NYSBA FALL/WINTER 2020 | VOL. 41 | NO. 2

ONEONONE

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

In This Issue

New York State Bar Association

NYSBA Membership 2021 Renewal Is Now Open

NYSBA membership grants you access to exclusive benefits and to be part of monumental change. Whether it's adapting to the new virtual environment, participating in health law discussions, or speaking out on racial injustice, we are always looking to increase involvement via leadership and task force opportunities.

Here's a list of existing benefits and partners…*with additional ones added throughout the year!*

- Complimentary CLE programs included with select Membership
- 25%+ discount on all additional CLE programs offered
- 25%+ discount on all NYSBA published books & forms
- Complimentary copies of the *NYSBA Journal*, *State Bar News*, *CasePrepPlus* and *NY Law Digest*

NYBSA Partners

ABA Retirement Funds
USI Affinity Insurance
ABACUSLAW
Clio
LawPay
JDL Group
Ruby Receptionists
UPS
Digital Age Marketing Group
Fastcase

Renew Online

NYSBA.ORG/RENEW2021
or by phone 800.582.2452

Don't forget!

Discounted entertainment, travel and activities.

New York Yankees
Brooklyn Nets
Barclays Center
Radio City Music Hall
Sightseeing Pass
NYC Zoos and Aquariums
AVIS/Hertz Rental Cars

**Select discounts and promotions will vary by partner*

NYSBA

Table of Contents

Fall/Winter 2020 • Vol. 41, No. 2

Page

Message from the Chair

I am humbled and honored to take the Chair of our General Practice Section, and I am extremely grateful to our outgoing Chair Elisa Rosenthal for steering the helm and in doing such a fantastic job. Thank you, Elisa.

I am equally excited, and not in the least daunted, by the challenges that the COVID-19 pandemic has imposed upon our profession. As Ralph Waldo Emerson once said, "What lies behind us and what lies before us are tiny matters compared to what lies within us." I am therefore encouraged that our individual inner strength will prevail and get us through this.

It is my goal this year to inspirit every member of our section to become a more active participant. There is a wealth of valued talent that I believe has gone untapped. I will therefore seek every member's input, from Buffalo to Brooklyn and place in between, on how we can make our Section a more meaningful one. I have begun this process of revitalizing the Section by asking the members of our Executive Committee to look at revamping, combining, and—where appropriate—eliminating some of our subcommittees that have gone inactive for many years. Hopefully, these changes will bring more vitality to the Section.

I will also be looking to energize those members, who albeit take an active role in the Section, to go a step further and take on a leadership position. In that respect, I will soon re-constitute a Diversity and Inclusion subcommittee which will be chaired by John Owens. I hereby seek volunteers to join John, Tamara Kenworthey, Paul Shoemaker and myself in this extremely important subcommittee. To those of you who are interested, please contact me directly by emailing me at domenick@napoletanolaw.com.

I want our members to feel vitalized by engaging in submissions of legislative proposals and reports on issues affecting our Section members to NYSBA. Many other Sections and committees are engaged in this manner, but our Section remains dormant on this. I want to tap into the wealth of knowledge that each of you have, and I don't want to see that talent go to waste or die on the proverbial vine. I want us to share that talent with the rest of the NYSBA family by putting on CLE and webinars, which throughout the pandemic have gone unimpeded. I am therefore sincerely grateful to those of our Executive Committee members like Matthew Bobrow, whose webinar entitled "General Practice Update: Calling All Lawyers" ran on November 5, 2020; Robert E. Brown, who will be putting on a bankruptcy/loss mitigation foreclosure webinar; Steve Richman, who has agreed to do a webinar on an election law sometime this spring, and others who have volunteered as well—thank you.

Domenick Napoletano

On the economic front, we created a first-time budget committee to work on putting together our Section budget this year. The committee worked diligently and has come up with an aspirational budget. The budget is an aspiration because it is our hope to increase our dues income by adding no fewer than 400 Section members, new or old—it truly doesn't matter. In this respect I've charged each of our district representatives to solicit as many members that they can from each of their representative districts. While time will tell if these efforts will bear fruit, I am optimistically confident that they will.

I likewise know and am acutely aware that this pandemic has placed financial hardships on all of us. With restrictions on law offices reopening throughout the state (and especially in the lower Hudson and New York City area), small and solo firm practitioners, which make up nearly two-thirds of the entire NYSBA membership, have been impacted the hardest. As Co-Chair of the COVID-19 Emergency Task Force for small and solo law firms, my fellow Co-Chair, June Castelano, and our task force members have, since the inception of the pandemic, worked hard to disseminate pertinent information on PPP monies, etc., to all NYSBA members. I trust that you all have benefited from this effort.

As I have stated earlier, I am excited, and not in the least daunted, by the pandemic and its effect on our profession and how we live our daily lives. Even in these trying times, nothing will stop us from moving forward as we have always done with our highly acclaimed Annual Meeting that produces impressive and talented speakers. And when we eventually find ourselves back to normal, we will look to revitalizing Elisa's vision of networking.

In closing, I trust that our year together will prove to be a meaningful one. Until we are hopefully all able to be together in a non-virtual world, I bid you my best wishes to be and to stay safe.

Domenick Napoletano

Message from the Co-Editors

Martin Minkowitz

At a time where we can look back on the uncertainty at the beginning of the pandemic, and reflect on how we have evolved as a legal community in the face of such unprecedented times, as the Co-Editors of *One on One*, we hope our journal can act as a useful resource as well as a reminder of our community's tenacity. As usual, our journal provides the most recent New York ethics opinions and articles that can be helpful to all of the areas of law in which our General Practice Section members practice.

This issue takes a deep dive on the impact that the COVID-19 pandemic has had on the legal community as a whole. This issue also addresses many of the new challenges related to working remotely and offers advice on how to keep adapting in an effort to better serve our clients. From Co-Editor Martin Minkowitz' article about workers' compensation law and its application to COVID-19, to various articles on the importance of transitioning to alternative forms of resolution practices, this issue takes an in-depth approach at how the law can withstand pressure from a pandemic, and how it can evolve to match and exceed the needs of the current times.

As a General Practice Section, knowing how to adjust to all contexts within the legal world is crucial. This issue addresses and suggests important changes to how we work from this point moving forward. We are proud to be able to offer this content to our members, and we hope you enjoy this issue.

Richard Klass

Article Submission

The General Practice Section encourages its members to participate on its committees and to share their expertise with others, particularly 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 Emily Sappol at sappol@law.cardozo.yu.edu (631-935-2885) to discuss ideas for articles.

We maintain the Letter to the Editor as a way for our readership to express their personal views in our journal. Please address these submissions to sappol@law.cardozo.yu.edu.

Martin Minkowitz
Richard Klass
Emily Sappol

The Link to an Occupational Disease and COVID-19

By Martin Minkowitz

Workers' Compensation benefits are payable under the Workers' Compensation Law whether the injury or disability was the result of a traumatic event or an occupational disease, as long as it arose out of and in the course of the employment.

However, a compensable occupational disease must result from the nature of the employment and be contracted in that employment. There has to be a recognizable link between the claimant's condition or disease and a distinctive feature of the occupation. The disease will not be compensable if it is caused by the peculiar environmental condition of the employment or the location of the employment. Similarly, if the aliment was caused by ordinary contact with other coworkers, that would not be a compensable claim as an occupational disease. Once established as a compensable claim by the Workers' Compensation Board, the benefits are the same as a claim that arose from an accident causing a physical or mental injury. The date of disablement is left to the Workers' Compensation Board to determine, after it reviews all the evidence presented to it in establishing the claim.

An occupational disease is specifically defined by the Workers' Compensation Law in § 2 (15) and the statute again addresses it in defining hazardous employment under § 3 group 24. There the law provides for the payment for disabilities or death from an occupational disease and divides the provision into two columns, one describing various diseases such as poisoning by nitrous fumes, and a second column describing the process, such as "any process in which nitrous fumes are evolved." However when that section concludes, there is a catchall subdivision stating "any and all occupational diseases and for the description of the process," which states any and all employment enumerated in the Workers' Compensation Law as a hazardous employment.

If the claim does not fit in the definition of an occupational disease, it does not mean that it would not be accepted as a compensable accidental injury. There is, however, a different statute of limitations for an accidental injury compared to an occupational disease. Notice to the employer of a disability for an accidental injury must be made within 30 days after the accident which caused the injury pursuant to § 18 Workers' Compensation Law and a filing of the claim must be made within two years from the date of the accident or death. But there is a different provision for an occupational disease, which gives the claimant the right to file within a two-year period after the claimant knew or should have known that the disease was due to the nature of the employment.[1]

Martin Minkowitz

Those issues came up in a recent case. The claimant was an employee of the New York State Police. His job was to service and maintain the police vehicles and he worked in Albany. After the September 11, 2001 World Trade Center attack, he was involved in cleaning the car as they came back to Albany from exposure to toxins at the World Trade Center cleanup operation. There is a separate provision for making claims with disabilities arising out of the World Trade Center cleanup operation.[2] The claim originally filed under that article was denied because the work was not performed at the specified World Trade Center site in lower Manhattan. The claim was filed in 2018, after medical treatment and a diagnosis of prostate cancer. It was also turned down because it was filed more than two years after the event. It was then argued to be an occupational disease which was timely but was turned down by the Workers' Compensation Board, which found initially there was a lack of causal relationship. The board's decision noted that it was not an occupational disease because it must derive from the very nature of the employment and not a specific condition peculiar to the employee's place of work. They believed that this exposure to toxins was not a normal attribute of his work.[3]

On appeal the Appellate Division disagreed. It reversed, finding that the board missed the point. It concluded that the board should have realized the claimant's maintenance duties required him to actually clean these vehicles by removing the toxins. Therefore his exposure to the toxins derived from the very nature of his work, not from an environmental condition of the workplace.

This was compensable because this occupational disease not only resulted from the nature of the employment but was a distinctive feature of the type of work the claimant was employed to do. When the HIV pandemic was here, claimants looked to the Workers' Compensation Law

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.

for benefits when they contracted HIV or AIDS and filed claims as essential workers. Nurses who attended patients in hospitals and had been exposed to HIV from needle pricks filed claims not necessarily because they had already become sick but because they were psychologically traumatized by the potential of getting the disease.

The discussion of the ability of the essential workers in the current pandemic has now emerged again, and we can expect a number of claims to be filed relating to the virus. It will be interesting to see how these claims are treated by the Workers' Compensation Board and potentially ultimately by the appellate courts.

Endnotes

1. *See* § 28 WCL.
2. *See* Article 8A WCL.
3. *RENKO v N.Y.S. Police,* 185 A.D. 3d 1263 (2020).

COVID-19: Force Majeure and Common-Law Contract Defenses Under New York Law

By Tai-Heng Cheng and Daniel R. Perez

The COVID-19 outbreak and government measures to combat the virus are causing widespread disruptions throughout the economy. Parties unable to perform contractual obligations due to COVID-19-related disruptions should consider whether contractual force majeure provisions or New York common-law defenses of impossibility and frustration of purpose may provide a means of limiting liability for non-performance. Parties struggling to perform contractual obligations due to pandemic-related circumstances should carefully analyze any relevant force majeure clauses, the potential applicability of any common-law defenses to performance, and the available dispute resolution mechanisms. A careful analysis of the available defenses and dispute resolution provisions may better enable parties to renegotiate their obligations and defend themselves against claims for non-performance.

