agent access to protected health information as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[5] However, presenting a *Short Form* to an attending physician, nurse, or health care professional who is (for good reason) not well versed in the law may result in delay. The solution is to include HIPAA authorization language in the modifications section of the *Short Form* that the agent can present to the third party to persuade them to accept. This expedites the process. We can all agree that medical professionals should be spending their time on treatment and learning medicine instead of the reviewing provisions of the General Obligations Law. For good measure, I generally include language in the modifications section explaining that any modification should be interpreted as supplementing the statute, and not altering or modifying it.

The modifications section, in conjunction with the Statutory Gifts Rider, can also give the agent authority to make gifts (transfers of assets) from the principal's funds and property to others. The point is not to facilitate Christmas presents on the incapacitated principal's behalf. A modification allowing estate planning, long-term care planning, and gift giving facilitates (1) tax planning for mentally incapacitated wealthy individuals; and (2) Medicaid, Supplemental Security Income, and public benefits planning for all individuals *because any person could need long-term care*. The potential for abuse by an agent is glaring, but it is somewhat reassuring that the Court of Appeals held that gifts made by an agent must be consistent with the principal's testamentary scheme.[6] You can even consider adding language to the modifications section requiring that all gifts be made consistent with the principal's testamentary scheme and prior pattern of gift giving.

Finally, there is a widely held belief among practitioners that a valid power of attorney and health care proxy, in effect, will always obviate the need for guardianship, but this is not the case. Additional language in the modifications section is required to authorize an agent to make decisions that are generally reserved for a court-appointed guardian, such as choosing the incapacitated principal's place of abode or social environment (which includes who may visit the principal).[7] For more on the legal basis for including such a provision, please see my article, "Obviating the Need for Guardianship With Powers of Attorney: It's Not as Easy as You Think," in the Summer 2018 edition of the NYSBA *Elder and Special Needs Law Journal*.[8]

V. Choice of Agent

The agent should be, first and foremost, trustworthy. I generally advise clients that a trustworthy agent, even if unskilled in the areas of finance and property management, is far superior than any other. The agent can, *and should*, retain counsel, accountants and other experts to advise him or her on all relevant matters, especially matters they may not understand. Other attributes of a terrific agent (but not always necessary or available) are geographical proximity; well-versed in finance, money, and property; reliable; and *not* the principal's child if said child has siblings he or she is seeking revenge upon.

Those who need an agent but are alone or do not know any suitable person should consider an attorney or daily money manager. Corporate fiduciaries may be considered, but usually as a last resort.

VI. Educate the Agent

Most often, in the context of estate planning, practitioners represent the principal, and not the agent. Despite hesitancy to provide legal advice to the agent, the practitioner should not hesitate to inform the agent that (1) they are a fiduciary; (2) explain what a fiduciary is; (3) advise that the agent keep detailed records; and (4) advise that the agent *always* consult with an attorney before and while acting as agent.

Conclusion

The power of attorney is a document that must be drafted with great care and forethought. It is subject to abuse and misuse. Short-sighted planning can result in unintended consequences, mayhem, and chaos. It increases the chances of litigation and disputes. Thought, care, research, and a through understanding of the client's personal circumstances can go a long way in decreasing the chances of such a malodorous result.

Endnotes

1. GOL § 5-1503.
2. GOL § 5-1504(1).
3. GOL § 5-1504(2).
4. *In re Hoerter*, 2007 NY Slip Op. 50448(U) [15 Misc 3d 1101(A)] (Nassau Co. Sur. Ct. 2007).
5. GOL § 5-1502K(1).
6. *In re Ferrara*, 7 N.Y.3d 244, 819 N.Y.S.2d 215, 852 N.E.2d 138 (2006) see also *In re Gargani*, 43 Misc. 3d 1211(A), 1211A, 990 N.Y.S.2d 437 (Nassau Co. Sur. Ct. 2014). A special thanks to David Goldfarb, Esq. for providing me with these important cases.
7. Daniel J. Reiter, *Obviating the Need for Guardianship With Powers of Attorney: It's Not as Easy as You Think*, N.Y. St. B. Ass'n. Elder and Special Needs L. J., vol. 28, no. 3, at p. 31 (Summer 2018).
8. *Id*.

A Labor Mediator's Perspective on Mediation

By Ira B. Lobel

Why Labor Mediation Works

The growth of mediation in recent years has been exponential and is used in many different settings. While it is difficult to accurately determine the success of any of these mediation programs,[1] it is clear that there are institutional and procedural differences between labor mediation, court induced mediation, and mediation in other arenas. Keeping these differences in mind may be helpful to mediators in other venues when attempting to help parties settle a dispute. Successful introduction of any of these elements may sometimes help sow the seeds for settlement.

The presence of these elements makes the dynamics involving labor mediation different from mediation in other arenas. The elements include the following:

1. Only parties make the decision
2. Power relationship
3. Deadline
4. Continuing relationship
5. Cost

It is important to analyze these factors to understand why labor mediation works in many situations and why the mediation process in other venues faces different challenges. Recognition of some of these elements makes me a more effective mediator in other venues. All of these elements are intertwined and overlapping, as will be apparent from the discussion below.

Only Parties Make the Decision

In a collective bargaining situation, labor and management negotiate over wages, hours and working conditions. In the event of a disagreement, the parties can (1) agree to new terms; (2) continue to bargain and maintain the terms of the expired agreement; or (3) engage in concerted activity (strike or lockout).[2] If there is a disagreement, no third party can substitute his judgment for that of the parties. This means the parties *must* make their own decisions about the terms and conditions of employment. Even if one side can dictate the terms and conditions of employment (because of superior bargaining power), no third party has the legal power to determine the terms and conditions of employment.

In most civil matters, if the parties cannot agree on a resolution, ultimately a judge will make a decision for the parties. The parties can look to the law, equity, and cost of continued litigation as factors in determining whether or not to negotiate and settle; however, both sides know that, ultimately, someone else can dictate the settlement terms for them.

At various times in my career, I have mediated in situations where the parties can move to arbitration if no agreement is reached in mediation. In these situations, the dynamics change, because an outside decision maker can determine the outcome. The mediator, instead of using what the other side will do or not do to raise doubt, can try to suggest what the third party decision maker must do. This can dramatically change the dynamics of the negotiations.

The mediator may be able to use the uncertainty of a judge's ruling, delay in the final decision, the cost of the legal process, etc., as factors that may encourage a party to make difficult decisions prior to a trial. These elements take on a different tenor than raising questions in a labor situation of the practical implications of a strike, lockout, continued negotiations, final offers and the like. The mediator can use the uncertainty of the outside decision maker as a pressure for the parties to evaluate and reevaluate positions.

Power Relationship

The second element one must consider is the question of power. In a labor dispute, a party has the legal right to be unreasonable; the consequences may be a work stoppage or unhappy employees or poor productivity, but it is up to the parties, singularly or jointly, to decide certain courses of action. In the event one side wishes to try to force its will on the other, there is no check, through a court or other third party, on the ability of the party to do this.[3]

Contrast this to a legal proceeding where one party cannot use its power in contravention of the law. Because the judge or third party must look at the law and justice, the parties may defer to the third party's judgment, rather than risk a negotiated settlement that does not achieve the goals they are hoping for.

Ira B. Lobel, iralobel@gmail.com, opened an office in 2003 focusing on mediation, arbitration and multiparty disputes, after a career of 30 years as a mediator with the Federal Mediation and Conciliation Service. He holds a BS degree from Cornell University and a JD from Catholic University.

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In some civil disputes, power can play an important role. For example, the side with deeper pockets may be able to prolong the litigation, engage in endless discovery, delay trial and have countless appeals and motions. This may prompt the weaker side into a settlement; however, if it holds out, the case will be decided on law and justice, not on power.

The mediator may constantly remind the parties that the use of power, or delaying tactics, may have some short and long-term consequences. The good mediator will constantly remind people of the "cost" of using power and leave it up to the parties whether it is worth using.

Continuing Relationship

In a labor matter, the parties know that once the dispute is settled, they must still find a way to work together. Unless one side can absolutely destroy the other side, a collective bargaining relationship is like a marriage without the possibility of divorce. The parties know that they must deal with each other in the future. Accordingly, both sides often have an interest in allowing the other side to survive. Mediators can use this "continuing relationship" as a tool to convince the parties not to be too harsh with each other.

In a civil mediation in which the parties will have to maintain a continuing relationship, such as a matrimonial matter involving children, an on-going business partnership, or an employment matter where the employee continues employment, the mediator can use the need for a continuing relationship as a means for preventing the parties from trying to "punish" the other side. In a single transaction dispute, such as a medical malpractice or a simple contract dispute, this dynamic is not present. The parties simply want to get the best deal possible and are really not concerned about the feelings or perceptions of the other party.

The mediator should be aware of whether there will be a continuing relationship. The mediator may wish to adjust questions and methodology, depending on the answer to this question. A dispute where there is a continuing relationship takes on an added dimension of possibilities that a mediator can use in "raising doubt" and trying to get the parties to reconsider their positions.

Deadline/Timing

Deadlines force parties to make decisions; lack of deadlines encourages parties to delay and defer decision. Regardless of the subject of the mediation, the reality is that the introduction of a mediator into a dispute often is a sign to the parties that they should begin to get serious. Many years ago, the entry of a mediator into a labor dispute was often tied to a strike threat or a specified stage in the process. The entry of the mediator into a labor dispute became a signal for the parties to get down to business.[4] Mediators often talk to both sides about the proper timing of the mediation. They look to see whether there is any deadline that can be used that will provide pressure for a settlement

In a civil matter, the entry of a mediator will also give the attorneys for both sides a reason to look at the file, to start preparing and to consider alternatives and possible settlements. In effect, because the mediation is taking place, it becomes a time for both sides to look at their cases more seriously. Nevertheless, parties sometimes go into mediation when they are not prepared to negotiate, possibly because it is court ordered or the proper amount of discovery has not taken place. Mediators could be very helpful to the process if, when scheduling a session, they discuss with the parties the proper time for scheduling a session, particularly as it relates to discovery. Scheduling mediation too early in the process may prevent either side from settling, since neither would have a clear idea what a case was worth. Too late in the process may have both sides firmly entrenched in their position. The timing of a motion for summary judgment or some other legal or practical event may help the parties set a deadline. A discussion with both sides may help assess the appropriate time to mediate.

Cost

In the labor arena, mediation is often provided free of charge by government. It is considered a legitimate government expense to promote sound labor relations and, in effect, keep both the economy and government working. Accordingly, the cost of mediation, and often who the mediator is, rarely becomes an issue. Even if the parties choose to hire a mediator, the cost is absorbed by the parties and not considered significant. Simply, the parties usually do not consider the cost of mediation as an issue to resolve before agreeing to mediate.

"The good mediator will constantly remind people of the 'cost' of using power and leave it up to the parties whether it is worth using."

In the non-labor arenas, there are many different approaches. Some parties choose to hire and pay a mediator on an ad hoc basis. Some courts require that the parties mediate, either pro bono from a list maintained by the courts or by hiring a mediator on their own. Many courts and community dispute resolution programs have numerous pro bono mediators that are available.

All of these approaches have certain advantages and disadvantages. Paying for mediation can be problematic in many situations due to cost and lack of understanding of the process. Many have some concerns that, without any payment for the process, the parties may not take it as seriously as they should. The cost of mediation is one of the elements that must be considered. If a case can be settled expeditiously with the help of a mediator, the cost may be worth it. It is, however, sometimes very difficult to get two hard-nosed negotiators to settle on mediation when they are at each other's throats on substantive matters. This is one reason why it may be helpful to have court-ordered mediation, paid for by the parties, with the mediators selected from a list of individuals who state their fees and experience up front.

Conclusions

Mediators in one venue can learn from the dynamics and peculiarities present in another venue. Labor mediators can learn from mediators in other venues and vice versa. Mediators should be aware of the similarities and differences and try to use them to help the parties resolve disputes. This article highlighted labor mediation dynamics as they will serve to inform mediation in other contexts.

Endnotes

1. Experts differ on how to properly evaluate the effectiveness of a mediation program. For example, settlement rates, while helpful, may not be an indicator of success, unless there is a control that studies settlement rates of similar cases without mediation.
2. In the public sector, the parties can proceed to fact finding or arbitration (police and fire). Both of these quasi judicial proceedings will change some of the dynamics explored in this section.
3. One check may be a company going out of business or reducing its operations. This was often a possibility in the manufacturing sector. This possibility diminished greatly if there was a very large plant with a large capital investment (making moving or closing impractical) or an employer that could not move (for example: hospital, service industry, public sector).
4. This dynamic has changed considerably in recent years with the decline of the labor movement and lack of interest for immediacy in reaching contracts. This could be due to declining power of the labor movement, the increase in economic uncertainty, and/or decline in the effectiveness of the strike. For whatever reasons, contract expirations today do not have the same immediacy for settlement that they had 30-40 years ago.

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Ten Common Mistakes to Avoid in Arbitration

By Joseph P. Zammit

There is no shortage of books, articles, and CLE courses that aim to educate practitioners about commercial arbitration, both domestic and international. These typically deal with such topics as the reasons for choosing arbitration over litigation, drafting arbitration clauses, arbitral jurisdiction, comparing the rules of various arbitral institutions, enforcing and vacating awards, and esoteric issues such as whether the manifest disregard of the law doctrine survives and whether 28 U.S.C. § 1782(a) discovery orders can be utilized in international arbitrations. It hardly needs to be said that anyone aspiring to be an effective arbitration lawyer needs to be knowledgeable about these things.

However, for purposes of this article, I put aside such weighty matters and address the much more mundane topic of convincing the arbitrator(s) hearing your case that your client should win. I am currently a full-time neutral focusing on complex commercial and technology-related cases, but during my professional career I have acted both as an arbitrator and as counsel in numerous arbitrations. My thesis arising from this experience is simple: seeing things from the perspective of the arbitrator can make one a better advocate. Hardly earth-shattering news, but I never cease to be surprised at how often even good counsel miss opportunities to effectively persuade the arbitrator or do things calculated to confound, confuse, or annoy her. Don't get me wrong: we arbitrators try to get it right despite the oversights or foibles of counsel, but we're only human. We cannot rely on evidence that was never presented, or resolve issues that were never addressed.