Force Majeure Under New York Law

Under New York law, a party seeking to invoke a contractual force majeure provision must generally establish that a specific occurrence rendering performance impossible constitutes a force majeure event under the contract, that the occurrence was beyond the party's reasonable control, that the occurrence was unforeseeable, and that the invoking party has satisfied any applicable notice requirements under the contract.

Unless the parties provide otherwise, an occurrence will only constitute a force majeure event if the occurrence renders performance under the contract impossible. "New York law is absolutely clear that 'where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused . . .'"[1]

New York courts generally construe force majeure clauses narrowly. However, the analysis of whether an occurrence constitutes a force majeure under a contract largely depends on whether the relevant clause specifically enumerates categories of occurrences constituting a force majeure event. Where the parties have specifically provided for the types of occurrences constituting force majeure events, the invoking party must establish that the occurrence preventing performance falls within one of these categories.[2] In certain cases, force majeure provisions contain catch-all provisions in addition to a list of specific occurrences constituting force majeure events. In order to benefit from such a catch-all provision, the invoking party must establish that the occurrence preventing performance is "similar in nature" to the types of occurrences enumerated in the contract.[3] In contrast, where the parties do not enumerate types of occurrences constituting force majeure events, courts will typically focus on whether the occurrence preventing the invoking party's performance was beyond the parties' reasonable control.[4] In addition, New York courts may reject a force majeure defense unless the occurrence preventing performance was unforeseeable to the parties even if the occurrence would otherwise constitute a force majeure event under the contract. For example, one New York court found that, where a force majeure clause was silent on the issue, it "must be interpreted as if it included an express requirement of unforeseeability or lack of control."[5]

Where a contract specifically enumerates occurrences constituting force majeure events, a party's ability to successfully invoke force majeure due to COVID-19-related circumstances may depend on whether the contract provides that "epidemics," "pandemics," "Acts of God," or similar occurrences constitute a force majeure event. Alternatively, where performance is constrained by government closures or other public health measures instituted to combat the virus, suppliers may be able to rely on provisions defining force majeure events to include "government prohibitions," "government actions," or other analogous events.[6] Where a contract does not enumerate specific categories of force majeure events, a party seeking to invoke force majeure due to COVID-19-related circumstances must establish that its inability to perform both resulted from the COVID-19 crisis and was beyond its control.

Finally, when invoking force majeure, parties must carefully comply with any applicable notice requirements under the contract. Deficient notice may not prevent a party from successfully invoking force majeure; however, improper notice will generally constitute a breach of contract.[7] As a result, parties invoking force majeure should document all communications with the counterparty regarding the force majeure event. Evidence of these communications may establish the immateriality of any deficiencies in the force majeure notice.

Tai-Heng Cheng is global co-head of arbitration and trade at Sidley Austin LLP and a member of the firm's COVID-19 task force.

Daniel R. Perez is an associate at Sidley Austin LLP.

This article originally appeared in *NY Dispute Resolution Lawyer*, summer 2020 (vol.13 no. 2), a publication of NYSBA's Dispute Resolution Section.

Generally, a successful invocation of force majeure will relieve the contract parties of their obligations under the agreement.[8] However, the parties may specifically provide for the effect of a force majeure declaration by contract.[9] Accordingly, parties considering whether to invoke force majeure should closely examine contractual language governing the effect of a successful invocation.

Common-Law Contract Defenses Under New York Law

In the absence of a force majeure provision, New York common-law doctrines such as frustration of purpose, impossibility, and impracticability may provide defenses to liability resulting from COVID-19-related disruptions.

The Doctrine of Impossibility

Under New York law, a party may assert the doctrines of impossibility or impracticability as an affirmative defense to non-performance under a contract. The impossibility doctrine may permit the non-performing party to postpone performance or avoid the obligation entirely. Whether the obligation to perform will be postponed or excused depends on whether the supervening event rendering performance impossible is temporary. "Where the 'means of performance' have been nullified, making 'performance objectively impossible,' a party's performance under a contract will be excused."[10] In contrast, "where a supervening act creates a temporary impossibility, particularly of brief duration, the impossibility may be viewed as merely excusing performance until it subsequently becomes possible to perform rather than excusing performance altogether."[11]

In one case, *Bush v. Protravel Int'l, Inc.*,[12] the party asserting impossibility as a defense was unable to timely cancel a travel booking (by telephone or by reaching the agency's Manhattan office) due to the chaos following the events of September 11, 2001. The court ultimately found that impossibility was a question of fact. The court explained that on "September 12, 13 and 14, 2001, New York City was in the state of virtual lockdown with travel either forbidden altogether or severely restricted" and that the impossibility doctrine excuses performance "when unforeseeable government action makes . . . performance objectively impossible."[13]

The Frustration of Purpose Doctrine

Under New York law, the frustration of purpose doctrine applies "when a change in circumstances makes one party's performance virtually worthless to the other."[14] "In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."[15] New York courts also require the party asserting the defense to establish that the frustrating event was not reasonably forseeable. For example, the Appellate Division has held that the doctrine "is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence."[16]

In light of the fact that a frustration of purpose defense, unlike an impossibility defense or a force majeure declaration, does not require the asserting party to establish the impossibility of performance, the doctrine may provide an alternative means of limiting its contractual obligations.

Multiple Contracts

Parties unable to perform fully their obligations under multiple contracts face additional challenges in successfully invoking force majeure or establishing impossibility defenses. Performing under certain contracts at the expense of others may undercut a claim that performance under a separate contract was impossible. In contrast, partially performing multiple contracts on a pro-rata basis breaching each of the partially performed contracts. In such situations, a solution negotiated with all counterparties is preferable to limit liability and claims later. However, parties that cannot meet their obligations under multiple contracts may also consider proactively seeking a judicial declaration (if the relevant courts are open) holding that a force majeure event has occurred and specifying how goods or services should be allocated amongst various contracts.

Dispute Resolution

Parties considering whether to invoke force majeure or assert an impossibility or frustration of purpose defense should also consider the potential dispute resolution mechanisms available under the relevant contract(s). For example, contracts may either require or permit parties to arbitrate or mediate disputes, allowing the parties to seek a confidential resolution. Many leading arbitral institutions remain open and most have instituted special procedures in response to the pandemic. In addition, the rules of many leading arbitral institutions provide for the appointment of emergency arbitrators that permit the institutions to address COVID-19-related disputes on an expedited basis.[17]

Endnotes

1. *Barclays Bus. Credit, Inc. v. Inter Urban Broad. of Cincinnati, Inc.*, No. 90 CIV. 2272 (MJL), 1991 WL 258751, at *8 (S.D.N.Y. Nov. 27, 1991) (quoting *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968)); *see also Macalloy Corp. v. Metallurg, Inc.*, 728 N.Y.S.2d 14, 14-15 (N.Y. App. Div. 2001) (force majeure provision inapplicable to a voluntarily plant shutdown due to financial considerations brought about by environmental regulations, as "financial hardship is not grounds for avoiding performance under a contract").

2. *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902-03 (1987) ("Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused."); see also *Reade v. Stoneybrook Realty, LLC,* 882 N.Y.S.2d 8, 9 (N.Y. App. Div. 2009) ("[O]nly if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.").
3. *See Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (N.Y. App. Div. 2007) ("When the event that prevents performance is not enumerated, but the clause contains an expansive catchall phrase in addition to specific events, the precept of ejusdem generis as a construction guide is appropriate—that is, words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.") (internal quotations omitted).
4. For example, *in Vitol S.A., Inc. v. Koch Petroleum Group, LP*, the force majeure clause only specified "by 'force majeure' or any other cause of any kind not reasonably within its control." In *Vitol*, the court held that the shutdown of a terminal was not a force majeure event that caused the delay of a delivery because the party did not even have the necessary cargo ready for delivery. *See id*.
5. *Goldstein v. Orensanz Events LLC,* 44 N.Y.S.3d 437, 438 (N.Y. App. Div. 2017).
6. For example, in *Harriscom Svenska, AB v. Harris Corp*., the parties entered into a contract to supply radio and spare parts to a distributor who sold to Iran. Subsequently, the United States government prohibited all sales of goods categorized as military equipment to Iran. The supplier was excused from performance because the force majeure clause contained "governmental interference." 3 F.3d 576 (2d Cir. 1993)
7. Compare *Toyomenka Pac. Petroleum, Inc. v. Hess Oil V.I. Corp*., 771 F. Supp. 63, 67 (S.D.N.Y. 1991) ("Because the forty-eight hour notice provision creates a duty to be performed by the party invoking force majeure, and not a condition precedent, only a material breach of this duty can affect the right to invoke force majeure.") with *Vitol S.A., Inc. v. Koch Petroleum Grp., LP*, 2005 WL 2105592, at *11 (S.D.N.Y. Aug. 31, 2005) (holding force majeure defense failed because "defendant did not provide plaintiff with notification of the force majeure event as defendant was required to do under the parties' contract.").
8. *See PT Kaltim Prima Coal v. AES Barbers Point, Inc*., 180 F. Supp. 2d 475, 482 (S.D.N.Y. 2001) ("A declaration of force majeure relieves both seller and buyer of their contractual obligations.").
9. *See id*. ("Parties may . . . broaden[] or narrow[] excuses of performance and attach[] conditions to the exercise and effects of a force majeure clause.").
10. *Bush v. Protravel Int'l, Inc.*, 746 N.Y.S.2d 790, 793 (N.Y. Civ. Ct. 2002) (citations omitted).
11. *Id*. at 797.
12. 746 N.Y.S.2d 790 (N.Y. Civ. Ct. 2002).
13. *Id.* at 795.
14. *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 924 N.Y.S.2d 391, 394 (N.Y. App. Div. 2011).
15. *Warner v. Kaplan*, 892 N.Y.S.2d 311, 314 (N.Y. App. Div. 2009).
16. *Id.*
17. *See generally* David Roney et al., *Int'l Arbitration Continues Apace Despite Pandemic,* Law360 (Apr. 28, 2020, 5:02 PM EDT), https://www.law360.com/articles/1267714/int-l-arbitration-continues-apace-despite-pandemic.

Conducting the Evidentiary Hearing Remotely

By David C. Singer

The COVID-19 pandemic has resulted in the expanded use of technology in arbitration, including conducting arbitration evidentiary hearings remotely. During the pandemic, conducting evidentiary hearings in person had not been possible, at least for certain participants and in certain locations. Postponing the hearing, perhaps indefinitely, was problematic since doing so is inconsistent with one of the hallmark features and benefits of arbitration, namely, the efficient administration of the process and the relatively prompt resolution of disputes that are submitted to arbitration. Even in the absence of a pandemic, or other special circumstances, the challenges of scheduling blocks of mutually convenient dates for the evidentiary hearing among busy practitioners, arbitrators and parties, especially when people are required to travel from far distances within the United States or from abroad, can cause delay that may contribute to party dissatisfaction with arbitration generally, and may be unfair to one or more of the parties specifically. In addition, conducting the hearing in person but socially distanced may impose other problems.

The alternative is to conduct the evidentiary hearing remotely, using computers and online platforms that are designed or can be adapted for such purpose.

One of the benefits of arbitration is that it is a flexible process. It has not been uncommon for testimony to be received via videoconference or even by telephone when the physical presence of a witness at the location of the hearing is impossible or impracticable. In such circumstances, everyone else – the parties, their counsel, the arbitrators, the court stenographer—have been together at the physical location of the hearing. Only the witness, perhaps with the witness' counsel, is remote.

When conducting a hearing remotely—through Zoom or another online platform – everyone may be physically separated and participating remotely from each other. Conducting remote evidentiary hearings can achieve greater efficiencies—in both time and expense—than waiting for in-person evidentiary hearings. This is especially true when participants live far away from the designated hearing location. With clear audio and video that permit the arbitrator to assess credibility of the witnesses, counsel can conduct their witness examinations. It may become more common to use remote evidentiary hearings even after the pandemic is behind us.

When conducting remote hearings, the parties and their counsel should meet and confer in in advance and agree upon protocols to the extent possible regarding the conduct of the hearing. The parties must agree upon the software platform and type of equipment that will be used. In preparation for the evidentiary hearing, counsel and the parties must be responsible for insuring the quality of their own and their witnesses' computer and other equipment, as well as the adequacy of lighting so that witnesses can be seen clearly and are not in shadow. All computer equipment and internet services that will be used should be tested in advance.

Shortly prior to the hearing, counsel and the arbitrator should conduct a pre-hearing video conference, in order to do a test "dry run." At such time, the agreed protocol for handling the technology can be practiced. Also, any unresolved issues can be raised, and questions answered as would typically occur at any pre-hearing conference.

During the hearing, no one should participate from a public location or where a non-invitee could hear, see or otherwise participate in any portion of the hearing. Each party and his or her counsel are responsible for their own respective witnesses, including the use of their equipment and making them available for their timely testimony.

The arbitrator, or an agreed technology or other designee, assumes responsibility as "host" for controlling the evidentiary hearing, including the technology involved in muting and unmuting, screen sharing, passing control, segregating people into breakout rooms, utilizing the waiting room, allowing participants into the meeting, and other functions. If there is an arbitration service provider, a representative of that provider could perform that function. Court reporting services can also perform such services.

Maintaining confidentiality of the evidentiary hearing is critical. The invitation to the hearing is sent to participants in the hearing by the host—and only the host. Such invitation should be password protected. All recipients should be told that they must not forward the invitation to anyone or share the hearing link or password associated with such invitation. In order to circulate the invitation, the contact information of the participants must be exchanged in advance. Backup contact information for the participants so they may be reached by text or phone, and backup contacts for reporting technology issues to the host, also need to be provided.

At the commencement of the evidentiary hearing, all participants must verify their attendance and disclose if anyone else is in the room with them. Virtual backgrounds should not be used because that could facilitate the presence of people who cannot be seen by other par-

---

David C. Singer has served as an independent arbitrator and mediator for 30 years, focusing on commercial, business, employment and international matters. From 1990 through 2017, he was a trial partner at Dorsey & Whitney LLP in New York City. Currently, he is a full-time neutral. *dsinger@singeradr.com*.

TThis article originally appeared in *NY Dispute Resolution Lawyer*, summer 2020 (vol.13 no. 2), a publication of NYSBA's Dispute Resolution Section.

ticipants. Participants and witnesses could be asked to sign an acknowledgment of any witness or participant protocols.

The matter of recording the hearing also raises issues concerning confidentiality. Online platforms may allow for recording of the hearing, both audio and visual. It is important that control be maintained over such recordings so that they cannot be forwarded or duplicated. There should be no independent recording of the hearing or taking of screenshots of the online proceedings, other than by the court reporter or as otherwise designated.

For the presentation of live testimony, the witness should be in full view of the camera. The witness should confirm that no one is in the presence of the witness. (Again, no virtual background should be permitted for the witness.) The arbitrator maintains the right to confirm during the course of the testimony that the witness is alone, and even ask the witness to provide a 360-degree visual of the room in which the witness is located.

The arbitrator can confirm that the witness is not referring to any notes or any other writings or materials, and that the witness has before him or her only the hearing exhibits. The witness should be advised to turn off any cellphone or other electronic devices that would enable the witness to communicate with others during the course of the testimony.

At the outset of any testimony, the witness should be sworn in by the arbitrator or court reporter. The parties should agree that the form of oath is satisfactory in the jurisdiction where the witness is located and the remote administration by court reporter or arbitrator is proper. The arbitrator may emphasize that the testimony given is under oath, as if testifying in a court of law, and that the witness' testimony is being recorded as part of the official record of the hearing. The witness and counsel should be advised to be particularly mindful not to interrupt the speaker so that the testimony can be recorded accurately by the court reporter. This includes the handling of objections. It is also advisable that all participants who are not actively engaged in the witness examination mute their audio, in order to eliminate background noise and reduce the use of bandwidth.

Exhibits must be circulated to the arbitrator and opposing counsel in advance of the evidentiary hearing. In this regard, the mailing address, email and other contact information must be circulated to all participants so that they can receive the exhibits in advance of the hearing. Exhibits can be delivered either in hard copy or on a flash drive or distributed by email or other method. Exhibits can also be made available electronically with an exhibit repository that parties agree is sufficiently secure and access to the repository or to individual exhibits in the repository provided as appropriate. In contrast to in-person evidentiary hearings, the arbitrator must receive the witness exhibits in advance, not on the first day of the hearing.

Witness exhibits can be displayed online through screen sharing which can be used by counsel. The use of screen sharing is most effective if the participants have multiple screens in front of them, which would enable them to view exhibits on one screen and the witness on another screen. The use of screen sharing presents risks associated with the use of the technology, relating both to the clarity of the documents as well as the ability of counsel to retrieve the documents as needed.

Exhibits used for cross-examination or rebuttal can be circulated to the witness, opposing counsel and the arbitrators immediately prior to the examination, either by email or other electronic means. Screen sharing can also be used for this purpose as well.

The arbitrators and counsel may also wish to consider ways to shorten the remote evidentiary hearing. One way to do so is the use of written witness statements as the direct examination of a witness. Such statements, typically in the form of sworn affidavits, can significantly shorten the amount of time that is required to present the direct examination of a witness. When using witness statements, counsel for the witness can still present an abbreviated direct examination, which would include confirming the accuracy and completeness of the content of the witness statement. The direct examination would be followed by a full cross-examination and, thereafter, rebuttal, as would occur in the absence of witness statements.

Concerns regarding witness statements may include that credibility of the witness cannot be assessed. However, given the live examination through the abbreviated direct testimony and full cross-examination and rebuttal, there can be ample opportunity to observe and assess the credibility of the witness, In addition, online platforms enable the viewer to show the face of the testifying witness on the full screen, in close proximity, thereby facilitating the view of the witness and her or his facial expressions. Going forward, the use of witness statements may become increasingly common in domestic arbitration, as they are the norm in international arbitration.

Major arbitration service providers, including the American Arbitration Association, JAMS and The International Institute for Conflict Prevention & Resolution, and other interested parties, including Thomson Reuters, have issued guidance with regard to conducting remote evidentiary hearings, and such guidance can be accessed on their respective websites.

Commercial Litigation and Post-COVID-19 Court Backlog

By Hon. Shira A. Scheindlin

All 50 states closed their courthouse physical doors during the height of the COVID-19 pandemic as did most courts throughout Europe and Asia. Now the courts have slowly begun to re-open but very cautiously. During the closures, while the details differed from state to state, and from state courts to federal courts, the outline of closure were remarkably similar. Most states suspended all tolling deadlines; only essential matters could be filed—electronically of course—but no non-essential matters could even be filed. Essential hearings were held remotely, via phone or videoconference, but once again, this occurred only in essential matters. The use of Zoom or Zoom-like platforms became suddenly ubiquitous. As judges and lawyers adjusted to the use of remote hearings, the pros and cons of such hearings were revealed.

While the use of remote hearings for essential matters, such as criminal cases, emergency applications, domestic violence and custody matters became widespread, the run of the mill commercial cases were essentially stayed. As a result, there is now a vast backlog of such cases. Briefing may have continued on previously filed motions, and some decisions were issued, but very few such cases were heard at oral argument or even at a status conference. It is this backlog that will have to be addressed as the courts slowly re-open.

This article will address several issues. The first will be a look at what the courts have been able to handle during the "stay-at-home" period and what can be expected from the courts in the future. The next focus will be on the issues raised by virtual or remote hearings and how those issues can be handled differently by courts as opposed to ADR. Finally, predictions as to what the future may hold for both courts and ADR may be worthy of consideration.

While physically closed, courts have focused on the most essential matters. In order to do that, technology has been embraced as never before. E-filing is now not only standard but is the only way in which written submissions may be made. While telephone conferences were widely used by some courts, video conferences were rarely used. Now courts are suddenly equipped to handle both and did so routinely during the past few months. For the first time in its history, for example, the United States Supreme Court, live streamed oral arguments which were available to be viewed by the public in real time. Judges all learned to work remotely setting up home offices with computers, printers, scanners, and access to video platforms like Zoom.

The greatest difficulty has been encountered with respect to criminal matters. In this context there are constitutional concerns, particularly the right to counsel. Typically a defendant and his or her counsel are together in the courtroom where they can easily speak and consult during proceedings such as bail hearings, suppressions hearings, plea allocutions or trials. The remote platform makes such interactions very difficult. Furthermore, there is little or no public access to remote proceedings. It is axiomatic that courtrooms are open to the public—particularly in criminal cases. Defense lawyers have complained that they are unable to effectively represent their clients unless they are present in the same space. And, once the client is released on bail, it is likely that he or she will not have access to the technology to participate remotely in a hearing or trial.

On the other hand, arguments in civil cases have generally gone smoothly. All courts have handled civil matters remotely with little difficulty, assuming that the parties and their counsel all have access to the necessary technology. However, until June there have been almost no trials that have been held by courts using a remote platform. Of course civil matters involving a pro se litigant present unique problems as once again the pro se litigant may not have the necessary technology or technological competence to fully participate in the proceedings.

What are some of the issues raised by virtual proceedings? In addition to the right to counsel issues discussed above with respect to criminal proceedings there is also the constitutional right to confront witnesses. Concerns have been expressed that the confrontation clause may present a barrier to virtual criminal trials. Moreover, criminal trials are almost always jury trials. It is difficult to envision live jury trials in the near future. Large panels must be summoned to court for jury selection. This generally means that hundreds of people are gathered in jury assembly rooms. It is doubtful that citizens will be willing to respond to jury notices and gather in large groups.