I have distilled my suggestions to 10 mistakes to avoid in prosecuting or defending an arbitration. Making one or more of these mistakes constitutes an unnecessary obstacle to a successful outcome. I should note that every arbitrator is different, and some may not agree with everything I say here. I suspect, however, that my suggestions will resonate with most arbitrators.

Mistake #1: Treat the Pleadings as Unimportant

The rules of most arbitral institutions do not require detailed statements of claim or answers (or, indeed, any answer at all). It is tempting, therefore, to make them as bare bones as possible to save expense and keep the opposition guessing about the theory of your case. After all, we are accustomed to notice pleading in court, and there will always be time to amend after discovery is closed or to make our position clear in the pre-hearing brief.

While this attitude *might* work in court where judges do not typically read the pleadings when a case is initially filed and liberally grant motions to amend or to conform to the proof after trial, it certainly is not a wise strategy in arbitration. For one thing, after the statement of claim and answer are filed and the arbitrator appointed, amendment is normally in the discretion of the arbitrator. Why take the chance it will not be permitted? A post-award proceeding to vacate an award because of the arbitrator's abuse of discretion is not likely to succeed.

More importantly however, the first thing an arbitrator does after being appointed (if not before) is read the pleadings. They are the arbitrator's first introduction to the dispute. Why squander the opportunity to educate her about the facts and the theory of your case? It may be months before you get another chance, and it may not come until the eve of the hearing. A lucid statement of what happened and why your client should win (with key documents attached as exhibits) will linger in the mind of the arbitrator and provide her a logical framework within which to view what is to come. While an arbitrator will not make up her mind based simply on the pleadings, however good they may be, they will help the arbitrator understand what is really in dispute. It is likely that before every conference or ruling (such as on discovery disputes) the arbitrator will refer back to the pleadings to refresh herself on the nature of the dispute. Spartan pleadings, on the other hand, inevitably raise myriad questions that are not likely to get answered for a long time.

You may be concerned that a comprehensive pleading educates your adversary. While that may be true, it is foolish to assume that your adversary does not already have

Joseph P. Zammit is an independent arbitrator, focusing on intellectual property matters and complex, commercial disputes involving technology. Before establishing Zammit Technology ADR, he was a partner at Norton Rose Fulbright US LLP, where he represented clients in numerous domestic and international arbitrations. Mr. Zammit serves on the panels of the AAA and the CPR Institute, and is included on the Silicon Valley Arbitration and Mediation Center's List of the World's Leading Technology Neutrals. He has written and spoken widely on the subject of arbitration. Further information regarding Mr. Zammit may be found at www.ZammitADR.com, and he may be contacted at jzammit@ZammitADR.com.

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a pretty good idea of what your best case is. The minimal surprise value of playing it close to the vest is not worth losing the chance to begin the education of your arbitrator.

What about the possibility that discovery may provide different facts or suggest a different legal theory than you have at the outset of the case? So long as those different facts or legal theory are not inconsistent with what you've pleaded, there is no problem. An arbitrator is not going to hold it against you or your client that you discovered something that has augmented or improved your case. A problem arises only if the discovered facts undercut those you have pleaded or demonstrate that your legal theory cannot be supported. That, however, is a problem of your or your client's own making, because it suggests someone has not been straight with the arbitrator or has naively banked on the absence of contrary evidence to advance a false or questionable narrative. That kind of "problem" should not dissuade good counsel from drafting and filing as complete a statement of claim or defense as is possible with the facts then known to the pleader.

Mistake #2: Insist on as Many Depositions, Interrogatories, Requests to Admit, and Document Production Requests as Possible

Many advocates still approach arbitration as if it were a case filed in federal court. That is a mistake. There's a reason they call it "alternative" dispute resolution. Arbitration is supposed to be faster, cheaper, more efficient, and less formal than litigation. But many lawyers do their best to frustrate those goals by demanding the same kind of discovery as is permitted under the Federal Rules of Civil Procedure. Why? They say it's to make sure justice is served by having all the facts, but if truth be told it's more likely because they have a hard time moving out of their traditional, open-ended discovery comfort zone. It is somewhat ironic that in recent years the courts themselves have been trying to put the brakes on runaway discovery.

Of course, if your client really wants discovery *a la* the Federal Rules, they can—and should—write it into the arbitration clauses your client is agreeing to so that their wishes will be honored under the principle of party autonomy. If the arbitration clause is silent on the subject, though, and the other side is unwilling to agree, I would suggest that you be restrained in what you ask for. A demand for 20 depositions, 50 interrogatories, 100 requests to admit, and 250 document requests each beginning "All documents. . ." is likely to mark you as an arbitration novice and irritate many arbitrators who pride themselves as specialists in a process that is distinct from, and in many ways superior to, judicial litigation.

Few arbitration rules expressly authorize interrogatories or requests to admit.[1] I have never actually had a case, as either arbitrator or advocate, where they were utilized. Let's be honest, when was the last time you got an interrogatory answer or response to a request to admit (both typically drafted by counsel) that was really useful? Therefore, unless you have some compelling reason unique to your case, my advice is, retain your credibility and don't ask.

In contrast, document requests are generally permitted. The questions, though, are how specific and how closely related to the issues in the arbitration must the requests be. The answers depend on the applicable rules, whether the arbitration is domestic or international, and the predilections of the arbitrator. For example, Rule 22(b)(iii) of the *Commercial Arbitration Rules* of the American Arbitration Association permits the arbitrator to:

> require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues.

In practice, most arbitrators operating under the American Arbitration Association's (AAA) rules do not require a showing of relevance or materiality in advance and resolve that issue upon objection by the party resisting the request. How strictly an arbitrator applies the relevance/materiality standard varies by arbitrator and the facts of the case.

International arbitration, on the other hand, tends to reflect to some degree the hostility to discovery of its civil law origins. Some international rules do not expressly address the subject of document requests, while others leave it to the discretion of the tribunal. In many, if not most, international arbitrations nowadays, the subject is controlled by the International Bar Association's *Rules on the Taking of Evidence in International Arbitration*, which are adopted either by agreement of the parties or at the direction of the tribunal. Article 3(3) of the IBA Rules provides in relevant part that a Request to Produce shall contain:

> (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

> (b) a statement as to how the Documents requested are relevant to the case and material to its outcome . . . .

Thus the IBA Rules require significant specificity in posing document requests and puts the burden on the requesting party to identify in advance the relevance and materiality of the requested documents. A common device to organize document requests, the statement of their relevance and materiality, arguments over objections, and the tribunal's rulings is the so-called Redfern schedule (named after Alan Redfern). International arbitrators—especially those from civil law backgrounds—are generally stricter than U.S. domestic arbitrators about enforcing specificity, relevance, and materiality standards.

Savvy counsel will strive to pose document requests that are carefully targeted to elicit documents that will significantly enhance her case or undermine her opponent's, and not simply be redundant of those already in her possession. She will be prepared to advance strong arguments about why the documents sought are not merely relevant to the subject matter of the arbitration, but material (i.e., important) to the resolution of the issues in dispute. (This goes double for international arbitration.) And she will avoid blunderbuss requests, which are likely to get short shrift from most experienced arbitrators.

When it comes to depositions, there is a definite dichotomy between international and domestic arbitration. Depositions are almost unheard of in international arbitrations. Except in rare circumstances, it is a waste of breath to even ask for one.

On the other hand, depositions in domestic arbitration have become more common in recent years, at least within limits. Some arbitral rules explicitly address the subject of depositions. For example, Rule L-3(f) of the *AAA's Procedures for Large, Complex Commercial Disputes* provides:

> In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

Other rules implicitly recognize an arbitrator's authority to permit the taking of depositions.[2]

Note, however, that the AAA procedures contemplate that depositions will be permitted only in exceptional cases and the International Institute for Conflict Prevention and Resolution's (CPR) rules emphasize "the desirability of making discovery expeditious and cost effective." In practice, where the parties are in disagreement, whether and how many depositions will be allowed depends on the inclinations of the arbitrator. In my experience, arbitrators are often skeptical of the argument that permitting depositions of adverse party employees will "streamline" their cross-examination at the hearing. More likely to succeed is an argument that a deposition is necessary because a witness is or likely will be unavailable to attend a

hearing due to illness or infirmity, or because attendance at the hearing cannot be compelled or would cause a non-party significant inconvenience or expense. Arbitrators might also be inclined to permit a deposition where they are convinced it may enable a party to discover facts essential to establishing its claim or defense; for this purpose, a 30(b)(6) type deposition of an adverse party representative might be appropriate. In short, don't just ask for depositions because you can, and be prepared with solid reasons to explain why you need to take a person's deposition even though they are available to testify at the hearing.

Mistake #3: Ignore the Contract

You're probably saying to yourself, "What competent lawyer ignores the contract?" My response is: more often than you would think.

I recently served as an arbitrator in a dispute in which one party was seeking reformation of the agreement between the parties. The parties battled back and forth vociferously about whether a basis for reformation had been shown. Curiously, until drawn to their attention by the arbitrators, neither side dealt with a provision in the arbitration clause that said the arbitrators were without authority to modify or amend the agreement. Even after the provision was pointed out, the party advocating reformation failed to address the question of arbitral jurisdiction head on, and the party opposing reformation devoted a single paragraph in its post-hearing brief to the issue.

Why this somewhat cavalier attitude to what one would think was a pretty fundamental point, especially in light of the arbitrators' expressed concern about it? Perhaps it was because it was not within the parties' pre-conceived theory of the case. Perhaps it was because they found no controlling legal authority on whether such language deprived the arbitrators of jurisdiction. Or perhaps it was because they simply missed it. I don't know. However, I think it was a mistake because they surrendered the opportunity to persuade the arbitrators one way or the other, and left the arbitrators to struggle with the issue on their own.

When preparing a claim or defense for an arbitration, counsel should scour the contract to ascertain what provisions might have a significant bearing on the outcome, and formulate their arguments accordingly. It rarely does any good to hide one's head in the sand and ignore problematic contractual provisions. It certainly makes no sense to ignore helpful provisions because you missed them or because you think the facts are so good for you that you don't need the help.

The practice of many, if not most, arbitrators is to read the contract soon after being appointed. You don't want to leave them to wonder why a seemingly pertinent provision such as the one in the example discussed above is not addressed in the pleadings. Most arbitrators take very seriously their obligation to enforce the contract. If the contract is clear, they are generally more comfortable making decisions based on that contract, if possible, than in resolving tough witness credibility issues or weighing hotly contested expert opinions.

Mistake #4: Rely on the Equities

There seems to be an almost unconscious belief on the part of many counsel that arbitrators should want to do what's "just," regardless of "technical" legal rules or the formal provisions of the contract, and that this is what really distinguishes arbitrators from judges. Frankly, a few arbitrators seem to share this view.[3] This belief leads counsel who have what they feel is a sympathetic client and facts to focus on the "equities" and give relatively little attention to the legal arguments. I would suggest that that is a mistake.

Unless the parties have expressly agreed that the arbitrator may act as an "amiable compositeur" or decide disputes *ex aequo et bono*, she is obligated to enforce the provisions of the arbitration clause and substantive law chosen by the parties. While courts will not vacate an award merely because an arbitrator erred in construing a contract or interpreting the applicable law, they can and will vacate an award (either on the basis that the arbitrator has exceeded her powers or through the manifest disregard doctrine) where an arbitrator has flagrantly and intentionally disregarded the terms of the contract or applicable law in an attempt to dispense her own brand of industrial justice.

More to the point for present purposes, however, I do not believe most arbitrators (especially if they are lawyers) *want* to decide cases this way. They are uncomfortable deciding matters based only on the abstract concept of doing the "right thing," unguided by established principles of law. Instead, they strive to understand what the parties agreed to in their agreement and to determine liability based on that understanding and their application of the substantive rules of law. To arbitrators, that constitutes doing "justice." Therefore, arguments pitched exclusively to fairness and equity are likely to receive a skeptical reception.

For example, in the arbitration I alluded to earlier, the party seeking reformation of the contract introduced an expert who testified that, based on the theory of economic rationality (i.e., that business people act in their own economic self-interest), it did not make any sense for that party to have made the agreement described in the contract as written because it was clearly a money-loser, and hence that the contract should be reformed to what the party claimed was the true intent of the parties. This testimony was unaccompanied by either any satisfactory evidence that the parties had in fact reached a different agreement than that set forth in the written contract, or by the citation of any legal authority that the principle of eco-

nomic rationality can support a ruling in favor of reformation. Unsurprisingly, the panel held that, even aside from the question of jurisdiction, the party had failed to satisfy its burden of proof on the issue of reformation.

The foregoing does not mean that equities are unimportant. Arbitrators are human, and long to do what is fair. However, it does mean that an advocate must proffer a legally principled route to that "fair" result. Take advantage of the opportunity to submit well-reasoned pre-hearing and post hearing briefs, supported by citation of relevant legal authorities, to provide the legal framework upon which to build your case, and show how the legal principles apply to the facts.

Mistake #5: Focus on Liability and Damages Will Take Care of Themselves

Too often, advocates become so focused on proving or refuting liability that they do not pay enough attention to the question of damages. Respondents are particularly prone to fall into this trap out of fear that proffering an alternative damage theory suggests that they are implicitly conceding liability. This is not a problem unique to arbitration, and can be found in court litigation as well. Regardless of the forum, this attitude can lead to disastrous results. The classic example is the $10.53 billion jury verdict in the Pennzoil-Texaco litigation (subsequently reduced by settlement to a mere $3 billion).

Arbitrators are not jurors, and they are unlikely to view a respondent's alternative damages theory as a concession of liability. Simply attacking the claimant's damages analysis is necessary, but not sufficient. If the respondent fails to put in its own damages case, and if liability is found, the arbitrators will be left with only one side's version of what an appropriate damages award should be. Counsel for a respondent would be well-advised to devote substantial attention to developing and presenting relevant evidence and convincing expert testimony leading to the conclusion that claimant suffered quantifiable damages in an amount substantially less than that sought. Doing so may not only soften the blow of an adverse finding on liability, but may also result in the incidental benefit of calling into question the claimant's entitlement to a finding of liability: if claimant is inflating its requested damages, what else might it be exaggerating?