Hon. Shira A. Scheindlin is a retired United States District Judge for the Southern District of New York, where she served for 22 years. She is now a mediator, arbitrator and special master with AAA, CPR, and Fed-Arb. She is a frequent author and lecturer. *sscheindlin@stroock.com*.

This article originally appeared in *NY Dispute Resolution Lawyer*, summer 2020 (vol.13 no. 2), a publication of NYSBA's Dispute Resolution Section.

The jury trial problem is as true in civil cases as criminal cases. A civil trial was recently held remotely by a Texas state court. Right in the middle of testimony, a juror left the trial to take a phone call! Such behavior will be difficult to police. Not only can the juror's movements not be controlled remotely, but there is no way to observe whether a juror is paying attention (rather than surreptitiously checking emails on cellphones), which can be easily observed by a judge in the courtroom. Moreover, there is already a problem with jurors doing internet research or using social media during a trial, which will only be exacerbated by jurors hearing evidence in the relaxed surrounding of their own home.

Do the same problems exist in the context of ADR? Because ADR is usually a voluntary process, and a flexible one, the answer is no. Participants in ADR are often quite sophisticated. They will likely be familiar with the technology needed for remote hearings and are well aware of the privacy and confidentiality concerns that differentiate ADR from court proceedings which are presumptively public proceedings. Many ADR providers have issued detailed protocols that address all of the procedural hurdles that might occur during remote hearings, including attorney-client conferences, witness sequestration, cybersecurity, and audio-visual testing and troubleshooting during the proceedings. ADR providers are capable of helping the parties to achieve efficient virtual hearings. The courts may not have the resources to ensure the same. The current reality may lead to a wave of post-dispute arbitration agreements as parties seek to resolve their disputes with the expertise available in ADR and without the lengthy delays they may now find in the courts for many civil matters.

What does the future hold? No one has a crystal ball. However, certain predictions can be made with confidence. There will be a large backlog of civil cases when the courts fully reopen. The courts will have to prioritize those matters that will require the most immediate attention. This will not likely include business to business commercial disputes such as disputes regarding contracts, insurance coverage, real estate, intellectual property, and construction, among others. And, as noted earlier, the last procedural mechanism to return will likely be jury trials, which do not lend themselves easily to remote hearings for many of the reasons already noted. That may mean that many complex civil matters will be in for long delays unless the parties choose an alternative forum, or unless the court requires the parties to retain a special master to resolve all pre-trial disputes so that the courts can focus solely on dispositive motions and trials. Another alternative, of course, is court-annexed mediation, which has already become a requirement in the New York state court system, but not yet in all state courts.

In some states this may require legislation. For example, New York empowers the "Chief Administrator of the Courts [to] authorize the creation of a program for the appointment of attorneys as special masters in designated courts to preside over conferences and hear and report on applications to the court."[1] Similarly, the Commercial Division of the Supreme Court of New York County created a pilot program to determine whether special masters could be useful in resolving discovery disputes in complex commercial cases.[2] These kinds of initiatives should be considered and implemented by state courts around the country to help ensure that commercial cases are not delayed to the point where justice is denied.

Endnotes

1. 22 N.Y.C.R.R. 202.14.
2. *See* https://www.nycourts.gov/Legacyu/PDFS/RULES/comments/orders/AO120-SpecialMasters.pdf.

COVID-19 and the Permanent Judicial Emergency: Is Arbitration the Answer?

By Joseph V. DeMarco

The decision to file a civil complaint in federal or stte court is typically preceded by a careful assessment of the time and resources required to obtain relief compared to other forms of dispute resolution. The COVID-19 pandemic has substantially altered that calculus, crucially, even for litigants who are *already in* court. This article explores whether litigants should, in the face of serious backlogs in federal and state courts, consider voluntarily moving their disputes, in whole or in part, to arbitral proceedings. It also discusses some potentially special considerations litigants should keep in mind when doing so and highlights the role that referees, and special masters can play in these scenarios. Finally, and simultaneously, it recommends that inside and outside counsel would be well-advised to consider whether existing contractual agreements should be revised to include arbitration clauses to govern future disputes.

COVID-19 and the Courts

Even prior to the onset of the COVID-19 crisis, the federal judiciary had 44 declared "Judicial Emergencies" arising from backlogs on district and circuit courts with significant backlogs of cases.[1] To pick even a "non-emergency" jurisdiction as an example, as of the last quarter of 2019, the median civil case in the Southern District of New York took over 30 months between filing and trial.[2] COVID-19 only made things worse. In March 2020, as pandemic cases began to spike in the New York City metropolitan area, District Courts in the region substantially curtailed courthouse operations, limiting physical access to courthouse facilities to essential emergency and criminal matters. Although judges have attempted to move matters along by allowing parties to make remote appearances for minor proceedings when possible, significant delays across the entire litigation ecosystem have become the norm. Parties may not, for example, be able to safely access needed discovery or be able to travel because of stay-at-home orders. To add to the problem for civil litigants, state and federal courts will almost certainly need to prioritize delayed criminal proceedings over civil cases when the pandemic subsides. Civil trials that were *already* on an inevitable slow calendar will likely be pushed off for many months—if not longer.

Compounding the above situation, there is almost universal expectation among litigators that the courts will be facing an entirely new wave of new disputes resulting from the pandemic itself and the unprecedented disruptions to the economy it has caused. Put simply, even absent a "second wave" of the virus in the fall, the cascading effects of COVID-related logjams will likely be felt for many years, and this new reality will undoubtedly change how parties in commercial disputes approach litigation strategy.

The news is not, however, uniformly grim. Although the pandemic has affected the operations of arbitral institutions, the inherent flexibility of arbitration proceedings has made the disadvantages of formal litigation more salient. Even before the crisis, the ADR community was already discussing how to design procedures to better leverage technology to make arbitration proceedings more efficient and convenient for practitioners. In late 2019, for example, the New York City Bar Association and the International Institute for Conflict Prevention and Resolution (CPR) published a Cybersecurity Protocol[3] that provides a framework for reasonable information security measures in arbitration matters. The American Arbitration Association and its International Centre for Dispute Resolution had already been providing the option of "virtual" hearings for many years. Indeed, shortly after the COVID-19 crisis began, the AAA,[4] CPR,[5] the ICC,[6] FedArb,[7] JAMS,[8] SVAMC[9] and other entities in the ADR ecosystem around the world[10] updated their rules and/or issued guidance for how to conduct virtual hearings.

Once these twin realities are understood with reference to each other, it becomes clear that a solution is hiding in plain sight: A party that decided against arbitration of a dispute at the outset of the controversy may understandably reconsider whether continuing "stasis" in court is optimal. Fortunately, with the consent of the other party, it *is* possible to change course.

Joseph V. DeMarco is the founding partner of DeVore & DeMarco LLP where he litigates, arbitrates and advises on data privacy and security, cybercrime and technology matters. In addition to his counsel practice, he also serves as an arbitrator and mediator in complex commercial and technology disputes and is on the national roster of neutrals of the American Arbitration Association (AAA) and Federal Arbitration, Inc (FedArb). ***jvd@devoredemarco.com***

This article originally appeared in *N.Y. Dispute Resolution Lawyer*, summer 2020 (vol.13 no. 2), a publication of NYSBA's Dispute Resolution Section.

Moving a Case from Litigation to Arbitration

Although not every litigant can easily move an active litigation to an arbitral proceeding, there are a some of scenarios when it makes eminent sense. Almost every general counsel has had the experience of finding oneself at the beginning of what will almost certainly be a protracted *Bleak-House*-style[11] litigation that will take years to reach the trial stage. It quickly becomes apparent that the parties will spend months upon months exchanging rolling productions of documents that are responsive to civil subpoenas—but are largely not essential to resolving the underlying dispute. While some litigants undoubtedly benefit from delay, this is not always true. Sometimes, *both* parties realize that there may be external business imperatives to resolving a dispute in months as opposed to years. Corporations now often insist that general counsels budget litigation expenses on a yearly or quarterly basis, which is difficult when litigation stretches on for years. Plaintiffs may also wish to monetize the case, which requires a forecast in spending that does not go out to 2023.

Other factors may also align in favor of converting selected aspects of the dispute, or the entire controversy, to arbitration or other forms of ADR. The parties who seemed bullish on court litigation pre-filing may be dissatisfied with the judge or magistrate to whom they were assigned, for example, and decide that they would be better off with a panel selected by themselves that has subject matter expertise in the object of the dispute.

Even if it is not appropriate or feasible to remove the entire litigation out of the courts and into arbitration, there may be instances where the parties identify some subset of the controversy that would be more appropriate for non-judicial disposition. Although not an arbitral proceeding, the parties may, for example, find it appropriate to ask the court to allow them to refer the entire discovery process (including disputes) to the oversight of a special master or a referee they select so that discovery can be completed more expeditiously and economically. In this scenario, the dispute would then be returned to the court at the close of fact discovery for motion practice and trial on the merits. Another scenario might involve the referral of the claim construction hearing in a patent dispute (the "Markman Hearing"), or other disputes requiring experience in the technical issues involved for an expert determination[12] to a third party for binding resolution. Often, these neutrals are quite comfortable with, and well-versed in, secure application of remote and "virtual" hearing platforms using arbitration association guidelines noted above. Of course, the parties, could also seek to stay or dismiss the case entirely from court in favor of binding arbitration—perhaps using the discovery taken to date in the court process to use in that proceeding.

Once the parties agree in principle to move the case or some phase of the case out of court, in consultation with arbitration counsel, they will naturally need to draft an arbitration submission agreement that in effect operates much like an arbitration provision in a contract. Like all arbitration agreements, the submission agreement must define, among other things, the scope of the dispute and decide on a forum and how to select arbitrators.

The institutions provide standard clauses for submission agreements, but these clauses need to be customized with care, particularly if the submission relates to a submission of a phase of ongoing litigation to ADR.

Bespoke clauses appropriate to a conversion to arbitration following litigation should be considered in developing the submission agreement. For example. it would be useful to record in the agreement how discovery from the litigation can be sued in the arbitration, what if any further discovery would be allowed in the arbitration, the timeline for the arbitration, what process tools might be employed in the arbitration, etc. Developing the arbitration agreement at this later juncture can provide the parties, now with greater knowledge of the case, the ability to develop a more nuanced and more appropriate process.

Special Considerations in Transitioning to Arbitration

Because it is fairly uncommon so far for parties to switch to arbitration after commencing a civil lawsuit, there are several special considerations in doing so. Given federal policy in favor of arbitration, judicial opposition to a submission agreement mutually agreed to by both parties is unlikely. As noted above, however, once a litigation has commenced, the parties may have already exchanged a significant amount of discovery and the judge may have issued rulings on a number of key issues. As a result, in proposing ADR options to the court the parties should:

- Emphasize the resources that will be saved by submitting the entire dispute, or parts of it, for determination by a third-party neutral;
- Carefully consider whether, and if so, how protective orders or confidentiality agreements should be reflected in the submission agreement, and
- Consider whether the court action will be dismissed with prejudice at the end of the arbitration.

Reassess Existing Contracts Before Disputes Arise

With both federal and state courts likely facing a long road before returning to normal operations, it will surely pay dividends to reassess *now* any dispute resolution provisions in existing contractual agreements. It is likely that many inside and outside litigation counsel made strategic decisions to avoid arbitration clauses entirely without anticipating the current reality of greatly increased court delays.

As noted above, the recession that resulted from the COVID-19 pandemic will almost certainly give rise to a torrent of new disputes. As a result, inside counsel

and outside counsel would be well advised to be more creative and proactive in thinking through the optimal means of dispute resolution. In drafting any dispute resolution clauses in new contracts or negotiating revisions to any such clauses so as to select arbitration instead of litigation, it is important to remember basic drafting principles and draft thoughtfully and with care.[13]

Conclusion

Although eschewing arbitration may have been the sensible decision at the time of entry into a commercial agreement, existing—and increasingly worsening—judicial backlogs may cause some of those who previously chose litigation over arbitration to reconsider. Even if a party has already filed a complaint and has begun discovery and motion practice, it is not too late, in consultation with arbitration counsel, to move the dispute to an ADR venue that will likely result in a less costly, more flexible and more efficient resolution.

Endnotes

1. United States Courts, "Judicial Emergencies." https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies.
2. Federal Court Management Statistics–Comparison Within Circuit, December 31, 2019, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2019.pdf.
3. "Protocol on Cybersecurity in International Arbitration," https://www.arbitration-icca.org/media/14/76788479244143/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf.
4. https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf.
5. https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf.
6. International Chamber of Commerce (ICC): Guidance Note on Possible Measures Aimed at Mitigating the Effects of COVID-19 (April 9, 2020): https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/.
7. *See* Fed. Arb. R. 10.04.
8. JAMS: Navigating Disputes Arising from the Coronavirus (COVID-19) Crisis (2020) .https://www.jamsadr.com/coronavirus?mc_cid=16e86d47c7&mc_eid=6acf557435.
9. *See* https://svamc.org/silicon-valley-arbitration-and-mediation-center-svamc-coronavirus-advisory-march-2020/ and https://svamc.org/technology-resources-for-arbitration-and-mediation-practitioners/ (collecting COVID-19 resources for arbitration and mediation practitioners).
10. *See, e.g.*, Chartered Institute of Arbitrators (CIArb) Guidance Note on Remote Dispute Resolution Proceedings (April 8, 2020): https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf; Hong Kong International Arbitration Centre (HKIAC) Service Continuity During COVID-19 (March 27, 2020): https://www.hkiac.org/news/hkiac-service-continuity-during-covid-19; London Court of International Arbitration (LCIA) Message from the Institutions: Arbitration and COVID-19 (April 16, 2020): https://www.lcia.org/News/message-from-the-institutions-arbitration-and-covid-19.aspx; Stockholm Chamber of Commerce (SCC): COVID-19: Information and Guidance in SCC Arbitrations (March 27, 2020): https://sccinstitute.com/about-the-scc/news/2020/covid-19-information-and-guidance-in-scc-arbitrations.
11. The case at the center of *Bleak House*, *Jarndyce and Jarndyce*, has become a byword for interminable legal proceedings.
12. *See, e.g.*, CPLR Article 76.
13. *See* Edna Sussman, *Drafting the Arbitration Clause: A Primer on the Opportunities and the Pitfalls*, Dispute Resolution Journal, Spring 2012, available at https://bit.ly/2YiTUA8.

Practical Tips for Drafting Agreements From "Whole Cloth"

By Joseph V. Cuomo and Keith Belfield

One of the biggest challenges faced by any contract lawyer is when a client or partner asks for an agreement to be prepared, and there is no clear precedent or starting point—the dreaded assignment of having to draft from "whole cloth." Without fail, this tall order is usually accompanied by a request that the draft is needed "yesterday."

This article will provide some helpful tips and strategies to navigate this challenge when it appears on your desk.

The Challenge

One of the mantras of any good contract lawyer is, "Don't reinvent the wheel." One of our mentors used to say "creativity is good . . . but copying is better." These guiding principles will typically apply to most contract drafting assignments. The usual approach is to find a prior agreement or form that is pretty close to what your client needs and customize it for the matter at hand. This is essentially the practice of most corporate attorneys.

However, from time to time, you may be tasked with preparing an agreement that raises your eyebrow a bit. *Gee, I don't think I've seen that one before.* You scan your brain's database for all of the agreements you have worked on in your career and find nothing. Next, you look to all of the precedent and form resources you frequently use, and again, nothing comes close. It may be that this client is engaged in a new cutting-edge business, or is engaged in an established business but in a new way. In any event, the client needs a draft, and you need to get cracking.

Step 1: Where to Start? Get the Client's "Vision"

Undoubtedly your client will have some sense as to what is needed, and likely some knowledge of the basic business terms. Your client's take on the underlying business terms is probably the best place to start. We will often ask the client to send over an email in whatever form that is easiest laying out the client's understanding of the agreement, the goals to be achieved, and the risks and issues to protect against. We do not ask for or expect good drafting by the client—just an expression of ideas in a businessman's hand. What we are looking for is a term sheet of sorts—a big-picture summary to help us see and understand the client's goals.

If appropriate, we may also ask the client if he or she has come across any sample agreements that have made an impression or might be relevant and if we can get a list of some competitors or similar parties in the industry that might be engaging in similar transactions. These inquiries may result, at best, in a serviceable sample or, at worst, a deeper understanding of the background surrounding the transaction and agreement. Taking these steps will assist you in developing a clear understanding of the client's vision so that you can draft an agreement that appropriately sets forth the client's rights and obligations.

Step 2: Finding Your Lump of Clay

As with any contract drafting assignment, you need some document to start with as it rarely makes sense to draft an agreement free form from scratch. Perhaps in Step 1, your client has provided you with a sample or identified a competitor that makes its agreements available online. Reviewing a sample agreement from your client or a competitor can be a good starting point, but you typically cannot just stop there.

It is essential to access as many resources as may be reasonably available to you so you can start to generate a pile of relevant sample agreements. Sources can include the most obvious—your files and prior agreement databases, in addition to those of your firm and colleagues. However, you are drafting something that has never been drafted before, so if it were that easy, there would be no need for this article. This exercise of accessing and stockpiling multiple resources will provide you with the building blocks you will need to move forward.

Additionally, when searching, you should keep in mind that if your current task involves a specific type of industry, you should look for agreements in that area. For example, if your client is primarily in the services industry, you should try to generate some good samples of services type agreements such as consulting agreements. This collection will help you see the structure and section headings you will need, including much of the boilerplate you will want to have in the back end.

Joseph V. Cuomo is a partner in the corporate and commercial practice group at Forchelli Deegan & Terrana LLP in Uniondale, N.Y. Keith Belfield is a law student at Cardozo School of Law and a Diversity Fellow at Forchelli Deegan & Terrana LLP.

This article originally appeared in the *NY Business Law Journal*, summer 2020 (vol. 24, no. 1), a publication of NYSBA's Business Law Section.

Other resources include "old school" treatises and form books, many of which now have online counterparts and/or accompanying disks from which sample agreements can be copied. LexisNexis and Westlaw, depending on the level of subscription, have extensive form agreement libraries that can be searched and accessed. Unlike precedent agreements from real-life deals, form agreements have not been negotiated or customized and generally contain relatively neutral but comprehensive provisions. Forms are also a great way to double-check that you have not missed anything. Additionally, forms can assist you if you need a relatively standard clause for something not covered in your base document.

Not surprisingly, the internet, in general, is a virtual treasure trove. Spending a little time doing general searches on the type of agreement you are working on often yields useful material. However, this is where your experience and judgment need to kick in. Some of the golden nuggets that you may mine may turn out to be fool's gold. Anything you find at this stage, including samples that are not from your database or a trusted colleague, or that did not pass the scrutiny of some form book editor, need to be reviewed carefully and cautiously. A useful resource for this stage is www.onecle.com, which aggregates and organizes agreements required to be filed by public companies by SEC requirements.

Step 3: Molding and Polishing the Draft

Once you have a pile of potentially useful samples and models, you should spend some time trying to identify the best example to start with. This step is time well spent because if you have a good starting point, the task at hand becomes much easier to execute efficiently. At this stage, you should also put aside three or four other samples to use for comparison purposes and/or to lift certain provisions. These comparables also serve as a useful check to make sure nothing was missed either in concept or actual language.

Now, it's time to put your drafting and organizational skills to the test by embodying your client's concepts and notes into your starting point base agreement, and improving the base agreement by lifting relevant provisions from your samples stockpile. When you begin drafting, it is imperative to think of the contract as a map guiding the parties through different factual situations, so that the parties will know their contractual duties over the life of the agreement. Throughout the drafting process you should constantly ask yourself what are the parties' duties, what is the timeline for performance, how will these duties be executed, and what should happen if one or both parties breach?

Once you have your first draft completed, it is essential that you read and re-read the agreement to ensure consistency, especially if your draft has drawn content from multiple sources. Look for consistency in the use of definitions, consistency in the parties' names and roles, consistency in the look and feel, and consistency in the contract structure, sections and sub-sections.

Finally, you should give the draft one last read to ensure that you completely understand the meaning and implications of every provision. If the agreement does not read cleanly and clearly to you, you can only imagine how the parties will view it.

Conclusion

Drafting an agreement from "whole cloth" is no doubt a challenging process, but with the proper approach and understanding, this tall order can be accomplished successfully. When this kind of assignment lands on your desk, you should not begin to panic. Instead, take a step back and follow some of the steps and suggestions discussed in this article. These tips and strategies will help you navigate the challenges of drafting an agreement from "whole cloth."

Cybersecurity: Law Firms Are Under Attack

By David J. Rosenbaum

One day in early May, the attorneys at a prominent law firm sat down at their computers to work, only to discover that none of their files were accessible. Making matters worse, the hackers who had infiltrated the law firm's network stole 756GB of firm and client data before encrypting everything on the firm's servers, demanded $21 million in ransom (later raised to $42 million) and threatened to begin releasing confidential data about the firm's clients to the public.

The information stored by law firms is among the most sensitive, potentially saleable, and therefore most desirable data imaginable. Law firm breaches can have catastrophic effects on people's lives, including wealthy and powerful world leaders. For example, after the hack of the Panamanian law firm, Mossack Fonseca, the offshore dealings of hundreds of politicians were exposed, including those of Russian leader Vladimir Putin.[1] Exposure of an entertainment, arts or sports figure's negotiations can have a dramatic effect on that professional's earnings potential. Even on a lesser scale, if the details of an acrimonious divorce or business deal were exposed after a data breach, it could result in ruination for personal lives and fortunes alike. As the risks associated with storing information continue to grow exponentially greater, attorneys' ethical responsibilities to protect the confidentiality and integrity of the confidential and privileged data they hold take on even greater significance. The failure of attorneys to properly understand the implications of cybersecurity can result in a devastating impact on their clients and may even threaten their licenses to practice law.

What Is Cybersecurity?