Claimants are not immune from the temptation to devote insufficient attention to damages. The danger here is not that the arbitrators will be left with a one-sided view of damages, but that they will be unconvinced by the view expounded by the claimant. Even if the respondent fails to put in its own damages case, it is not inevitable that the claimant will get what it asks for simply because it prevails on liability. An arbitrator is not precluded from slashing elements of a requested damages award because she feels that the evidence does not support them, or, for that matter, refusing to award any damages at all because she finds that they are speculative. It behooves claimant's counsel, therefore, to spend the time to develop a valid damages model, to find relevant evidence to satisfy that model, and to select and work with an experienced damages expert to present a cogent and convincing damages case.

Mistake #6: Assume That a Tutorial Is Unnecessary Because the Arbitrator Is an Expert

It is commonplace these days for arbitration clauses to specify that arbitrators have certain industry experience or technical backgrounds, and for arbitral organizations to maintain specialty panels of arbitrators with such experience and backgrounds. This is one of the reasons that arbitration often offers a superior dispute resolution mechanism than court litigation.

But just because the arbitrator possesses industry experience or a technical background does not mean that a tutorial may not be useful. If a matter involves complex information technology, for example, the fact that the arbitrator may be an attorney with substantial IT industry experience does not mean she will necessarily have expertise in the specific technical area involved in your arbitration. It may be quite helpful to provide a tutorial for the arbitrator on that specific area as background to her consideration of the evidence and determination of the relevant factual issues.

It is difficult to generalize on the subject of how tutorials should be conducted. Every case is different, and every arbitrator has her own predilections. For me, the chief benefit of a tutorial is to educate me about those aspects of the technology (or other area of specialized knowledge) as to which there is no dispute so that I will be in a better position to evaluate the evidence (including expert testimony) as to those aspects that are in dispute. I do not find it of much value to have two separate tutorials that themselves are in conflict, or that are used *sub rosa* to color disputed questions of fact. If a neutral statement is not possible, I'd rather scrap the idea of a separate tutorial altogether and just hear what the contending experts have to say during their respective hearing testimony.

Fortunately, this should not normally be necessary. Counsel can and should work together to develop a tutorial that is unbiased, technologically sound, and as complete as possible given the factual issues upon which the parties disagree. A tall order perhaps, but one that will pay dividends in terms of streamlining the hearing and providing a better-educated decision-maker.

One way to accomplish this is for the parties to mutually appoint a single expert whose sole function is to provide the tutorial, and who may not be examined about the specific technological issues in dispute in the arbitration. Alternatively, the arbitrator can, in consultation with the parties, appoint an expert to serve the same purpose. Yet another way is for the parties to jointly prepare a written

or video description of the technology. This approach may provide a less satisfying tutorial, but has the advantage of avoiding the expense of a separate tutorial expert.

What form should the tutorial take? There are myriad possibilities. These include a live expert lecture, PowerPoint slides, a video presentation, animations, a stipulation of undisputed facts, glossaries, or some combination of these. What works best for any given matter depends on the subject matter, the extent to which the parties agree about the technology, the level of cooperation of counsel, and the preferences of the arbitrator.

Whatever method is chosen, it would be a waste to forgo the opportunity to provide a tutorial in those cases in which it would be helpful to the arbitrator. How do you know if it would be helpful? Listen to see if the arbitrator broaches the possibility or ask the arbitrator yourself.

Mistake #7: Don't Let the Arbitrator's Silly Questions Get in the Way

We've all been there: you're comfortably into your examination of a witness, proceeding in a logical sequence to establish facts or an expert opinion consistent with your theory of the case, when out of left field, the arbitrator interrupts to ask you a question that (a) jumps ahead to matters you were planning to get to later in your examination, (b) makes no sense to you, (c) reveals a worrisome view of the facts or the law, or (d) raises a problem with your case that you were trying to skirt. While it may be tempting to give short shrift to the question and get back to your examination of the witness, I don't recommend that approach.

One of the advantages of arbitration over jury trials is the opportunity for real time feedback. With a jury, you typically don't know if you are in trouble until the verdict is in, by which time it is too late to do anything. An arbitrator's questions at least give you a hint regarding where her head is at. Use the opportunity to educate your arbitrator. Avoiding an arbitrator's question, or deferring a response, is only going to annoy and frustrate her or, worse, suggest that you are trying to conceal or avoid something.

Deal with the question head on. If the question raises something you planned to cover later with the witness, go with the flow. Respond with something like, "I was planning to get to that a bit later, but let me ask the witness right now." Whatever tactical advantage you had perceived in the planned sequence of your examination, it is outweighed by the value of immediately satisfying the arbitrator's interest or concern. If need be, you can always return to the point again at the time you had originally planned.

If the question does not seem to make sense or is just plain stupid (it happens), you might start with something like, "Could you please ask me that again, so I can make sure I'm answering the right question." If that fails to help, you need to do your best to explain—politely—why, for example, the fact that the respondent is a cat hater is not legally relevant to the issue of whether he breached a contract to provide outsourcing services. Needless to say, this must be done in a fashion that treats the question as a serious one, and avoids a tone that implies the arbitrator is playing with something less than a full deck.

An arbitrator's question may not be an unintelligent one, but rather suggest that her perception of the facts or the applicable law is one not favorable to your client. Here the response must be two-fold. First, you need to immediately answer the question calmly, succinctly, and in a way that conveys that the facts or the law (or both) actually support your client's position. This requires that you have a detailed command of the facts and the law, and the ability to use them to formulate a cogent answer on the spot. But often this is not enough. The question may be a red flag that the arbitrator has an inclination that must be addressed and overcome in presenting the balance of your evidence and in the post-hearing briefs.

An arbitrator's question may spotlight a hole or weak point in your case. Truth be told, if you have been hiding your head in the sand and have not already dealt with such a hole or weakness before the arbitrator asks the question, you are in trouble. The ostrich-like approach rarely is a wise strategy. You are usually best off acknowledging the problem from the beginning, and having an explanation or rationale worked out to deal with it. Having been upfront with your explanation, the arbitrator's question may never come, but if it does, you will be prepared to respond credibly and in as strong a manner as possible.

Mistake #8: Never Use One Witness or Exhibit Where You Can Use Two or More

Although counterintuitive, it is frequently true that the evidentiary hearing in an arbitration can last longer than a jury trial of an equivalent case in court. Why? Because overworked judges in busy venues often impose strict limits on the length of trials. It is not unusual for even complex matters, like patent cases, to be tried in four or five days. Arbitrators, on the other hand, are sensitive to the principle of party autonomy and more inclined to be flexible on the question of hearing length if the parties are in agreement. While there is value in having an adequate amount of time to present one's case, there is also the danger that evidence will expand to fill the time allotted. Aside from the waste of unnecessary time and expense, having three witnesses testify to essentially the same thing poses a strategic risk. Almost inevitably, two of the witnesses are going to be weaker than the third, and only result in dissipating the impact of the strong witness. Even worse is the risk that the multiple witnesses will contradict each other, even if only in small ways, either on direct or cross-examination, thereby undermining your case.

The best advice is to go with the fewest number of witnesses possible to make out your case or defense, and those of course should be the strongest of the possibilities, even though that may be an articulate lower level employee rather than a senior executive. I hasten to add that there is at least one exception to this rule. If you are planning to call adverse witnesses on your case in chief, it may be beneficial to call overlapping witnesses for exactly the same reasons you want to avoid doing that with your own witnesses: they may contradict, and thereby impeach, one another.

When it comes to exhibits, there is a kitchen sink approach on the part of many counsel. There will be many large binders (or the electronic equivalent) filled with hundreds of exhibits, generally broken down into joint exhibits, claimant's exhibits, and respondent's exhibits. Typically, only a relatively small percentage of these are referenced in any witness's testimony or even cited in any brief. Apparently, they are there "just in case." Yet counsel almost invariably move that all the exhibits be deemed in evidence.

What is the point? If the document was not important enough to address with a witness, or even cite in a brief, how material to your case can it be? Submitting such documents into evidence is, in effect, asking the arbitrator to do your work for you, and implicitly laying on her the burden to read, interpret, and determine the significance of the documents, unaided by any witness testimony or legal argument. That is, at best, unfair to the arbitrator and, at worst, constitutes a cynical attempt to lay the basis for a manifest disregard argument on a motion to vacate in the event of an unfavorable award. I do not believe an arbitrator has any obligation to consider such documents, and in fact think that attempting to do so is prone to error and borders on inappropriate *ex parte* factual investigation. My own view is that an arbitrator can and should exclude such documents from evidence.[4]

My recommendation to counsel is that they offer in evidence only the documents they actually use, and that they withdraw the unused documents at the end of the hearing or after submission of post-hearing briefs.

Mistake #9: Give 'em the Ol' Razzle Dazzle

By now, the use of animations, computer-driven presentation systems, projectors, charts, graphs, and all sorts of audio-visual aids during arbitrations is old hat. Sometimes it seems like counsel are competing for the title of "The Greatest Show on Earth." At the risk of sounding like a Luddite, I suggest that you show some restraint in the use of all the fancy technology and colorful graphics. It's not that I am against technology (after all, I concentrate on technology-related matters), it's just that I think overdoing it during the hearing can be distracting and become an obstacle—rather than an aid—to understanding. After all, your goal is to inform and persuade, not to entertain.

The use of technology can definitely serve very useful purposes. An animation illustrating how a complex system or process works, for example, can be extremely helpful to an arbitrator. But sometimes technology does not add much, if anything. It is not particularly helpful, for example, to project on a screen the simple image of a page from a document if, as should be the case, the arbitrator has a copy of the full document in front of her. Indeed, doing so can interfere with the arbitrator's focus. Moreover, the overuse of technology can come across as "dumbing down" your presentation. You picked your arbitrator because of her sophistication and subject matter expertise; don't insult her by acting as if you think you must spoon-feed her your argument.

I suggest you attempt as best you can to assess in advance the arbitrator's preferred method of absorbing information and tolerance for showy displays. Some people learn best by listening, others by reading, and still others by seeing. At the risk of gross overgeneralization, I suspect that in general younger arbitrators are used to receiving information visually, whereas older arbitrators are quite comfortable receiving information through reading and listening. In any event, be judicious in your use of trial presentation technology.

And one more thing: if you are going to use it, make sure in advance it works and that you are fully prepared to integrate it seamlessly into your presentation. Few things are more deflating to counsel and annoying to an arbitrator than having to waste time because of balky technology or an advocate uncomfortable using it.

Mistake #10: Don't Forget to Pound the Table

Let me conclude with what should be an obvious point. Respect—for the arbitrator, for opposing counsel, for witnesses, and for the process itself—is the key to being an effective advocate.

Some lawyers view arbitration (as well as litigation) as a form of warfare. While there may be some theoretical validity to that analogy (there is, after all, a winner and a loser), my strong advice is: do not go there. Raised voices, *ad hominem* remarks, sarcastic tones, feigned incredulity, and belligerent cross-examinations don't win you any brownie points with the arbitrator. Rather, the opposite is true. As noted earlier, arbitrators are not lay jurors, and they are rarely impressed with theatrics. Moreover, aside from being rude and inconsistent with the notion of arbitration being a business-like means for resolving disputes, such behavior inevitably raises the question whether it is a smokescreen to hide a lackluster case.

Being respectful does not mean counsel cannot be aggressive. To be effective, counsel may have to be aggressive, for example, in cross-examining an adverse witness

who is dissembling, evasive, or argumentative. Counsel must be persistent, demand an answer to the question asked, and refuse to let the witness off the hook. However, at the same time, she must be invariably civil and polite. The contrast in demeanor between counsel and the witness will make the cross-examination all the more devastating.

Likewise, respect for opposing counsel does not mean that one should not vigorously object to a clearly inappropriate line of questioning or argue strongly that an opposing party's position is not supported by the facts or the law. In doing so, though, counsel must let clarity of expression, the force of logic, and legal principle carry the day, and not the number of times she can interrupt or belittle her colleague.

Respect for the arbitrator does not mean counsel should be obsequious. Directness and simple courtesy are far more prized by most arbitrators than flattery. Respect means listening to the arbitrator's questions and concerns and attempting to address them head on with logic and law, rather than evade them. If you disagree with the arbitrator, politely tell her so, but be sure to tell her why.

Finally, it should go without saying that counsel should never stretch or shade the truth. If you are discovered, and you probably will be, it is the kiss of death. It can cost your client the case, and severely damage your reputation. Worst of all, it demonstrates disrespect for perhaps the most important person of all, yourself.

Endnotes

1. One notable exception is the CPR Institute's Rules for Non-Administered Arbitration of Patent and Trade Secret Disputes, which contain a presumptive limit of ten interrogatories.
2. *See, e.g.*, International Institute for Conflict Prevention & Resolution, Administered Arbitration Rules, Rule 11 ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.").
3. I once was taken aback to hear a retired federal appellate judge turned arbitrator say that, as an arbitrator, he strove to do what he thought was "right," even if that meant ignoring the law.
4. My comments do not apply to documents that underlie a summary presented through a witness or documents reviewed by an expert for purposes of formulating an opinion.

New York State Bar Association Committee on Professional Ethics

Opinion 1160 (01/02/19)

Topic: Affiliation and fee-sharing with a New York resident attorney not admitted in New York, although admitted out-of-state, and licensed to practice in New York federal courts.

Digest: Not proper for a New York attorney to affiliate and share fees with a lawyer who, though resident in New York, is not admitted to practice in New York, if the solicitation of clients, sharing of fees, and any other services performed would as a matter of law, constitute the unauthorized practice of law.

Rules: 1.5(g); 5.5; 7.1, 7.2, 7.3, 8.4

FACTS

1. The inquirer, an attorney recently admitted to practice in New York, is acquainted with another lawyer. The other lawyer, like the inquirer, resides in New York, but the other attorney is admitted only in another state, not New York, though the latter is admitted to practice in federal courts located in New York. According to the inquirer, the other lawyer is capable of generating business, and the inquirer would like to affiliate with this other lawyer, listing the other lawyer as a partner, associate, counsel, or otherwise, on letterhead showing that the other lawyer is admitted solely in the other state and not New York. The inquirer anticipates that the other lawyer would attend initial meetings with the clients being produced by the other lawyer, but then would not deal with any of the legal work being performed.

QUESTION

2. May a lawyer admitted in New York affiliate and share legal fees with another lawyer, who, while a resident of this State, is not admitted here, with the affiliation intended solely for the purpose of obtaining clients referred by the non-admitted lawyer?