From the largest multinational firm to the smallest solo practice, nobody is immune from a cyberattack or a cyberbreach. The best a firm can do is understand the risk, then take steps to manage the risk and mitigate the potential impact of a breach. In order to manage cybersecurity risk, it is important to first understand what cybersecurity is and the specific impact it can have on a law firm.

Cybersecurity encompasses not only the protection of hardware and network devices but also data stored and transmitted throughout the firm. Cybersecurity is protection of:

- **Computers**—All of the devices used to access data, including desktop computers, laptops, tablets and smartphones;
- **Networks**—Collections of devices used to connect computers and share information, including file servers, firewalls, peripheral devices like printers and scanners, and Internet-connected appliances (IoT – the Internet of Things);
- **Data at Rest**—Data that is stored on file servers, computer hard drives, back-ups or removable media, and in the Cloud; and

David J. Rosenbaum

- **Data in Motion**—Data that is moving between computers and between networks, including email, websites, portals, networks, Wi-Fi, faxes, and phones.

While data privacy is most commonly understood as the focus of cybersecurity, there are actually three cybersecurity objectives:

- **Confidentiality**—Ensuring that data can be seen, accessed and used **only** by authorized individuals (e.g., the theft and subsequent release of client data stolen from the law firm mentioned above resulted in unauthorized disclosure of confidential and privileged information);
- **Integrity**—Ensuring that data cannot be modified by unauthorized individuals, and that it is not inadvertently modified by authorized individuals (e.g., the hackers who breached the law firm encrypted all of the data on the firm's network, representing an extreme form of unauthorized modification of data); and
- **Availability**—Ensuring that data is accessible when needed (*e.g., the ransomware that was used to encrypt*

David J. Rosenbaum, MBA, is a principal at Citrin Cooperman and a practice leader of the firm's technology consulting group. He has more than 40 years of experience in the information technology field and can be reached at 914.693.7000 or at drosenbaum@citrincooperman.com.

This article originally appeared in the *Entertainment, Arts and Sports Law Journal*, summer 2020 (vol. 31, no. 3), a publication of NYSBA's Entertainment, Arts and Sports Law Section..

the law firm's servers disrupted the firm's ability to access its data).

All organizations, including law firms, are subject to specific cybersecurity-related compliance requirements, such as state privacy laws (e.g., New York State's the Stop Hacks and Improve Electronic Data Security Act, otherwise known as the SHIELD Act). Firms that accept credit cards for payment of fees are subject to the Payment Card Industry Data Security Standard (PCI DSS) requirements. Law firms with health care practices may be subject to compliance with certain provisions of the Health Insurance Portability and Accountability Act (HIPAA) Rules. Firms with clients or counterparties in California are subject to the California Consumer Privacy Act (CCPA); those with clients or counterparties in the European Union are required to comply with General Data Protection Regulation (GDPR) privacy rules. Along with the compliance requirements applicable to all organizations, attorneys have additional ethical obligations under the Model Rules of Professional Conduct to ensure the protection of client data from inadvertent or unauthorized disclosure. Clients may also have specific requirements regarding a law firm's cybersecurity, especially as firms are considered to be third party providers, and the list goes on . . .

The costs of a cyber breach are significant and may include fines and penalties, technology expenditures, forensics and legal costs, constituent notification requirements, operational downtime, and loss of billings. However, one of the most significant costs to a law firm is the reputational damage that can result from a breach. Clients are entrusting a firm with their confidential information; if one cannot protect this information, then clients will find another firm that can.

What Can a Law Firm Do to Protect Itself?

Although there is no way to fully protect a firm's or clients' data, there are best practices that will help to manage risk and mitigate losses in the event of a breach:

- Make cybersecurity awareness a part of the firm's culture. For example, one of our clients has a policy that every meeting starts with a reminder about cybersecurity, even if it is as simple as asking each attendee if he/she/they locked his/her/their computer screen before coming to the meeting.
- Understand what information you have, where the data is stored, who has access to it, how it is protected, and what regulations and standards apply to the data and to the firm.
- Develop and enforce **written** cybersecurity policies and procedures.
- Enforce the use of complex passwords, firewalls, antivirus and antispam software, data encryption, and comprehensive data backups. Perform periodic vulnerability assessments and penetration tests to discover and correct holes in your security before they're discovered and exploited by bad actors.
- Understand and evaluate the cybersecurity controls of the firm's vendors and service providers; remember that that they often have access to the firm's systems and information.
- Do not collect or retain more data than necessary, and limit access to that data. Segment the data so that individuals have access only to the specific files they need for the matters with which they are directly involved.
- Social engineering techniques are **very** effective at tricking people into opening attachments, clicking on links, and otherwise disclosing confidential information including network credentials. Users are the weakest link in cybersecurity. Train yourself and your staff to be aware and alert.
- Audit **and test** the firm's cybersecurity controls, repeatedly, to ensure that they are being followed.

Most firms are not anxious to devote time and money to activities that are neither client facing nor revenue generating, but protecting the firm's and clients' data is a regulatory requirement, an ethical obligation, and just good business.

Elimination of cyber risk is not possible, but by gaining an understanding of the importance of cybersecurity, leveraging the use of expert advisors, and focusing on continuous incremental improvement, significant risk reduction is possible and necessary . . . unless you want your firm to be in the latest headline about a law firm breach.

Endnote

1. Chirgwin, Richard, *'Panama papers' came from email server hack at Mossack Fonseca*, The Register, 5 Apr. 2016.

Conducting Investigations in the Midst of the COVID-19 Pandemic: Five Threats and an Opportunity

By Oliver Powell and Jeremy Scott-Joynt

Investigations are about mitigating and managing risk. By ascertaining the facts, they clarify duties and responsibilities, avoid the blame game, identify lessons to learn, and equip decision-makers to avoid legal and regulatory sand traps.

Oliver Powell

However, a good investigation is only as good as the preparation that goes into it. Further, a bad investigation—one that creates risk instead of mitigating it—is (arguably) worse than no investigation at all.

As lawyers carrying out investigations or setting the ground-rules for them, those preparations naturally fall to us. In this time of crisis, the risks are particularly high. The unknowns are legion. Staff unused to new ways of working are outside their comfort zones. Mistakes will be made and will need fixing; that much is inevitable. But management time is precious, now more than ever, and must not be wasted on fixing mistakes that were foreseeable.

The good news is that foreseeing risks is the core of what we do as lawyers. So whether it is interviewing or broader investigative practice, we should be able to identify the biggest threats, and pre-empt some of the problems. Out of the infinity of problems, we have selected five threats to discuss here, together with an opportunity.

Working Cross-Border

For many readers, working across borders and jurisdictions is old news. Your organization is multinational. It's what you do.

As we deal with this crisis, however, things are changing. Staff falling sick or isolating means others will have to fill in. And with remote working now the norm, organizations seeking to maximize efficiency will fill the gaps from across borders.

Further, with supply and communications chains buckling and reshaping at pace, many firms will be working with partners in new places. With new relationships comes new risks, new wrongdoing, and new loci for investigations.

Jeremy Scott-Joynt

We are increasingly likely to be working more, in places we know less. It's tempting to work as if one's home-field legal rules apply, but that is rarely the case, and always risky.

The solution? Tap into local expertise. Colleagues don't have to be investigators, or lawyers even, to help you understand what's required. If you have already been building a network of those who can assist, on the basis that investigators can't be everywhere themselves, then you're most of the way there. If not, start now.

Employment Issues

One thing is a constant right now: the stress of the unknown.

It's bad enough that your investigators are working without a map (at least until you have drawn them a new one) but everyone they deal with—partners, witnesses, subjects—are in the same situation. Worried for their job, their health and their family.

Oliver Powell is a barrister at Outer Temple Chambers, London. He is ranked in both Chambers & Partners (U.K.) and The Legal 500. He undertakes instructions that involve the regulation of business activity and commerce. His practice encompasses: asset forfeiture and civil recovery; business crime; commercial fraud; financial services; investigations and sanctions. He is a contributor to *Lissack & Horlick on Bribery* and *Millington & Sutherland Williams on the Proceeds of Crime*.

Jeremy Scott-Joynt is also a barrister at Outer Temple Chambers, London. He practices across a range of areas including commercial, employment and data protection, but focuses on regulatory and business crime, particularly fraud and corruption. His previous career was in banking, running investigations and anti-corruption compliance programs, and in regulation.

This article originally appeared in *Inside*, summer 2020 (vol. 38, no. 2), a publication of NYSBA's Corporate Counsel Section.

For subjects in particular, you need to put yourself in their shoes. Their work support network has evaporated. Whether innocent or culpable, they feel horribly exposed.

Should you interview them remotely, spare a thought for the fact that they are being asked sensitive and difficult questions, about things they may wish to keep secret, while their spouse and kids may be in the next room. Imagine the embarrassment, even the shame. This is a time for soft skills to come to the fore. Make sure your staff know this. Politeness is power and may even result in more successfully fact-finding.

Even in jurisdictions with relatively lax labor laws, we owe a duty of care to the people we investigate. So think about these effects. Consider what investigative and interview techniques work, and which may need adjustment. The classic admission-seeking interview for instance (which is itself often poorly executed) may simply not be appropriate, or possible, but you can still put evidence to a subject and elicit a response. Follow the evidence, as always.

Where the laws are stricter, such as in most E.U. jurisdictions, greater care is needed. Make sure you know what is required, that you have re-crafted procedures to take that into account. Some places require staff to have someone with them when interviewed. That's possible when working remotely but requires greater planning.

Broader employment issues need attention too, particularly whistleblowing. Take the time to make sure your whistleblowing architecture still works. If you outsource, does the contractor still have capacity? One thing on which almost everyone agrees is that more concerns will be raised, now and in coming months. These will range from favoritism about who's been overlooked for a bonus and who isn't, to COVID-enabled fraud or bribery. Be ready for it now and make sure management is forewarned, thereby ensuring that they are well placed to avoid allegations of victimization.

Confidentiality, Systems, and Privilege

How do we keep secrets when our staff are having to treat their kitchen table, or a corner of their living room, as an ersatz office? Not everyone has the luxury of private space, or a truly reliable (and fast) internet connection. This will apply to people we deal with, as well as our own staff.

Even if the systems we rely on—data storage and analysis, record-keeping, and so on—are entirely virtual, we will still need ground rules if (as seems likely) remote is now the "new norm."

Accordingly, look at the systems you have. Check access. Can staff work offline, for the times when the VPN dies, or the cable connection is overwhelmed by Netflix or Fortnite? If not, consider making it possible, but make sure the rules are clear about how to do so safely.

As for privilege: well, we rightly rely on it. But now may be the time to learn to lean on it less. Remote working means more asynchronous communications: emails, text messages, Slack, WhatsApp, rather than in-person chats over the watercooler. And even real-time communications may be recorded—have you checked your Zoom settings? And particularly when working cross-border, remember that the U.S.'s expansive view on privilege is not generally shared elsewhere, with some jurisdictions practically ruling it out for in-house advisers. Discipline among investigators is critical here, and clear do's and don'ts are a must.

This has implications for interviews too. Some are still reluctant to record interviews, preferring to rely on a lawyer's note. However investigators used to remote working say they expect subjects to record interviews, not least given how easy it is to have a phone running Voice Memos just out of camera range, and whether or not they've promised not to. So if the interview is already being recorded, perhaps it's time to do it yourself as well. Similarly, showing an interviewee a document remotely means it's probably been copied. Think through the implications, risk-assess your interviews accordingly, and keep the surprises to a minimum.

Again, the key is the use of simple and pragmatic guidance. Make sure your staff aren't left to work these problems out by themselves. Make the decisions, make it clear, write it down, and make it work.

Data Issues: Collection, Protection, and Privacy

In some ways, the biggest problem with data isn't getting it, even in our new world. For most corporates, everything is stored and backed up. Admittedly, it is harder to cleanly get a physical device to image. However, given how much is available elsewhere, you may be surprised at just how little change the lack of physical devices requires.

The bigger problem is what you do with the data. As mentioned earlier, the temptation (or perhaps necessity) in our new world is to use resources as efficiently as possible, which may mean passing data to investigators in different jurisdictions. Be very cautious about this. A growing number of countries (particularly European and Asian) have rigorous, enforced and expensive privacy and data protection laws. By their nature, investigations involve the processing of personal data, some of it highly sensitive. If you haven't already designed protocols to ensure it is being used properly, safely, and within the bounds of lawfulness, you must do so now.

Crucially, don't make the mistake of thinking of consent as a solution. In Europe in particular, employees' consent is legally worthless. You need other reasons to allow you to process their data. They exist and can be planned for, but do it now.

Finally, on data (which elides with confidentiality and privilege), make sure you know what data an employee can ask for. A subject access request in many jurisdictions is a wide-ranging thing. A well-run investigation, even one not wholly cloaked in privilege, has little to fear. A poorly run one, where investigators have been left to fend for themselves in dealing with the challenges of the new environment, is a labor lawsuit and an embarrassing headline waiting to happen.

Regulation

The fifth challenge may not apply to everyone but if you are in a regulated sector, perhaps particularly in finance, be aware that you are under the microscope. Regulators are making their expectations clear. They are not relaxing their standards, and any firm whose staff are taking advantage of the crisis at customers' expense is likely to attract unwanted and expensive attention. As investigators we need to keep a particularly close eye on developments. If any such allegations emerge, we need to show we have dealt with them smartly, quickly and fairly.

The Silver Lining

Whilst there is a lot to do, a lot of thinking, planning and teaching, there is also an opportunity. At times of crisis, we need to reduce friction, to make sure we're doing things effectively. We can lay the foundations for doing things better even once the crisis has passed, by finding new allies—IT staff, security, data protection officers, HR, etc.—and treating them as the experts they are, and/or by creating or revising procedures to ensure that they are clear, simple, and disseminate actionable advice that hard-pressed people need.

Finally, the current pandemic can also help us enhance our personal growth as investigators (as we have to be agile and fast thinking); identify who the 'MVPs' are in our workforce; and scrutinize and evolve our systems. It is only at times of crisis that a system is robustly tested. It is only when something is tested that we can truly understand its strength and frailties.

Crises, as they say, make opportunities. Let's not waste this one.

Arbitration and COVID-19

By Dan Grodinsky and Neil Hazan

Dan Grodinsky

Neil Hazan

We are living in "unprecedented times," as we have heard from half of the emails sent over the last several months. The ongoing COVID-19 pandemic has seen its impact on all aspects of society, and the judicial system is no exception. Courthouses are closed or operating at significantly reduced capacity, procedural deadlines are suspended or extended, and depositions have been rescheduled. The focus of many businesses is on survival, rather than on driving forward their commercial disputes, whether it is a fresh issue or a dispute that existed prior to the pandemic.

One expects that there will be a rush of COVID-19-related litigation once there is a return to a new normal. This may include anything from "force majeure"-style claims where contracts have been terminated, claims for delayed performance of contracts for the delivery of goods or services, trickle-down effects from supply chain issues, disagreements over newly negotiated payment terms and pending insolvencies, and disputes regarding how risks or unexpected costs are dealt with. This is in addition to the normal roster of new commercial disputes that were put on the backburner in favor of other priorities.

As the courts slowly reopen, it is a good opportunity to reconsider how businesses and their decision-makers can best deal with commercial disputes, as this is yet another new area in which the pandemic should give rise to new and creative thinking. For a number of reasons, arbitration, instead of litigation before the courts, may be better suited for resolving a new or lingering dispute in the current climate and new challenges.

There are a number of advantages to arbitration that are well known. Parties will have a higher degree of autonomy and control over a dispute beyond which they can expect before a court. Parties also can better ensure that they maintain confidentiality over a dispute and the underlying commercial information that would otherwise be subject to filing before a public court hearing. Parties often see cost advantages by way of opting for a tailor-made dispute process that could be both quicker and often cheaper. Litigants from different jurisdictions can also agree on a neutral panel, thereby avoiding the fear of a "home-court advantage" for one party over the other. A dispute can also be submitted to specialized arbitrators with industry specific knowledge, instead of trusting whichever judge is assigned the case.

In addition to these advantages, the COVID-19 pandemic has given rise to a number of other benefits to proceeding with arbitration, which are becoming apparent because of the COVID-19 pandemic. In a number of jurisdictions, courts have been forced to close or to significantly limit access to hearings. From mid-March onwards, a tremendous number of trials and hearings have therefore been postponed or canceled, or have seen the allocated hearing time reduced well below what is realistic. Users of these systems have been asking questions as to when they will ever see the inside of a courtroom, or alternatively, that their ability to be heard within a fair hearing has been unacceptably reduced. As all these postponed hearings now have to be rescheduled into a judicial system running at less than full capacity, it is very likely that we will see significant delays for cases

---

Daniel Grodinsky is a partner at the Canadian law firm of Borden Ladner Gervais. His practice is focused on commercial and securities litigation and arbitration, intellectual property, and regulatory investigations. His expertise includes contract disputes, shareholder disputes, and the protection and enforcement of intellectual property rights. Mr. Grodinsky appears regularly before Canada's Federal Court of Appeal and Federal Court, and Québec's Court of Appeal and Superior Court, as well as before arbitration tribunals.

Neil Hazan is a partner at the Canadian law firm of Borden Ladner Gervais. His practice is focused on cross-border mergers and acquisitions, corporate finance and joint ventures. He also assists businesses with their expansion into Canada and advises on local and international agency and distribution agreements. Mr. Hazan regularly advises strategic and private equity buyers in diverse industries on Canadian and international platform and bolt-on acquisitions.

This article originally appeared in *Inside*, summer 2020 (vol. 38, no. 2), a publication of NYSBA's Corporate Counsel Section.

which have already been filed, let alone finding hearing times for new cases. There is also a potential for a second wave of the COVID-19 virus causing further uncontrollable court delays. If that is the case, the initial shutdown could easily lead to a slowdown for even longer, meaning months if not years into the future. Finally, the sheer weight of these cases requires not just hearing time, but the judge's attention in deliberation. It is possible parties see further delays waiting for judgments to be rendered.

Transitioning a dispute from the courts into an arbitration should allow many businesses to avoid these delays to some extent and to ensure that a lingering dispute does not become that much more expensive due to the passage of time, or that key evidence and testimony are not lost. The ability to skip the line of litigants before the courts and to agree on arbitrators with availability and the expertise to quickly drive progress in a dispute is therefore a significant advantage in the current climate. Moreover, if there are fears of the opponent's solvency, the quicker one gets to an enforceable award, the better are the chances of recovering.

While major jurisdictions have slowly moved toward authorizing virtual hearings for certain matters, often with an urgent component, arbitral institutions and arbitrators appointed ad hoc are already making use of hearings by videoconference or by phone. They are also more familiar with more streamlined and efficient practices for managing the evidence filed by the parties. This includes regularly employed practices such as using shared data rooms, providing dedicated iPads populated with the parties' evidence and pleadings. Arbitration has also been at the forefront of some pleading techniques made available by flexibility in regard to technology. This includes e-briefs that are more dynamic, comparisons for the purpose of contractual analysis, and demonstrative aids. This often avoids some of the inefficiencies seen by the courts as they try to adapt their local procedural rules with the realities of moving online or to a virtual space, let alone to any reluctance on the part of certain judges to embrace the advantages of technology.

Another benefit lies in an often-discussed fear on the part of non-U.S. parties to subjecting disputes to American courts. The reasons cited often include unpredictable damage awards, a desire to avoid an extensive and costly discovery process, and a need for more foreseeable partition of costs. When it comes to disputes with an international aspect, these benefits should remain the same. However, parties should also consider the unpredictability of the state of the law regarding how risks related to COVID-19 are going to be apportioned. By opting for an international arbitration, bounded by reference to an appropriate governing law, and appointing experienced arbitrators, parties may be able to better predict how a dispute may be decided and therefore to reduce any variability resulting from any unexpected outlier precedents rendered by local courts.

Arbitration should also allow parties to agree amongst themselves as to what the range of cost consequences will be for a dispute, thereby adding a degree of predictability and autonomy, which may not otherwise exist.

So as we move into a new world characterized by revelation of the frailty of how the judicial system responds to panic, it is useful to consider whether there are other methods by which a dispute can be resolved quickly, easily, and hopefully, more successfully, by way of a move to arbitration. Therefore, it may be the right time to consider whether to include an arbitration clause in a new or renegotiated contract, to verify if a potential dispute is subject to an exitings arbitration clause, or for a dispute where litigation is anticipated, whether it is possible to agree between the parties to transition the dispute to arbitration.

Creditor Protections for Inherited IRA Benefits and the Proposed Harmonization of Protections for Savings and Retirement Benefits Act

By Albert Feuer

Seymour Goldberg's well-written article, *Non-Compliant Trusts and Circular 230*, in the Fall 2019 issue of NYSBA's *Trusts and Estates Law Section Journal* article raises the issue of whether New York law permits a judgment creditor to enforce its claim against the debtor's interest in an inherited individual retirement account (IRA). The article states, "[s]ome states have enacted legislation that protect inherited IRAs from creditors of the nonspouse beneficiary. These states include Alaska, Arizona, Florida, Missouri, North Carolina, Ohio and Texas."[1]

Mr. Goldberg thereby recognizes the applicable New York law is ambiguous. He focuses on (1) the issues that arise when the IRA participant addresses this ambiguity by naming a spendthrift trust as the IRA beneficiary in order to protect the individual beneficiaries from the participant's creditors, and (2) the distinction drawn by the Supreme Court between bankruptcy protections available to an IRA beneficiary and those available to the individual who establishes the IRA, often called an IRA participant.[2] It is useful to understand the reason for the ambiguity and how it would be eliminated by the proposed Harmonization of Protections for Savings and Retirement Benefits Act, which the NYSBA has endorsed.[3] The act would make clear that creditor protections do not require that an IRA participant be wealthy, well-advised and willing and able to interpose a spendthrift trust as an IRA beneficiary to obtain creditor protections for the participant's desired beneficiary or beneficiaries.