OPINION

3. "Our prior opinions have recognized that a New York law firm may include lawyers not admitted to practice in New York." N.Y. State 955 ¶ 7 (2013); see, e.g., N.Y. State 704 (1997). Our main concern has been that the New York firm, consistent with the rules governing lawyer advertising setout in Rule 7.1 of the N.Y. Rules of Professional Conduct (the "Rules"), avoid misleading the public by failing to disclose the jurisdictional limitations on practice by out-of-state lawyers. See Rule 7.5(d) (partnership practicing with lawyers licensed in different jurisdictions must "make clear the jurisdictional limitations on" lawyers in the firm not licensed to practice in all jurisdictions); N.Y. State 1042 ¶ 15 (2014) (so concluding); N.Y. State 144 (1970) (same result under the Rules' predecessor the N.Y. Code of Professional Responsibility (the "Code")).

4. Our prior opinions blessing affiliations with such non-lawyers presupposed that an affiliation among lawyers admitted in different jurisdictions were engaged in a common enterprise in which all lawyers in the firm would render legal services to clients of the firm within the confines of their jurisdictional limitations. The sharing of fees among lawyers in the circumstances is a function of the common enterprise in which the lawyers perform legal services for the benefit of the firm's clients within those confines. But we have never sanctioned an arrangement between a New York lawyer and a non-attorney consisting of nothing more than signing up clients and passing them on to lawyers, with a fee skimmed off the top. N.Y. State 705 (1997) (quotations and citations omitted).

5. The Rules "generally do not allow lawyers to pay for referrals of clients." N.Y. State 979 ¶ 4 (2013). Rule 7.2 (a) says that an attorney "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client," subject to two exceptions. See Rule 7.2, Cmt [**1**]. One exception appears in Rule 5.8, which authorizes contractual relationships between lawyers and certain non-legal professional services enumerated in Section 1205.3 of the Joint Appellate Division Rules; an out-of-state law firm is not so listed. The other exception, Rule 1.5(g), allows a lawyer to share a fee with an unaffiliated lawyer if, among other things, the client gives informed consent, confirmed in writing, to the division of fees and the division either reflects the proportional contribution of the lawyers to the services performed or, in a writing shared with the client, the referring lawyer assumes joint responsibility for the representation.

6. We examined Rule 1.5(g) in N.Y. State 864 (2011), in which the inquirer wished to accept a referral from an out-of-state lawyer in a personal injury matter. The injury occurred in New York and the referring lawyer proposed that, in the particular matter at issue, the in-state lawyer would "handle" the matter and pay the referring lawyer a portion of any recovery. We endorsed the proposal subject to compliance with Rule 1.5(g). Id. ¶ 16. Although we have declined to delineate the precise contours of "joint responsibility" under this Rule, see N.Y. State 745 (2001); cf. Rule 1.5, Cmt. [7] ("joint responsibility" under this Rule, see N.Y. State 745 (2001); cf. Rule 1.5, Cmt. [7] ("joint responsibility entails financial and ethical responsibility for the representation as if the lawyers were associ-

ated in a partnership"), we have made clear that the mere cultivation of client relationships does not qualify as "services performed" by the referring lawyer, N.Y. State 954 ¶ 9 (2013). Thus, the inquirer's contemplated action would violate Rule 7.2(a) unless it could be said that the inquirer is ethically permitted to be affiliated with the out-of-state lawyer in the circumstances presented.

7. Our opinion in N.Y. State 801 (2006), which involved facts closer to the instant situation, is not inconsistent. There, the New York lawyer contemplated forming a professional partnership with an attorney admitted in another state, but not in New York. The out-of-state attorney was nevertheless to be based in the New York office, participate in work of the practice, including "paperwork," meet with clients, and share fees. There, we said that either the out-of-state attorney would be engaging in the unauthorized practice of law here, or acting in a quasi-paralegal capacity, as a non-lawyer. While noting that unauthorized practice is a creature of statute not the Rules, we concluded that, "[i]f the out-of-state lawyer were to limit activities to those permitted a non-lawyer, such as a paralegal, then the lawyer would violate [the Rules] by partnering with the lawyer, as it is impermissible for a New York lawyer to share fees with a non-lawyer," but that "[i]f the out-of-state lawyer is engaged in the unauthorized practice of law, then the New York lawyer would violate [the Rules] by partnering with the lawyer."

8. The principal distinctions between the situation proposed here, and that considered in Opinion 801, would appear to be the facts that (a) the proposed affiliated attorney in the instant inquiry is not to participate in "paperwork," or in client meetings beyond the initial meeting, and (b) the proposed affiliated lawyer in the instant case is licensed to practice in the New York federal courts. What is being proposed here therefore appears to be an arrangement for the solicitation of legal work in New York, for purposes of receiving a share of the fees earned thereby, by an attorney residing in New York but not licensed to practice by the New York courts, using licensure by the federal courts in New York as a predicate. The question then becomes whether an out-of-state lawyer may set up shop in New York for purposes of rainmaking and fee-sharing based solely upon admission to federal courts located here.

9. As we have said, whether something constitutes the unauthorized practice of law is a question of statutory interpretation, which is beyond our purview. Nevertheless, Rule 5.5 says:

a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

10. *In re Peterson,* 163 B.R. 665 (Bkptcy. Ct., D. Conn. 1994) addressed a situation similar to the one described by the inquirer. The situation was summarized by the Bankruptcy Court as follows, id. at 667:

> Betsos is not licensed to practice law in Connecticut. He is licensed in New York, and is admitted to practice in the federal district courts for the district of Connecticut and the southern and eastern districts of New York. He has had no office in New York since approximately 1983. Betsos has a law office in Stamford, Connecticut where he has provided legal services by telephone in bankruptcy matters. Moreover, he has prepared pleadings in that office for filing in bankruptcy court. He has not met with clients at his office, but he has met with them at other locations in Connecticut. His stationery lists his Stamford office address and states that he is an attorney-at-law..

11. Determining that Betsos, on those facts, was engaged in the unauthorized practice of law, the Bankruptcy Court held, 163 B.R. at 672-673 (footnotes omitted):

> I find at the outset that Betsos's activities constituted the practice of law. The practice of law is not limited to appearing before state courts; it includes giving legal advice and drafting documents regardless of whether it occurs in a "court of record," and regardless of whether the practice is carried on as a business.
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> * * * *
>
> The flaw in [the attorney's] argument is that it fails to recognize the distinction between the right to practice in a court and the right to practice law generally. The essence of that distinction is that the general practice of law connotes the right to offer legal services to anyone who seeks them, whereas the right to practice in a court is limited to providing legal services that are incidental to a specific case or proceeding pending in that court.

12. *Peterson* was subsequently followed by, *e.g., Servidone Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F. Supp. 560, 572-576 (N.D.N.Y. 1995) (also citing *Spanos v. Skouras Theatres Corporation*, 364 F.2d 161 (2d Cir.), *cert. den'd*, 385 U.S. 987 (1966)), and *In re Swendiman*, 57 N.E.3d 1155, 1156-1157 (Sup. Ct., Ohio 2016) (noting that *Peterson* had been distinguished *In re Desilets,* 291 F.3d 925 (6th Cir. 2002) (holding that an attorney licensed in Texas and admitted to practice before federal bankruptcy court in Michigan was authorized to practice federal bankruptcy law in Michigan, even though he was not licensed in Michigan, because the bankruptcy courts rules expressly permitted the attorney not only to appear before the bankruptcy court, but also to generally counsel clients).

The ultimate question being one of law, we leave to the inquirer to resolve the import of *Peterson* and like cases on the proposed arrangement, with the caution that, were *Peterson* to control, then the inquirer would run afoul of Rule 5.5(b). We caution, too, that the proposal may well constitute improper solicitation under Rule 7.3, the provisions of which, in Rule 7.3(i), fully apply to an out-of-state lawyer who solicits retention of clients in New York. See Rule 8.4(a) (a lawyer may not "knowingly assist or induce another" to violate the Rules). Finally, we note that the Court of Appeals has adopted rules governing temporary practice by out-of-state lawyers, which provide, among other things, that "except as authorized by other rules or law," an out-of-state lawyer shall not "establish an office or other systematic and continuous presence in this State for the practice of law." 22 N.Y.C.R.R. Part 523.

CONCLUSION

14. It would not be proper for the inquiring New York attorney to affiliate with, and share fees with, a solely out-of-state-licensed attorney, resident in New York, for matters to be solicited and originated by the out-of-state-licensed attorney, based upon the New York resident out-of-state-licensed attorney's admission to New York federal courts, if the solicitation of clients, sharing of fees, and any other services performed, would as a matter of law constitute the unauthorized practice of law.

[12-18]

Opinion 1161 (01/04/19)

Topic: Confidential information: Lawyer's duty to preserve and to make adequate disclosure in seeking client consent to disclosure

Digest: When a lawyer rather than a broker prepares a real estate contract, the lawyer may not disclose the contract to the broker without the client's informed consent, which must include disclosure of any personal, financial, or business interest of the lawyer in responding to the broker's request for disclosure of the information.

FACTS

1. The inquirer is a New York real estate transactional lawyer. We are informed that, in contrast to many areas in New York, the custom in the locale where the inquirer principally practices is for the lawyer, rather than (as elsewhere in the State) the broker, to prepare the contract of sale. The inquirer represents a selling client in a pending residential real estate transaction in which the client's broker has now requested a copy of the signed contract between the buyer and the seller. The inquirer expresses concern about complying with this request absent client consent, and also because the inquirer frequently encounters this broker in other real estate matters and does not wish the broker to learn what the inquirer depicts as provisions uniquely of the inquirer's design.

QUESTIONS

2. The inquiry raises two questions:

(a) When a lawyer rather than a broker prepares the contract of sale in a real estate transaction in which a broker is also involved, may the lawyer disclose the contract to the broker without the client's consent?

(b) When a lawyer has a personal, financial, or business interest in not disclosing a real estate contract to the client's real estate broker, does a conflict of interest arise in the event that the lawyer seeks client consent to disclose the contract?

OPINION

3. Rule 1.6(a) of the N.Y. Rules of Professional Conduct (the "Rules") says that a lawyer "shall not knowingly reveal confidential information" unless, among other things, the client gives informed consent. The same Rule defines "confidential information" to mean "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential." We have characterized this duty of confidentiality as "one of the lawyer's principal obligations" under the Rules. N.Y. State 1125 ¶ 3 (2017.)

4. Two exceptions appear in Rule 1.6(a). One is if disclosure is permitted under circumstances set out in Rule 1.6(b), none of which apply to this inquiry. The other is if the disclosure "is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." We have no factual basis on which to conclude that these factors apply in the circumstances presented. In the absence of such facts, we assume that the sale contract is confidential information, the sanctity of which the inquirer must preserve absent the client's consent.

5. The inquirer may not bury the broker's request. Rule 1.4(a)(1) says that a lawyer "shall promptly inform the client of," among other things, "any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules." Rule 1.0(j) defines "informed consent" to mean "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." "The extent of the information needed and the risks to be addressed will vary both with the nature of the information being disclosed and the sophistication" of the client. N.Y. State 1059 ¶ 15 (2015); see N.Y. State 1061 ¶ 19 (2015) (facts and circumstances determine the adequacy of disclosure).

6. We decline to speculate here whether a dispute over the broker's fee is latent in the broker's request for the real estate contract, except to observe that this potential may be part of a lawyer's duty to meet the adequacy test of disclosure under Rule 1.0(j). In light of the inquirer's own admitted personal, financial, and business reason for resisting disclosure to the broker, however, we believe that the inquirer's own interests implicate Rule 1.7(a)(2), which arises when a significant risk exists that such interests will "adversely" affect the lawyer's "professional judgment on behalf of a client." That a lawyer may wish for the lawyer's own sake to decline to disclose the real estate contract to the broker, when disclosure may be in the client's interest in the matter in which the lawyer represents the client, is a conflict within the meaning of Rule 1.7(a)(2). This conflict may be subject to informed consent under the standard set out above if, nevertheless, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the client, Rule 1.7(b)(1), but we cannot imagine the lawyer complying with Rule 1.7 without adequate disclosure of the lawyer's own stake in advising the client whether to provide informed consent to disclosure of the contract.

CONCLUSION

7. When a lawyer rather than a broker prepares a contract of sale in a real estate transaction, a copy of which the broker has requested, the contract is confidential information that the lawyer is obliged to protect absent informed client consent. The adequacy of informed consent depends on the facts and circumstances of each case, but a lawyer's own personal, financial, or business interest in resisting disclosure creates a conflict of interest, subject to waiver, which the lawyer must disclose to the client in seeking consent to disclosure of the confidential information.

[14-18]

Opinion 1162 (01/017/19)

Topic: Referral fees

Digest: A lawyer who forms a tax credit business may not pay referral fees to other lawyers unless the lawyer or his law firm could pay such referral fees under Rule 1.5(g) or 7.2. A lawyer who is an employee of a tax credit business owned by non-lawyers may receive a referral fee from the business if none of the lawyer's activities as an employee constitute the practice of law. A lawyer who is a non-employee consultant to a tax credit business may receive a referral fee if the lawyer is not involved in the underlying transaction, obtains informed client consent, and satisfies Rule 1.8(f); if the lawyer is involved in the underlying transaction, then the lawyer must advise the client of the referral fee and credit the client with that fee.

Rules: 1.5(g), 1.7(a), 1.7(b), 1.8(f), 5.4(d), 5.7, 5.8, 7.2

FACTS

1. The inquirer, a patent attorney licensed in New York, seeks to start a business (RD1) that would advise clients on applying to the Internal Revenue Service for research and development tax credits and prepare the necessary applications to the IRS. The inquirer characterizes these R&D tax credit services as non-legal, because the IRS authorizes certain qualifying non-lawyers who are licensed as Enrolled Agents to engage in this business. We are told that the factors that determine whether something is eligible for a tax credit are the same as those that determine patentability. The inquirer envisions that at least some of the clients of RD1 would also be clients of the inquirer's law firm. The inquirer intends either to obtain an Enrolled Agent license or to hire licensed Enrolled Agents in order to become competent to prepare the necessary IRS filings.

2. Alternatively, the inquirer would work for, or collaborate with, another R&D tax credit business (RD2) as an Enrolled Agent or a consultant, such as a marketing consultant. As part of that engagement, the inquirer would market the firm's services to select industries.

3. In either case, the inquirer would market the tax credit services to intellectual property attorneys to encourage them to refer their clients to the tax credit business, whether RD1 or RD2. These marketing efforts may include conducting presentations or sharing materials on the relevant subject matter. At the present time, the inquirer tells us, it is usually a company's accountant that refers the company to an R&D tax credit business to see if the company is eligible for the tax credit.

4. The inquirer asks whether RD1 or RD2 could pay referral fees to the lawyers who refer their clients. We answer questions only about a lawyer's own proposed conduct. While that includes questions about a business owned by the lawyer, our jurisdiction does not include questions about the conduct of third parties—in this case, RD2.

QUESTIONS

5. May RD1 pay referral fees to lawyers who refer clients to RD1?

6. May the inquirer receive referral fees from RD2 if the inquirer (a) is employed by RD2 but does not have an ownership interest in RD2, or (b) has no affiliation RD2 but merely refers clients to it?

OPINION

Lawyer-Owned Tax Credit Firm

7. 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). Since the publication of N.Y. State 206, this committee has issued opinions regarding the implications under the rules of legal ethics of dual practice of legal and nonlegal services. See, e.g., N.Y. State 536 (1981) (financial planning business); N.Y. State 687 (1997) (lawyer-insurance broker); N.Y. State 711 (1998) (same); N.Y. State 784 (2005) (entertainment management).

8. We addressed the issues arising in dual practice most recently in N.Y. State 1155 (2018). As explained in that opinion, two issues raised by multidisciplinary practice are: (a) the potential conflict of interest under Rule 1.7 of the N.Y. Rules of Professional Conduct (the "Rules") if the lawyer's interest in the nonlegal service will have an adverse effect on his or her independent professional judgment on behalf of the client in the legal services, and (b) whether the Rules as a whole (for example, the rules on confidentiality, conflicts, or, as here, payment of refer-

ral fees) will apply to the lawyer's provision of the nonlegal services as well as the legal services.

9. 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 (absent the client's informed consent) if a reasonable lawyer would conclude there is significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial, business or other personal interests. Whether a significant risk exists that the lawyer's professional judgment will be adversely affected will depend upon the size of the lawyer's financial interest in the nonlegal services, and whether the lawyer's actions in the legal matter may affect the lawyer's ability to receive the nonlegal fees. If there is a significant risk that the lawyer's professional judgment will be adversely affected by the non-legal financial interests, the lawyer must disclose that possibility to the client, but may proceed with the representation if the conflict is subject to consent and the lawyer obtains informed consent, confirmed in writing. See Rule 1.7(b)(4); see also Rule 1.7(a), Cmt. [10] (a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest).

10. The other issue in multidisciplinary practice is whether the Rules apply to the conduct of the lawyer's rendition of nonlegal services, in this instance through RD1. We believe that the Rules do apply. In N.Y. State 779 (2004), which involved tax services that could be performed by CPAs and Enrolled Agents, we explained that, even when the services can be performed by both lawyers and non-lawyers (such as preparing tax returns), when the services are performed by a lawyer designated as such, the services constitute the practice of law and the lawyer, in performing them, is governed by the rules of lawyer conduct. Since it seems likely when the inquirer is marketing to intellectual property lawyers that the inquirer will inform the targets that the inquirer is a lawyer, we believe that the services RD1 will provide should be considered legal services and therefore subject to the Rules.

11. Rule 5.7(a) independently supports this conclusion. That Rule says that a lawyer or law firm "that provides service 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 provisions of both legal and nonlegal services." In N.Y. State 1135 ¶¶ 7-8 (2017), we said that, in determining distinctness, one should look to the substance of the service to be provided, the proposed recipient, and the degree of integration of the two services. Here, some of the clients to whom RD1 would provide tax credit services would also be clients in the inquirer's law firm. We are told that the same factors that would render something patentable (the inquirer's legal business) are the very factors that relate to whether a company may receive a tax credit for the same thing. When a lawyer provides both legal services (patent eligibility) and non-legal services (tax credit eligibility) based upon the same operative facts and criteria, the two services are necessarily integrated and are therefore not distinct within the meaning of Rule 5.7(a). See also N.Y. State 1015 ¶ 14 (2014) (legal and nonlegal services provided in the same matter are not distinct). As a result, the provisions of the Rules apply to the nonlegal services.

12. Prominent among these is Rule 7.2, which prohibits a lawyer from compensating a person to recommend or obtain employment of a client, with certain exceptions. Rule 7.2 provides:

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

13. Thus, Rule 7.2 prohibits the payment of referral fees for the referral of business to RD1, unless one of two exceptions applies: (a) the existence of a contractual relationship permissible under Rule 5.8, or (b) the referral fees comply with the provisions of Rule 1.5(g). Here, the first exception is inapplicable because Rule 5.8 extends only to nonlegal services provided by professionals listed in Section 1205.3 of the Joint Appellate Division Rules, none of which includes a business like RD1, and, in any event, Rule 5.8(a)(2) bans a lawyer from giving any monetary benefit to the non-legal professional service firm for a referral. The second exception does not apply because Rule 1.5(g) permits a lawyer to divide a fee for legal services with another lawyer not associated the same law firm only when either (a) the division is in proportion to the services performed by each, or (b) by a writing given to the client, each lawyer assumes joint responsibility for the representation – conditions not contemplated in the inquirer's proposal.

14. Accordingly, because Rule 7.2 applies to the lawyer's conduct through RD1, the inquirer may not pay referral fees to lawyers who refer clients to RD1.

Non-Lawyer-Owned Tax Credit Firm

15. Lawyers occasionally refer a client to another service provider. Rule 5.8(c) says that its restrictions on multidisciplinary practice 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." This has differing implications depending on whether the lawyer is an employee or an outside consultant to RD2.

16. Whether or not the inquirer, as an employee of RD2, may accept a referral fee from RD2 for marketing services depends on the precise conduct in which the lawyer would be engaged. If the lawyer is engaged in purely marketing activities (for instance, drafting advertising copy), and not in the practice of law, then the referral fee would be permissible. Whether certain activities comprise the practice of law is a legal question regulated by, among other things, criminal statutes; legal questions are beyond our jurisdiction to resolve. If, however, the lawyer's marketing activities for RD2 would involve the lawyer in applying law to specific facts in order to identify targets for RD2's business, a very significant question could arise whether the conduct constitutes the practice of law when a lawyer is engaged in such conduct. In that event, the lawyer could not be employed by an entity owned by non-lawyers owing to statutes and rules barring the practice of law in or with entities that non-lawyers own. See N.Y. State Business Corporation Law § 1503 (non-lawyer may not own an interest in a professional services corporation authorized to practice law); N.Y. State Judiciary Law § 495 (corporation or voluntary association may not practice law except in certain instances inapplicable here); Rule 5.4(d) (a "lawyer shall not practice with or in the form of an entity authorized to practice law" if "a non-lawyer owns any interest therein").

17. If the lawyer is not an employee of RD2, then the lawyer would be able to receive a referral fee—even if the lawyer is engaged in the practice of law in making the referral—as long as the lawyer is not otherwise involved in or benefiting from the underlying transaction and the client gives informed consent to the lawyer's receipt of the fee under Rule 1.8(f). Rule 1.8(f) says:

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

18. We have held that a lawyer may accept a referral fee from a nonlegal service provider provided that the referring attorney is not benefiting financially from the underlying transaction and complies with Rule 1.8(f), or, if the referring attorney is involved in the underlying related transaction, the attorney (a) advises the client of the arrangement and (b) credits the client with the referral fee obtained. See N.Y. State 845 (2010); see also N.Y. State 667 (1994); N.Y. State 626 (1992); N.Y. State 576 (1986); N.Y. State 461 (1977). Recently in N.Y. State 1086 ¶¶ 15-16 (2016) we again visited the question of referral fees from a third-party service provider. In that case, we stated that the attorney may not accept the referral fee from a third-party investment firm as the money to be invested arose from the engagement in which the lawyer represented the client. In contrast, in N.Y. State 981 ¶¶ 4-5 (2013), we said that a referral fee was not prohibited when the service is not related to the lawyer's legal services and the lawyer makes no recommendation to use the service, which is not the case here.

CONCLUSION

19. A lawyer who forms an R&D tax credit firm may not pay referral fees to other lawyers unless the lawyer or his law firm could pay such referral fees under Rule 1.5(g) or Rule 7.2, which does not appear to be the case here because, among other things, the payment would be a referral and not in proportion to the work done and the referring lawyers would not be assuming joint responsibility for the matter. Assuming that referring business to an R&D tax credit company constitutes the practice of law when conducted by a lawyer, the lawyer may not do so as an employee of a business owned by a non-lawyer. If the lawyer is not employed by the tax credit business, a lawyer who is not involved in the transaction may receive a referral fee from such business if the lawyer obtains informed consent from the client and satisfies the other conditions of Rule 1.8(f). If the lawyer is involved in the underlying transaction, then the lawyer would need to advise the client of the arrangement and credit the client with the referral fee obtained.

[1-18]

Opinion 1163 (03/11/19)

Topic: Missing client: Lawyer's duty when unable to locate client

Digest: A lawyer represented a defendant who later defaulted in making payments under a settlement agreement, who cannot be now located by the lawyer, and who is facing a motion before a court based on the failure to make such payments, may inform the court that the lawyer no longer represents the defendant if the prior representation ended and the prior action before the court had ended. If the representation of the client had not concluded or the prior matter before the court had not been closed, the lawyer will have to seek permission from the court to withdraw from the representation, after using reasonable efforts to locate the client.

Rules: 1.6, 1.16

FACTS

1. The inquirer, who now practices primarily in Colorado, previously focused a law practice in New York, where the inquirer remains admitted and still maintains an office. When practicing mainly in New York, the inquirer frequently represented defendants in breach of contract and debt cases. In the event of a settlement of one of those cases, the settlement agreement would often provide for the clients to make payments over time. On occasion, the parties would file a stipulation of discontinuance upon execution of the settlement agreement; on other occasions, the settlement agreement contemplated that a stipulation of discontinuance would be filed upon the final payment by the inquiring lawyer's client. In each event, on execution of the settlement agreement, the inquiring lawyer would provide the client with the payment instructions in writing and inform the client that the representation was concluded.

2. Recently, the inquiring lawyer received an email from plaintiff's counsel in a matter in which the inquirer represented defendant. Plaintiff's lawyer asserts that defendant has defaulted on making payments under the settlement agreement and, consequently, plans to file a motion for summary judgment. Upon hearing from plaintiff's counsel, the inquiring lawyer attempted to contact defendant by email and telephone but has been unable to reach the person. Although the inquiring lawyer believes that the representation of the defendant concluded when the matter was settled, the inquirer is concerned the court may take a different view.

QUESTIONS

3. The inquirer asks two questions:

a) May the inquiring lawyer tell plaintiff's counsel that the inquirer no longer represents defendant?

b) If plaintiff's counsel files a motion in court, does the inquiring lawyer have to respond to the motion, or may the inquirer instead seek to be relieved as attorney for defendant?

OPINION

4. The answer to the first question is yes: No ethical rule prohibits the inquiring lawyer from informing plaintiff's lawyer that, on the inquirer's view, the inquirer no longer represents defendant. This, however, does not solve the inquirer's difficulty, because either plaintiff's lawyer may find the answer unacceptable or, more problematic, a court may. If plaintiff's lawyer files a summary judgment motion with the court, the inquiring lawyer will still need to decide whether a duty exists to respond to the motion on behalf of defendant.

5. That the inquiring lawyer sent defendant a writing terminating the representation is of some consequence: We have noted that, in some circumstances, a termination letter may be dispositive on the issue whether the attorney-client relationship has ended. N.Y. State 1008 (2014). We cautioned there, however, that whether the attorney-client relationship has ended "depends in part on questions of law beyond our jurisdiction," and so, in that opinion, we did not opine on whether the lawyer's representation of the client had concluded. *Id*. ¶¶ 9-10; see New York Rules of Professional Conduct (the "Rules"), Preamble ¶ 9 ("principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

6. The Rules offer some guidance on how the inquirer ought to proceed, the outcome of which depends on the terms of the settlement agreement and the import of those terms for the status of the matter in court. If both the representation of the client and the matter before the court have concluded, and the plaintiff's lawyer then takes action concerning the unpaid settlement amount against the former client, then the lawyer should inform the court that the lawyer no longer represents the defendant and is not otherwise obligated to respond on behalf of the defendant.

7. If, however, the representation has not concluded, or the matter before the court remains open, the lawyer must comply with Rule 1.16, which governs withdrawal from representation of a client. Rule 1.16(c) outlines when a lawyer may withdraw from a representation, including, in Rule 1.16(c)(7), when "the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively," or in Rule 1.16(c)(12), when "the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of good cause for withdrawal." In most representations, "effective representation requires meaningful communication be-

tween a lawyer and a client." N.Y. State 1144 ¶ 10 (2018). In our view, "good cause" exists for the lawyer to seek to withdraw from representation if the lawyer cannot locate the client after taking reasonable steps to do so. See, e.g., N.Y. State 787 (2005) (discussing reasonable steps a lawyer should consider when attempting to locate a missing client).

8. Rule 1.16(d) qualifies permissive withdrawal when a matter is pending before a tribunal the rules of which require the tribunal's permission to withdraw. In that circumstance, the lawyer must seek the tribunal's permission and, if the tribunal declines, "a lawyer shall continue representation notwithstanding good cause for terminating the representation."

9. In applying for withdrawal, a lawyer remains bound by Rule 1.6 governing the nondisclosure of a client's confidential information, which includes information learned during the course of the representation that is subject to the attorney-client privilege, is "likely to be embarrassing or detrimental to the client if disclosed," or "that the client has requested be kept confidential." Privilege issues are questions of law beyond our purview, but we recognize that a communication is a necessary predicate to its assertion, as is a request for confidentiality. There being no communication here, the inquirer must resolve whether disclosure of the client's unavailability would likely "be embarrassing or detrimental to the client if disclosed." In N.Y. State 1057 (2015), we discussed disclosure in the context of a motion to withdraw as counsel. There, we noted that a lawyer may always advise a court that "professional considerations require termination of the representation." Id. ¶ 12; Rule 1.16, Cmt. [3]. If the court insists on more, then Rule 1.6(b)(6) allows a lawyer to disclose confidential information if ordered to do so by a court.

CONCLUSION

10. When unable to locate a client once represented in a settled action, a lawyer's duty to respond to a claimed default under the settlement agreement depends on whether the representation and action are concluded or not. If the representation and matter are over, the lawyer may inform the court that the lawyer no longer represents the client. If instead the representation of the client had not concluded or the prior matter before the court had not been closed, then, following reasonable efforts to locate the client, the lawyer may seek permission from the court to withdraw from the representation, sensitive to the lawyer's ongoing duty to maintain a client's confidential information lawyer's ongoing duty to maintain a client's confidential information.

[15-18]

Opinion 1164 (03/21/19)

Topic: Returning client files without keeping a copy; conditions on compliance.

Digest: A lawyer has an interest in maintaining a copy of client-owned documents provided to the lawyer during a representation, but in certain instances that interest must yield to a client's legitimate request to destroy those copies. To protect the lawyer's exposure to later suit, the lawyer may condition compliance on the client's request on receipt of certain protections that are reasonable in light of all the facts and circumstances attending the client's request.

Rules: 1.6, 1.15, 1.16

FACTS

1. The inquirer is a New York lawyer who represented a client in an intellectual property matter adverse to the client's former employer. During the course of the representation, the client provided the inquirer with a large amount of data in digital form relating to the dispute between the client and the client's erstwhile employer (though the inquirer does not know the provenance of all the data). In the dispute, the latter alleged that the former had misappropriated proprietary information, some of which is embodied in the data given to the inquirer. Subsequently, the client decided to retain different counsel to handle the dispute, thereby ending the inquirer's attorney-client relationship with the client. The inquirer delivered to successor counsel all the materials comprising the client's file, doing so in the manner that successor counsel requested, but the inquirer retained one or more back-up copies of the data provided by the client during the representation.

2. The inquirer's former client thereafter settled the dispute in a confidential agreement, one provision of which requires the former client to retrieve and destroy all data comprising the subject of the dispute. The inquirer is not a party to the settlement agreement, but the inquirer's former client has requested the inquirer to destroy (and certify to the destruction of) the data in question. The inquirer is concerned that, in complying with this request, the inquirer would be without information that may be needed in the event of a subsequent lawsuit brought either by the former client or by the former client's onetime employer, who claims ownership of the data at issue. To protect against this prospect, the inquirer seeks guidance on the extent to which a lawyer may condition a request to destroy a file on receipt of a release and indemnity – from each party to the settlement agreement – and insistence on maintaining an index of the files destroyed in keeping with the former client's request.

QUESTIONS

3. The inquirer poses two questions:

(a) Does an attorney have an obligation to delete back-up copies of files or data provided by a client after the client has terminated the legal engagement?

(b) May the attorney condition compliance with such a request on obtaining a release and indemnification (including advance of attorneys' fees and expenses), as well as creating an inventory of file names, sizes, and dates to prove what files were or were not in the attorney's possession?

OPINION

4. Rule 1.15(c)(4) of the N.Y. Rules of Professional Conduct (the "Rules") says that a lawyer shall "promptly . . . deliver to the client . . . as requested by the client . . . properties in possession of the lawyer that the client . . . is entitled to receive." Rule 1.16(e) provides that, "upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client," including, among other things, "delivering to the client all papers and property to which the client is entitled." The Rules offer no guidance on which "papers and property" the client "is entitled to receive." Rather, the question of whether documents (including electronic versions) belong to the client is "generally a question of law, not ethics." N.Y. State 766 (1993). Which documents may belong to the client is "not always easy to ascertain" and may entail "a complex issue of both fact and law." N.Y. State 623 (1991). See generally *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 91 N.Y.2d. 30, 37 (1997). Our Committee does not resolve issues of law, and so for our purposes we assume, without deciding, that the data in question belongs to the client.

5. In N.Y. State 780 (2004), we addressed whether a lawyer may retain a copy of documents belonging to a client despite the client's objection. There we said that "there can be little doubt" that a lawyer "has an interest in the file that would permit the lawyer to retain copies of file documents." Citing opinions from other jurisdictions, we concluded that, as a "general rule," a lawyer may retain "copies of the file at the lawyer's expense," notwithstanding a client's objection. See Rule 1.6(c)(5)(i) (lawyer may reveal or use client confidential information to the extent that the lawyer reasonably believes necessary to defend the lawyer against an accusation of wrongful conduct); Restatement (Third) of the Law Governing Lawyers § 46, Cmt. d (Am. Law Inst. 1998) (a "lawyer may keep copies of documents when furnished to a client.") In recognition of this interest, we said in N.Y. State 780, a lawyer may insist on a release from a client as a condition of forgoing the lawyer's interest in maintaining a copy.

6. This interest is not unqualified. The Restatement notes that "extraordinary circumstances" may exist in which the very nature of the lawyer's assignment overrides the lawyer's interest in maintaining a copy; as an example, the Restatement cites "when a client retained the lawyer to recover and destroy a confidential letter." Restatement § 46, Cmt. d. Our N.Y. State 780 took a somewhat less narrow view of the possible exceptions to the "general rule" that a lawyer may always maintain a copy of a client file; without attempting to anticipate all conceivable circumstances, we said there that exceptions might include "where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." These qualifications require a fact-intensive inquiry balancing factors favoring a lawyer's interest in maintaining a copy of a client file and factors favoring a client's interest in destruction of that copy. This balance determines the extent to which the lawyer may condition compliance with a client's demand for destruction of a file on protections for the lawyer's benefit.

7. No exhaustive catalog of these factors is practicable, but certain common considerations are likely to recur, among them the strength of the client's claim to ownership; the sensitivity of the documents; the centrality of their sensitivity to the object of the representation; the legitimacy of the client's request for destruction; the extent to which the documents slated for destruction comprise the client file (i.e., one document versus the entire file); the difficulty associated with destruction of the documents; the degree to which the lawyer is subject to a meaningful risk of later liability; and the availability and feasibility of provisions protective of the lawyer's interests. In balancing these and other factors, the weight to be given each depends on the facts and circumstances, with the overriding concern that a lawyer's demand for protections for the lawyer's benefit must be reasonable in light of those facts and circumstances.

8. Applying these considerations to the current inquiry, we believe that it would be reasonable for the lawyer to request a release and a simple hold-harmless agreement from the lawyer's former client in exchange for the lawyer's agreement to destroy the documents at issue. Because the documents originated with the client (no matter their original provenance), the client's claim to ownership is strong. The nature of the dispute—that the documents embody proprietary information—reflects their sensitivity, which appears to be core to the nature of the lawyer's initial engagement, and the settlement agreement supplies a legitimate basis for the client's request. The documents are in an electronic format, so we detect no undue difficulty in achieving the client's aim. If the lawyer destroys the documents as requested, the risk of later liability is correspondingly diminished. Maintaining an inventory of the documents, with which we see no problem, affords the inquirer an additional layer of protection from a subsequent claim. Merely asking for advance payment of legal fees and expenses in the event of suit, or requesting a release and indemnity from the non-client former employer,

may not alone violate the Rules, but we are dubious that the lawyer may insist on these conditions before complying with the former client's request that the documents be destroyed and that the lawyer certify to their destruction.

CONCLUSION

9. Compliance with the terms of a settlement reached by a former client provides a legitimate reason to comply with that former client's request to destroy client-owned documents in a lawyer's possession. The lawyer may condition deletion of the file on obtaining a release and a simple hold-harmless clause from the former client, and may maintain an inventory of the file names, sizes, and dates for data supplied by the former client to the lawyer during the representation and maintained in the lawyer's files.

[18-18]

Opinion 1165 (05/07/19)

Topic: Unpaid client fees

Digest: Lawyer may not remove amounts from client's trust account if in dispute. Lawyer may only charge reasonable interest if provided for in the engagement letter.

Rules: 1.15(b)(4)

FACTS

1. The inquirer, a New York lawyer, was retained nine years ago to represent a client in numerous litigations arising out of an estate matter. The client is executor of the estate and sole beneficiary of various annuity contracts of the decedent that the Surrogate's Court ruled, in response to interpleader litigation, were the client's property and not part of the estate. A sum of money was received into the inquirer's escrow account while the interpleader litigation regarding the annuity contracts was pending. The Surrogate's Court has now authorized the distribution of those funds to inquirer's client.

2. The inquirer had previously sent the client invoices for legal fees and expenses while the litigation was ongoing, but the inquirer agreed at the client's request to defer payment until the end of the litigation. The client raised no objection to the invoices at the time. The principal balance of the bill is now an amount greater than $50,000, which the inquirer observes is the ceiling set forth for mandatory fee arbitration under 22 N.Y.C.R.R. § 137.1. The client refuses to pay the bill, demanding that the inquirer cut the bill by approximately 20%. The inquirer claims that the inquirer has repeatedly and voluntarily reduced the amount of the bill over the years, and has recently evinced a willingness further to negotiate, but now wants the client to pay the outstanding amount. The inquirer asserts that a "written formal fee agreement" exists. The inquirer wants to withhold payment of the escrowed funds in an amount equal to the fees the inquirer says are due and owing, as well interest on those fees and an amount to cover fees and expenses should litigation arise over the amount the inquirer says is due and owing, which the inquirer proposes to seek by litigation after what the inquirer asserts is some statute of limitations.

QUESTIONS

3. May the inquirer remove from the trust account the sums equal to what the inquirer believes are due and owing, and, if so, may this amount include payment of interest due on the unpaid bill?

4. May the inquirer also withhold from distribution to the client an amount the inquirer depicts as a "cushion" to cover fees and expenses in the event that the fee dispute results in litigation?

OPINION

5. The answer to each question is no.

6. Rule 1.15(b)(4) of the New York Rules of Professional Conduct (the "Rules") states that a lawyer may withdraw funds from a trust account "when due, unless the right of the lawyer to receive it is disputed by the client . . . in which event the disputed portion shall not be withdrawn until the dispute is finally resolved." The client's insistence on the discount is a dispute for purposes of the Rule and so the inquirer may retain but must not remove from the trust account those sums that the client questions until the dispute is resolved, whether by settlement or through some dispute resolution process. Insofar as the client concedes that some of the amounts in the account are properly the lawyer's property, the lawyer may distribute the same to the lawyer's account; to the extent the client disputes any portion of those sums, the lawyer must retain them in escrow.

7. Absent a prior written agreement, the lawyer may not unilaterally charge interest on a delinquent client account. "[I]n order to charge interest on delinquent accounts, a lawyer must advise the client prior to performing services of the fact that interest will be so charged, the definition (time period) of delinquency, and must obtain the client's consent thereto." N.Y. State 399 (1975). "A law firm may seek its clients' agreement to modify its retainer agreement with the clients during the pendency of a current matter to secure payment, by confessions of judgment and collateral mortgages, of fully earned but unpaid legal fees and expenses in an amount on which the parties agree, if the law firm complies with the rules governing business transactions with clients and is mindful of ongo-

ing obligations to avoid general conflicts of interest." N.Y. State 1139 (2017). *See* N.Y. State 910 (2012) ("A lawyer may request a client to amend a retainer agreement. Whether such an amendment must meet the requirements for fee agreements under Rule 1.5 or for business transactions between the lawyer and client under Rule 1.8(i) depends on the circumstances in which the amendment is requested and the nature of the amendment."); N.Y. State 783 (2005) ("If a client deliberately disregards an agreement to pay legal fees and expenses, and the letter of engagement or retainer agreement is silent as to interest charges on the delinquent accounts, a lawyer may condition continued representation on the client's agreement to prospectively pay interest on any past balance due for services previously rendered or to be rendered in the future"). Accordingly, absent a prior written agreement, the inquirer may not charge interest on the amounts the inquirer believes are due and owing.

8. Nor may the inquirer decide to withhold from the escrowed funds an amount that the inquirer deems apt to indemnify the inquirer for fees and expenses that the inquirer may incur in the event that litigation arises from the dispute with the client over the appropriate amount of fees for services rendered. In our view, the inquirer is ethically obligated to pay to the client those sums that are not part of the fee dispute—that is, the amount the client agrees the lawyer is due, without reference to interest or other holdbacks unless the client explicitly agrees. See Rule 1.15(c)(4) (lawyer must promptly pay to the client as requested by the client funds the client is entitled to receive). Absent some agreement, no authority exists for a lawyer to use disputed funds for self-help in the event that a dispute arises between a lawyer and a client over legal fees.

CONCLUSION

9. A lawyer may not remove any amounts from the client's trust account if the client disputes the lawyer's entitlement to them. The lawyer may charge only a reasonable rate of interest on any unpaid bills if provided for in the written fee agreement.

[07-19]

Opinion 1166 (05/07/19)

Topic: Non-legal business owned by lawyer in intellectual property: Choice of law, fee-sharing, and supervisory duties

Digest: A New York lawyer who operates both a law firm and a consulting firm on intellectual property matters in multiple jurisdictions must determine the applicable ethical rules on a matter-by-matter basis, is not engaged in work distinct from the practice of law, may associate and share fees with a non-U.S. lawyer if certain criteria are met, may not share ownership or share fees with a person not thus qualified as a lawyer, and may not delegate the duty to supervise the work of a non-lawyer.

Rules: 5.3(a), 5.3(b), 5.4(a), 5.5, 5.7(a), 8.5(a) & (b).

FACTS

1. The inquirer is a New York attorney who is also admitted in other U.S. jurisdictions and before the U. S. Patent and Trademark Office (USPTO). The inquirer is the sole owner of a law firm, through which the inquirer practices intellectual property law, and also the lone shareholder of a corporation that provides business and consulting services on issues relating to intellectual property. The two entities have separate, but linked, websites and the inquirer uses a different email address for each entity. The mailing address for both entities is the inquirer's home in New York, where the majority of the work is performed. The inquirer also provides services to clients elsewhere in the U.S. and in countries around the world.

2. The inquirer provides intellectual property-related services through the entity the inquirer deems appropriate. For services that the inquirer deems to be "clearly not the practice of law (e.g., the brokering of patents)," the inquirer would engage clients through the consulting firm and provides "an appropriate disclaimer that [the] services are NOT the practice of law." For services that the inquirer deems to "clearly [constitute] the practice of law or where there is some potential confusion," the inquirer would engage clients through the law firm and treats the matter as a legal matter. The inquirer notes that one need not be a lawyer to practice before the USPTO.

3. The services the inquirer proposes to render include, among others, assessing the validity and value of intellectual property, whether registered (e.g., patents) or unregistered (e.g., trade secrets); advising on whether property should be registered or otherwise classified; drafting and reviewing business arrangements between the client and third parties; counseling on how best to exploit and protect the intellectual property; outlining

best practices for policies governing issues such as human resources, cyber-security, risk management, contracts with manufacturers and suppliers, insurance, and corporate governance; advising on strategies to raise capital for the client's business and to sell or otherwise transfer the intellectual property; and representing the client in pursuing registrations of intellectual property, issuing opinions, negotiating contracts with third parties in jurisdictions around the globe, and managing other counsel in litigation, arbitration or regulatory proceedings on behalf of the client.

4. The inquirer is in the process of engaging four individuals: (a) a U.S. lawyer with a profile similar to the inquirer's; (b) a U.S. patent agent (who is not and need not be a lawyer); (c) a person certified to practice law in Europe but not admitted to practice in any U.S. jurisdiction; and (d) a technologist who is neither a lawyer nor a patent agent. These individuals would like to be partners or shareholders in the entities the inquirer owns, or at least employees who not only receive fixed salaries, but also share in the profits and fees generated by the entities.

QUESTIONS

5. The inquirer poses several questions, two of which ask whether the non-lawyers the inquirer plans to hire would be engaged in the unauthorized practice of law if they perform any of the above services without the direct supervision of a properly admitted firm lawyer in the relevant jurisdiction. This Committee does not provide opinions on the unauthorized practice of law. As Comment [2] to Rule 5.5 states: "The definition of the 'practice of law' is established by law and varies from one jurisdiction to another." Thus, determining what constitutes the practice of law is a question of law that is outside our jurisdiction. N.Y. State 1093 ¶ 14 (2016); N.Y. State 1082 ¶ 7 (2016). We turn, therefore, to the inquirer's remaining questions, and the issues thereby raised, which are:

(a) Since the inquirer practices in several jurisdictions, which ethical rules will apply?

(b) Do the New York Rules of Professional Conduct (the "Rules") apply to the activities of the consulting firm?

(c) Is the non-U.S. lawyer a non-lawyer for purposes of the application of Rule 5.4 which prohibits sharing legal fees with a non-lawyer?

(d) May the inquirer share fees from the legal services or non-legal services with the non-lawyers the inquirer hires?

(e) If a non-lawyer is involved in any of the activities above that are deemed the practice of law, and is merely an employee of either the law firm or the consulting firm, what degree of lawyer supervision is required? May the lawyer be from a third party law firm or be an in house counsel of the client?

OPINION

Disciplinary Authority and Choice of Law

6. The inquirer is admitted in New York as well as several other U.S. jurisdictions and before the USPTO. The inquirer provides services to clients across the U.S. and around the world, but most of the work is physically performed in New York. Being admitted in New York, the inquirer "is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs." Rule 8.5(a). Being admitted in other U.S. jurisdictions, the inquirer may also be "subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct." *Id.*

7. Rule 8.5(a) is jurisdictional; it tells us the forum authorized to exercise authority over the lawyer. That New York may have the power to discipline a lawyer does not mean that the Rules will apply in evaluating the lawyer's compliance with ethical standards. N.Y. State 1058 ¶ 6 (2015). Rather, the rules of conduct that a New York disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b), which provides:

In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

8. In addition, a practitioner, including a lawyer, who handles matters before the USPTO may need to adhere to the Rules of Professional Conduct that the USPTO adopted, effective May 3, 2013, and "that govern a wide range of professional conduct by lawyers and others practicing before the USPTO. See 37 C.F.R. §§ 11.101 et seq." N.Y. State 1027 ¶ 18 n. 5 (2014). The USPTO, like New York, followed the format of the ABA Model Rules of Professional Conduct, but with provisions tailored to the USPTO's jurisdiction; among other things, the USPTO

defines "tribunal" to include the Office itself, 37 C.F.R. § 11.101. Whether the USPTO Rules preempt and therefore take precedence over the New York Rules is, however, a question of law beyond our jurisdiction to resolve. N.Y. State 1027 ¶ 18 n. 7.

9. N.Y. State 1027 is also instructive on identifying the place where a lawyer "principally practices" for purposes of Rule 8.5(b)(2)(ii). There we named factors that could bear on that determination, including (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; and (d) the activities the lawyer performs in each jurisdiction (e.g., legal work for clients vs. administrative work for the law firm). We added that, in light of "the increase in law practice over the Internet, and the corresponding decrease in the importance of the lawyer's physical location, the jurisdiction in which a lawyer 'principally practices' for purposes of Rule 8.5(b)(2)(ii) is becoming less certain, and we should consider a lawyer's significant contacts with all jurisdictions, not only the jurisdiction in which the lawyer is most often physically present." *Id.* ¶ 14.

10. No matter where the inquirer "principally practices," if a lawyer's "conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." Rule 8.5(b)(2)(ii). Determinations under Rule 8.5(b) are necessarily fact specific. Such are the multiplicity of the inquirer's proposed activities, and the locations where the inquirer expects to engage in them, that we are in no position to guide the inquirer beyond saying that the lawyer should assess the potential choices of ethics rules with respect to each discrete activity in which the lawyer is involved. For now, we assume that the applicable Rules are those in New York.

Application of the Rules to the Consulting Firm

11. This Committee has issued a number of opinions on the application of the Rules to non-legal services provided by a lawyer who provides both legal and non-legal services to clients. See, e.g., N.Y. State 1162 (2019) (patent law and consulting on research and development tax credits); N.Y. State 1157 (2018) (legal and engineering services); N.Y. State 1155 (2018) (family law and financial planning services); N.Y. State 1135 (2017) (state and local tax services); N.Y. State 1026 (2014) (mediation in domestic relations matters); N.Y. State 938 (2012) (law firm owns firm that provides services with respect to social security disability insurance claims). One of the major issues discussed in these opinions is whether the Rules apply to non-legal services provided to clients, including the rules on advertising and solicitation and the rules on payment of referral fees and profit-sharing. Rule 5.7 provides:

> (a) With respect to lawyers or law firms providing non-legal services to clients or other persons:
>
> (1) A lawyer or law firm that provides non-legal 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 non-legal services.
>
> (2) A lawyer or law firm that provides non-legal 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 non-legal services if the person receiving the services could reasonably believe that the non-legal 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 non-legal services to a person is subject to these Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal 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 non-legal 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 non-legal services, or if the interest of the lawyer or law firm in the entity providing non-legal services is de minimis.
>
> (b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing non-legal services to a person shall not permit any non-lawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and Rule 1.6(c) with respect to the confidential information of a client receiving legal services.
>
> (c) For purposes of this Rule, "non-legal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a non-lawyer.

12. Under Rule 5.7(a)(1), whether non-legal services provided to a person by a lawyer or law firm are subject

to the Rules depends upon whether the non-legal services are distinct from legal services being provided to that person. In N.Y. State 1135 ¶¶ 7-8 (2017), we said that, in determining distinctness, one should look to the substance of the service to be provided, the proposed recipient and the degree of integration of the two services. That the two different entities provide the services is not sufficient; if the services are not distinct, and a single person receives both services, the recipient is presumed to believe that the attorney-client relationship applies to both. Non-legal services that are not distinct from legal services are always subject to the Rules, no matter what disclaimer a lawyer may provide about the non-legal services. N.Y. State 1155 ¶ 13.

13. In our opinion, the services that the inquirer proposes to render through the law firm and the consulting firm are not distinct. The vast majority of the services provided by the inquirer involve the protection of intellectual property, whether intellectual property is subject to registration, and the validity and infringement of registered intellectual property. They involve legal determinations and advice. Users of the services are likely to view the services as part of a continuum of legal services. The fact that the USPTO authorizes certain of the services to be performed by persons who are not lawyers is irrelevant. Consequently, under Rule 5.7(a)(1), the activities of the consulting firm will be subject to the Rules. See N.Y. State 1162 ¶ 14 (Rules apply when lawyer provides both legal patent advice non-legal tax credit services); N.Y. State 1155 ¶ 15 (Rules apply when lawyer provides both legal estate planning and non-legal financial planning affecting estate); N.Y. State 1157 ¶ 11 (Rules inapplicable when lawyer provides engineering services); N.Y. State 938 ¶ 10 (Rules inapplicable to lawyer-owned business processing disability claims when business employed no lawyers, operated from separate facility, and disclaimed legal services).

Sharing Legal Fees with a Non-U.S. Lawyer Not Admitted to Practice in a U.S. Jurisdiction

14. The inquirer next asks whether the inquirer may share legal fees with a person who is certified to practice law in a civil law country in Europe, but does not have a license to practice law in any of the United States. We are mindful that it is not uncommon for law firms today to operate around the world using various juridical entities and, in some instances, sharing legal fees with persons qualified to practice law in an extraterritorial jurisdiction but not in any of the United States. In the past, we have endorsed this practice – see, e.g., N.Y. State 1072 (2015) (Japanese benrishi); N.Y. State 806 (2007) (Italian law firm); N.Y. State 658 (1993) (Swedish law firm); N.Y. State 646 (1993) (Japanese bengoshi); N.Y. State 542 (1982) (U.K. solicitors) – with two caveats. First, the arrangement must comply with the substantive law of New York and with the ethical and legal codes of the non-U.S. jurisdiction. Second, the New York lawyer must make an independent evaluation that the educational requirements for the non-U.S. lawyer are equivalent to those for a New York lawyer, and that nothing in the arrangement would compromise the New York lawyer's ability to uphold the ethical requirements of this State, including those requiring the exercise of independent professional judgment and protecting the confidentiality of attorney-client communications. If the inquirer is satisfied that the non-U.S. lawyer here would meet these requirements, then the inquirer may share legal fees with that person.

Sharing Ownership of and Fees Generated by a Non-Distinct Services Firm

15. The same is not true of a person who fails to qualify as a lawyer under the foregoing criteria, including in particular the inquirer's proposed retention of a non-lawyer patent agent and a technologist. Having concluded that the services the inquirer proposes to render in the consulting firm are not distinct from those to be rendered through the law firm, the full panoply of the Rules applies. Thus we believe that Rule 5.4(b) prohibits a lawyer from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. Although the inquirer maintains that the consulting firm will not engage in the practice of law, we have often remarked that there are some activities that would not constitute the unauthorized practice of law when engaged in by a non-lawyer that would still constitute the practice of law when engaged in by a lawyer. See, e.g., N.Y. State 779 (2004) (even though tax services can be performed by both lawyers and non-lawyers, when the services are performed by a lawyer designated as such they constitute the practice of law and the lawyer, in performing them, is governed by the rules of lawyer conduct); N.Y. State 662 (1994) (if activity is the practice of law when performed by lawyer, lawyer does not escape ethical requirements by "announcing he is to be regarded as a layman" for that particular purpose).

16. Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a non-lawyer, with limited exceptions. A lawyer is prohibited from sharing legal fees from either the law firm or the consulting firm with the non-lawyer employees unless an exception to Rule 5.4(a) applies. A significant exception is that Rule 5.4(a)(3) permits a lawyer to "compensate a non-lawyer employee . . . based in whole or in part on a profit sharing plan." Comment [1B] explains:

Paragraph (a)(3) permits limited fee sharing with a non-lawyer employee, where the employee's compensation or retirement plan is based in whole or in part on a profit-sharing arrangement. Such sharing of profits with a non-lawyer employee must be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case.

17. For example, in N.Y. State 887 (2011), we said that a lawyer or law firm may have a profit-sharing plan that pays bonus compensation to a non-lawyer marketer based on the overall profits of the firm or on a percentage of the employee's base salary, but that the bonus compensation could not be based on referrals of particular matters or based on the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts, or on the fees paid by clients that resulted from such marketing. The same is true here.

Supervision of Non-Lawyers at Inquirer's Firms

18. The inquirer's final question entails the degree to which lawyer supervision is required over the non-lawyer employees. The Rules recognize that lawyers will frequently require the assistance of non-lawyers to provide legal advice in a competent fashion. See Rule 5.5, Cmt. [1] (noting that the Unauthorized Practice of Law Rule "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."). Rule 5.3 provides in its opening subparagraph that "[a] law firm shall ensure that the work of non-lawyers who work for the firm is adequately supervised, as appropriate." See N.Y. State 774 (2004) (addressing supervisory duties of firm hiring paralegal or other non-lawyer). Rule 5.3 dictates that "[a] lawyer with direct supervisory authority over a non-lawyer shall adequately supervise the work of the non-lawyer, as appropriate." The Rules thereby impose upon both law firms and individual lawyers a duty of direct supervisory authority over a non-lawyer. This is a rule of reason: Rule 5.3(a) provides that the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

19. The rule requiring a law firm and a lawyer with direct supervisory authority over a non-lawyer to adequately supervise the work of a non-lawyer serves an important goal. It provides "reasonable assurance that the conduct of all non-lawyers employed by or retained by or associated with the law firm, including non-lawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and firm." Rule 5.3(a), Cmt. [2]; *see Matter of Galasso*, 19 N.Y.3d 688, 695 (2012) (observing that attorneys are not prohibited from delegating tasks to firm employees, but also stressing that any delegation must be accompanied by an appropriate degree of oversight by a lawyer). The duty of supervision is supplemented by Rule 5.3(b), which imposes responsibility on a lawyer for the conduct of a non-lawyer in certain circumstances. Accordingly, the inquirer must assure that the work of the non-lawyers is adequately supervised, as appropriate, in accordance with the standards outlined above.

20. The inquirer asks whether the necessary degree of supervision must be achieved by a supervising lawyer from within the law firm or, alternatively, may be satisfied by a lawyer from a third party law firm or by an in house counsel of the law firm's client. We have opined that certain fundamental obligations imposed by the Rules upon law firms and lawyers cannot be delegated to another. See N.Y. State 693 (1997) ("Attorneys must be aware that responsibility for client funds may not be delegated"). A law firm's responsibility for developing and implementing systems to ensure professional and ethical practice, which would include adequate supervision of non-lawyers, may be delegated to a management committee or similar group within the firm. See N.Y. State 762 (2003); Rule 5.1, Cmt. [3]. Given that the duty of supervision over non-lawyers housed in Rule 5.3 is fundamental to the ethical practice of law, we conclude that it may not be delegated to a lawyer not associated with the inquirer's firm. See N.Y. State 807, ¶¶ 2-3 (discussing factors to consider in determining if a lawyer is "associated" with law firm). Therefore, the inquirer cannot rely on a third-party law firm or an in house counsel of a client to comply with Rule 5.3's duty of supervision of non-lawyers who work for his law firm.

CONCLUSION

21. A lawyer admitted in New York State and other jurisdictions is subject to the disciplinary authority of New York State regardless of where the lawyer's conduct occurs, and may be subject to the disciplinary authority of another jurisdiction. The rules of conduct that a New York disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b). Whether a lawyer's non-legal consulting firm is subject to the Rules depends on whether the services it provides are distinct from legal services. If the non-legal services are not distinct, as in the inquiry presented, then a disclaimer that they are legal services is not effective. Whether a non-U.S. lawyer is a "lawyer" for purposes of the Rules depends on whether the admitting jurisdiction's educational requirements are equivalent to those for a New York lawyer and whether New York's ethical requirements will be upheld. A New York lawyer may not share fees with a non-lawyer employee except under a profit-sharing plan permitted by Rule 5.4. Reliance on a third-party law firm or in-house counsel of a client to supervise the lawyer's employees does not relieve the lawyer of supervisory responsibility under Rule 5.3.

[21-18]

Opinion 1167 (05/09/19)

Topic: Law Firm Name: Use of multiple surnames

Digest: A lawyer who practices under the lawyer's full surname name may use a law firm name that omits a first name and includes only the lawyer's middle name and last name.

Rule: 7.5(b)

FACTS

1. The inquirer, a New York sole practitioner whose full legal name we will call "Charlotte Moretti Jones," is forming a new law firm and wants to know whether the firm may be called "Moretti Jones, PC." The inquirer recently changed the inquirer's surname to include the name of a spouse. Nevertheless, the inquirer's concern is that, because the inquirer's middle name sounds like a surname, the public may mistakenly conclude that Moretti and Jones are two different lawyers.

QUESTION

2. May a lawyer practice under a law firm name that includes only the lawyer's surname includes a name that is a common last name?

OPINION

3. Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules") provides, with certain narrow exceptions, that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm. " As we have often remarked, the purpose of this rule is to protect the public from being deceived about the identity or status of those who use the firm name. See, e.g., N.Y. State 1003 (2014).

4. In N.Y. State 740 (2001), the Committee opined that "[u]sing a name that is not the legal name of one or more partners or former partners in the law firm constitutes [the] use of a trade name" within the meaning of Rule 7.5(b). Applying this interpretation of the rule to the inquiry at issue, the Committee concluded that a lawyer could not insert the letter A before the firm name to insure favorable placement in the Yellow Pages.

5. The Committee has, however, determined that not all minor name variations violate Rule 7.5(b). Thus, in N.Y. State 1003 (2014), the Committee opined that the inquirer could use a firm name that omitted the lawyer's first name but contained the inquirer's full surname and the initials of two middle names without running afoul of Rule 7.5(b). The Committee concluded that such minimal variation is acceptable as long as the proposed firm name is not misleading about the identity of the lawyer practicing under such name.

6. Applying these principles to the current inquiry, we conclude that the inquirer's proposed firm name does not violate Rule 7.5(b). For purposes of the Rule, no material difference exists between using a firm name that is comprised of a middle name and a last name and using a firm name that is comprised of middle initials and a last name. The inquirer's concern that the public might conclude that the firm's name is the last name of an additional partner because it is happens to be a name that is commonly a last name is a concern too amorphous to affect our application of Rule 7.5(b). We live in a country (unlike some other countries) that does not impose blanket limitations on given names, and it is not uncommon for names that are more traditionally last names to be used as given names. In light of this facts, the public cannot reasonably assume that a particular name is a given name or a last name. Accordingly, we do not view the inquirer's proposed use of the firm name "Moretti Jones, PC" as "misleading" about the identity of the lawyer within the meaning of Rule 7.5(b).

7. We note the difference between this inquiry and the one we resolved in N.Y. State 1152 (2018). There, we concluded that the use of only a lawyer's first name as the name of the firm – as opposed to its use in advertising or branding – was impermissible. We reasoned that Rule 7.5(b) "embeds an understanding that a law firm's name consists of the surnames of lawyers who either practice there or once did." Id. ¶ 6. Here, by contrast, the inquirer's proposed firm name is the inquirer's actual surname, whether as a spousal name or a middle one coupled with an actual one.

CONCLUSION

8. A lawyer who practices under the lawyer's full surname may use a law firm name that includes only the lawyer's middle name and last name, without including the lawyer's first name.

[05-19]

Opinion 1168 (05/013/19)

Topic: Sale of law practice; Use of firm name after sale

Digest: A lawyer affiliated with firm wholly owned by another lawyer may purchase the firm consistent with Rule 1.17 and may use the name of the seller's firm provided that doing so is not misleading. The meaning of "retired" for purpose of such a sale is as set out in Rule 1.17.

Rules: 1.5(h), 1.17(a), 7.5(b), 7.5(c), 8.4(c) Overrules N.Y. State 148 (1970) and modifies N.Y. State 850 (2011).

FACTS

1. The inquirer is a New York lawyer affiliated with a firm wholly owned by another New York lawyer (here, "Owner"), which currently operates under the name of the [Owner] Group, P.L.L.C.. The firm has offices located in New York City metropolitan area. The Owner has decided to leave the firm, to cease practicing law there, and to move to a location in New York State distant from the metropolitan area, where the Owner intends to start a new practice. The inquirer wishes to purchase the Owner's law practice in the metropolitan area, and to continue to use the Owner's name in conducting the practice as [Owner] Group, P.L.L.C.

QUESTIONS

2. May a lawyer purchase another lawyer's wholly owned law practice, notwithstanding the seller's continuing in law practice?

3. May the buying lawyer continue to use the name of the selling lawyer's practice?

OPINION

4. Standards governing the sale of law practices are of comparatively recent origin. Before the 1996 adoption of DR 2-111 of the N.Y. Code of Professional Responsibility (the "Code") – the predecessor to Rule 1.17(a) of the New York Rules of Professional Conduct (the "Rules")— a lawyer in New York could not sell a law practice. See EC 4-6 (as in effect prior to 1996); N.Y. State 707 (1998). The theory, still reflected in Comment [1] to Rule 1.17, was that "[c]lients are not commodities that can be purchased and sold at will."

5. According to the Report and Recommendations approved by the New York State Bar Association's House of Delegates on January 26, 1996, the provision that became Rule 1.17(a) was designed to "address the disparate treatment of sole practitioners and members of law firms with respect to the 'good will' of their respective practices". See also EC 2-34 of the Code. That is, before the adoption of this rule, a member of a law firm could retire from the practice of law and receive payments from the firm under a separation or retirement agreement under what became Rule 1.5(h). But a solo practitioner could not sell a law practice or divide fees from legal business except in very restricted circumstances. DR 2-111 and its successor Rule 1.17(a) were intended to address this disparity.

6. Rule 1.17 now provides in pertinent part:

> A lawyer retiring from a private practice of law … may sell a law practice, including good will, to one or more lawyers or law firms, who may purchase the practice. … Retirement shall include the cessation of the private practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

7. Here, the Owner is "retiring" within the meaning of Rule 1.17 because the Owner will cease practicing law in geographic areas where the Owner once practiced. The owner intends to practice, if at all, in counties not contiguous to but distant from the New York City metropolitan area where the Owner's offices once were. Consequently, as long as the purchase complies with the other requirements of Rule 1.17, the inquirer may purchase the Owner's law practice.

8. The use of the Owner's name in the purchased entity presents a closer question owing to a tension between Rule 1.17 and Rule 7.5(b).

9. This Committee has long recognized, as the Rules do and their predecessors did, that a law firm may continue to use the names of partners who once practiced there in the names of their law firms. For instance, in N.Y. State 622 (1991), we recognized the practice of continuing to use the names of retired or deceased partners in firm names:

> Many firms, large and small alike, continue to practice under firm names -- essentially trade names -- that include the names of their founders or other former partners, often long after those lawyers have passed away. They do so to perpetuate the good will associated with their institutional names, as well as to honor lawyers whose efforts and skills laid the foundation for their practice. . . . The justification for sanctioning this practice, in the absence of danger of deception, is that all of the partners contribute to the good will attached to a firm name, and that surviving partners should not be deprived of their right to a benefit to which they con-

tributed their time, skill and labor. N.Y. State 279 (1973).

10. Yet nothing in Rule 1.17 restricts prospective purchasers to persons having a prior affiliation with the purchased firm; "one or more lawyers or law firms may purchase the practice," and the Rule authorizes the sale not only of the practice, but also its "good will." Good will "is an intangible asset of an enterprise that arises from the reputation of a business and its relationship with its customers." N.Y. State 961 ¶ 2 (2013). We have long recognized that the name of a law firm is central to its good will. N.Y. State 45 (1967). Branding and reputation are precious commodities in any profession, including the legal profession. We cannot ignore that, in today's rapidly changing legal market, the constant merger or acquisition of law firms has engendered combinations in which the nexus between or among the combined firms and their predecessors is at times attenuated or opaque. To say that today's legal profession does not trade in the goodwill of storied names would require blinders on reality. Rule 1.17 is alone no obstacle to this commerce.

11. Thus, Rule 1.17 suggests that any lawyer, whether or not previously affiliated with the acquired firm, is free to adopt some or all of the acquired firm's name as its own. Therein lies the rub with Rule 7.5(b), which says:

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

12. "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." N.Y. State 869 (2011). See N.Y. State 1152 (2018) (lawyer's first name alone); N.Y. State 1138 (2017) (English translation of lawyer's name); N.Y. State 948 (2012) (the phrase "The Business Dispute Clinic"); N.Y. State 869 (2011) (an area of law in which the lawyer practices); N.Y. State 740 (2001) (using a name that is not the legal name of one or more partners or former partners in the law firm). This broad interpretation is consistent with the purpose of Rule 7.5(b). It serves to protect the public from being deceived about the identity, responsibility, or status of those who use the firm name. See N.Y. State 920 (2012) (citing N.Y. State 732 (2000)). See also Rule 8.4(c) (a lawyer shall not engage in conduct involving misrepresentation).

13. We think it is important to address a potential tension between Rules 1.17 and 7.5(b), because we can envision circumstances in which, without full disclosure, the entry of a stranger to a firm, operating under the firm's name, could generate the public confusion that Rule 7.5(b) (as well as Rules 7.1 and 8.4(c), among others) is intended to prevent. Rule 7.5(b) is explicitly addressed to firm names, whereas Rule 1.17 is intended to facilitate the sale of a law business. "As a general rule of statutory construction, the specific governs over the general." N.Y. State 669 (1994). Whether here the drafters of the Rules intended the inclusion of "good will" in Rule 1.17 to temper Rule 7.5(b) is an issue we need not resolve in this inquiry because of the pre-existing, and we presume bona fide, relationship between the Owner and the inquirer in the conduct of the Owner's New York City metropolitan area practice. We believe that a lawyer with a pre-existing and bona fide affiliation with a law firm—reflective of a continuation of the practice—may acquire that law firm and use its name provided that all the other requirements of Rule 1.17, including notice to clients and maintenance of client confidences, are respected. Our sole caveat is that the use of the word "Group" in the name of the firm implies that the inquirer is not the only lawyer in the firm; assuming that other lawyers are engaged in the practice, then we see no ethical obstacle to the inquirer's continued use of the firm name.

14. Our conclusion here requires us to revisit two prior opinions of this Committee which we now modify or overrule.

15. First, in N.Y. State 148 (1970), this Committee concluded that a former associate may not continue the use of a firm name containing the name of a deceased partner because to do so implies that the surviving associate was a partner. We no longer hold this view, especially in light of the changing nomenclature common in the legal profession today. In 1970, non-equity legal personnel were never called partners; today, it is commonplace. Moreover, in N.Y. City 725 (1948), the City Bar Ethics Committee took a broader view of when a firm is a bona fide successor to another firm, looking to substantial continuity of partners or other lawyers from the predecessor firm, as well as continuity of clientele and professional practice. Even without the change in labels, we now consider the City Bar's view more persuasive.

16. Second, in N.Y. State 850 (2011), we were asked whether a law firm could use the name of a former partner in its firm name if the former partner continued to practice law as general counsel to a corporation. Citing N.Y. State 266 (1972), an opinion decided under the Code, we said the former partner "is still engaged in the practice of law as the general counsel to a corporation." Partly depending on EC 2-11, N.Y. State 266 did not require the "retired" partner to stop practicing completely, as long as the lawyer did not practice law except with the former firm. When we issued our opinion in N.Y. State 850, the Rules had eliminated the Ethical Considerations, including EC 2-11. But the Committee still believed that "retired" for

purposes of Rule 7.5(b) should mean "not practicing law," despite the fact that Rule 1.17 contained a less restrictive definition. In support of this broader definition, we cited the definition of "retired" in the court rules governing registration of lawyers. See 22 NYCRR § 118.1(g) (providing, then as now, that an "attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law"). Upon reconsideration, we believe that Rule 1.17 should recognize that a partner may retire from a law firm without entirely retiring from the practice of law. N.Y. State 622 (to the same effect). The Court Rule on the registration of lawyers has a different purpose from Rules 7.5(b) and 1.17. The Court Rule determines when a lawyer is required to pay registration fees to the Office of Court Administration and when a lawyer must comply with the rules on continuing legal education—not when a law firm name should be considered misleading or a trade name. For these reasons, we believe that N.Y. State 850 is distinguishable and to the extent inconsistent with this opinion is modified.

CONCLUSION

17. A lawyer affiliated with firm wholly owned by another lawyer may purchase the firm consistent with Rule 1.17 and may use the name of the seller's firm provided that doing so is not misleading. The meaning of "retired" for purpose of such a sale is as set out in Rule 1.17.

[4-19]

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zabella@gmail.com

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New City, NY 10956
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John J. Roe III
Egan & Golden LLP
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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

Richard E. St. Paul
211 East Main Street, Suite 268
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rstpaul@thestpaullawfirm.com

Solo and Small Firm Practice
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351 Court Street
Brooklyn, NY 11231-4384
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Third Department Chapter
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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

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Law Office of Paul J. O'Neill, Jr.
1065 Lexington Avenue
New York, NY 10021
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