I. New York Creditor Protections for Savings and Retirement Benefits

New York Civil Practice Law and Rules (CPLR) 5205(c) generally prevents a money judgment from being enforced against a judgment debtor's interest in

> all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either any trust or plan, which is *qualified as an individual retirement account under section four hundred eight or section four hundred eight A of the United States Internal Revenue Code* of 1986, as amended, *a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code* of 1986, as amended, or created as a result of rollovers from such plans pursuant to sections 402 (a) (5), 403 (a) (4), 408 (d) (3) or 408A of the Internal Revenue Code of 1986, as amended, or *a plan that satisfies the requirements of section 457 of the Internal Revenue Code of 1986, as amended*.[4]

This section directly governs the enforcement of claims outside bankruptcy. It must be considered in concert with other statutes for bankruptcy purposes. The CPLR provides that such property "shall be conclusively presumed to be spendthrift trusts" for all purposes, explicitly including bankruptcy purposes.[5] Thus, the property would be excluded from the bankruptcy petitioner's bankruptcy estate.[6] Moreover, if the petitioner chooses to use the state, rather than the federal exemptions, even if such assets were in the bankruptcy estate, they would be treated as exempt property.[7]

The benefits protected by the statute would appear to be clear from the statutory text. The protected benefits apply to any person with an interest in a corporate plan qualified under Section 401 of the Internal Revenue Code of 1986, as amended (IRC). Similarly, the protected benefits apply to any person with an interest in an IRA. In neither case is a distinction made between plan or IRA participants and plan or IRA beneficiaries. Thus, there seems to be no basis for concluding that one group is protected from its judgment creditors, but one is not.

The title of IRC § 401 is Qualified Pension, Profit-sharing, and Stock Bonus Plans. IRC § 401(a) provides that the statute sets forth the qualification rules for trusts that are part of a stock bonus, pension or profit-sharing plan. Profit-sharing plan participants may withdraw benefits while they remain employed.[8] Thus, these benefits are not restricted to retirement benefits. Participants may transfer

---

Albert Feuer is the principal attorney in the Law Offices of Albert Feuer in Forest Hills, New York. The firm focuses on employee benefits, executive compensation, estate planning and administration, and related tax issues. He is the Chair of the Debtor Protections for Pension & Profit-Sharing Plan Benefits Committee of the Trusts and Estates Law Section, which drafted the proposed Harmonization of Protections for Savings and Retirement Benefits Act.

This article originally appeared in the *Trusts and Estates Law Section Journal* summer/fall 2020 (vol. 53, no. 3), a publication of NYSBA's Trusts and Estates Law Section.

funds from any tax-qualified plan in a tax-free fashion to an IRA[9] that is "described in section 408(a)."[10]

Qualified plans must be created or organized for "the exclusive benefit of employees or their beneficiaries."[11] Similarly, IRAs must be created or organized for "the exclusive benefit of an individual or his beneficiaries."[12] Thus, the requirements for both plans and IRAs are designed to benefit their respective participants (who may, respectively, be either plan sponsor employees or individuals establishing IRAs) and beneficiaries.

Thus, it is not surprising that, as described above, the CPLR protects all IRA benefits and all qualified plan benefits, and does not distinguish participant protections from beneficiary protections.

II. The Unconvincing Court Decisions Holding That a Creditor May Enforce a Claim Against the Judgment Debtor's Interest in an Inherited IRA

Only two courts, one affirming the decision of the other, appear to have considered whether New York law protects a judgment debtor's benefits from an inherited IRA. In 2018, a federal bankruptcy court for the Northern District determined that a bankruptcy petitioner was not entitled to a bankruptcy exemption for the petitioner's $800,000 interest in an IRA that she inherited from her late mother.[13] The court based its decision on its finding that the inherited IRA was not a spendthrift trust under CPLR 5205(c)(3).[14] This finding, in turn, rested on the court's finding that the inherited IRA did not satisfy the requirements of CPLR 5205(c)(2) to be considered a "CPLR § 5205(c)(3) spendthrift trust." The court focused on the meaning of the phrase "qualified as an individual retirement account under section four hundred eight . . . of the United States Internal Revenue Code of 1986."[15] The court focused considerable attention on the fact that IRC § 408 does not use the term "qualified" and the lack of a "definition" of the term in CPLR 5205(c).[16] The court claimed that there are two reasonable interpretations of the "qualified" IRA: (a) one that meets the six requirements of 408(a), or (b) one that qualifies for all the tax benefits available to an IRA, such as an ability to make further contributions and be permitted more minimum required distribution options.[17] However, the issue is not about the term "qualified" in isolation. The relevant inquiry should be about the entire quoted term, which implies that the relevant question is did the IRC set forth the meaning of the relevant term "individual retirement account." The IRC does so, as the court admits.[18] In particular, the IRC provides that an IRA is a trust that satisfies the six cited requirements,[19] i.e., the first interpretation. It is unclear why this does not demonstrate the lack of any ambiguity. However, rather than looking at the statute at issue, CPLR 5205(c), to determine if there was any ambiguity, the court searched for an ambiguity elsewhere within the IRC. In particular, it asked whether, under the IRC, a participant may "qualify" for better tax benefits than the participant's beneficiary.[20] The court failed to construe the statute CPLR 5205(c) in accord with the usual guiding statutory principle of resolving ambiguities "in conformity with its dominating general purpose."[21] As discussed above, that principle is to give the same protections to corporate plans and IRA benefits. Moreover, the court did not mention that the exact same argument could be made to conclude that there are no debtor protections for the beneficiary of a corporate plan because, even though the word "qualified" is used in IRC § 401, the tax treatment for plan participants and their beneficiaries differs in the same manner as is the case for IRA participants and beneficiaries.

The court then engaged in a similarly questionable analysis of the CPLR's legislative history to find that IRA beneficiaries are not entitled to debtor protections. First, the court observed that in 1989, when the legislature added implicit debtor protections for rollovers to IRAs,[22] the statutory memo described the purpose as '"mak[ing] the protection of IRAs of qualified retirement plans explicit in order to avoid potential disqualification by bankruptcy judges.'"[23] Similarly, when later in 1989, the legislature broadened protections for benefits from Keogh and corporate plans, Assemblyman Silver's Memorandum in Support of the legislation stated that the legislative purpose was to '"advance . . . the interests of New York retirement plan participants by ensuring that *their retirement benefits* are fully protected' and to avoid a legislative scheme where '"citizens concerned about protecting *their retirement benefits* have an incentive to relocate in a state that has adopted [a] more explicit statute.'"[24]

The court disregarded the fact that the prior statute protected benefits from profit-sharing plans that need not provide retirement benefits. The prior statute protected benefits from profit-sharing plans, such plans do not provide retirement benefits. The statute did not even use the term retirement benefits. Thus, it did not limit debtor protections to retirement benefits. There is no evidence that the prior statute failed to give beneficiaries debtor protections to beneficiaries. Both of these 1989 legislative acts were designed to expand benefit protections previously provided. In fact, the cited statement in support of the rollover legislation by Assemblyman Silver included the following statement description of the broad range of benefits that would be further protected: "This proposal is a logical extension of the 1987 law, Chapter 108, on the satisfaction of trust exemptions. It specifically affords protection from judgment creditors to rollovers in qualified retirement plans in accordance with" the 1987 legislation.[25] Thus, there is no basis for the court suggestion that this legislation limited debtor protections to retirement benefits or excluded debtor protections for beneficiaries of corporate and Keogh benefit plans.

Limiting retirement benefits to a participant's lifetime benefits is contrary to the IRC treatment. As discussed above, IRC limits the most favorable tax treatment to

plans and IRAs organized exclusively for participants and beneficiaries, and the Employee Retirement Income Security Act of 1974 (ERISA) protects the benefits of both participants and beneficiaries.[26]

Such an interpretation would also be contrary to why people so value their retirement benefits. They can be used to provide survivor benefits. Moreover, citizens concerned about protecting their retirement benefits would be concerned about protecting the benefits payable to their beneficiaries because those survivor benefits are part of their retirement benefits. That is why many plan participants choose not to limit plan benefit payments to their lifetimes but arrange that a significant portion be paid to their dependents so they may be supported after the participant dies. It is also why wealthier participants choose to maximize the benefits paid to them and their beneficiaries, by ensuring that a significant portion of their tax-deferred plan benefits will be paid to their beneficiaries.

The court further observed that in 1994, when the CPLR was first amended to explicitly include IRA benefits, the stated purpose was "to 'provide protection to individuals who establish IRA accounts for *their retirement*.' N.Y. State Senate Introducer's Memorandum in Support, S. 4244-A; A. 6806-A (1994)."[27] The suggestion that such reference to "their retirement" is meant to restrict debtor protections to participants is even less convincing than the suggestions about the earlier legislation because this legislation limits the protected IRA benefits to those attributed to corpus, but not to those attributed to income.[28] Thus, the legislature was quite capable of making narrow distinctions in benefit protections if it intended to. Moreover, the May 24, 1994 comment letter of the NYSBA Committee on Civil Practice Law and Rules said nothing about giving different protections to participants and to beneficiaries, but focused on the importance of parity of treatment for IRA and plan benefits by declaring that:

> The subject legislation is commendable in that it excepts from the reach of judgment creditors the relatively modest assets usually found in IRAs and thereby serves the important public interest of ensuring that senior citizens have adequate resources with which to support themselves upon retirement. Moreover, there is no principled distinction between IRAs and the other assets already protected under the statute. Indeed, IRAs are more limited and generally relied upon by lower income, less advantaged individuals. Compared with 401ks, Keoghs, or other retirement plans, IRAs allow a much lower yearly contribution. Permitting judgment creditors to reach IRAs held by such individuals, while allowing the typically more substantial 401k and Keogh accounts of higher income individuals to escape execution would work an injustice.[29]

The bankruptcy court's decision was affirmed by a district judge.[30] The district court repeated the arguments of the court below,[31] mentioned the distinctions with respect to the bankruptcy law drawn by *Clark v. Rameker*[32] and relied on the canon that '"a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"[33] In particular, the district court relied on the fact that CPLR 5205(c)(2) concludes with the clause,

> [A covered asset] shall be considered a trust which has been created by or which has proceeded from a person other than the judgment debtor, even though such judgment debtor is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan or (v) a participant in a section 457 plan.[34]

The district court asserted that if this language were not to be surplusage it must limit the protected IRA benefits to debtors who made contributions to the IRA.[35] This assertion is absurd on its face. Protections for benefits of participants in tax-qualified corporate plans are not limited to those who are corporate shareholders, whereas the clause is so limited. This belt and suspenders clause appears to have been included to assure the reader that the draftsman recognized the CPLR provision permits those from whom the "trust" had proceeded to benefit from debtor protections that are not otherwise available to trust settlors.

III. How the Harmonization of Protections for Savings and Retirement Benefits Act Would Change Protections for a Judgment Debtor's IRA Benefits

The proposed Harmonization of Protections for Savings and Retirement Benefits Act would increase the coherence, clarity and equity of New York debtor protections for savings and retirement benefits by applying the current widely accepted paradigm to all similar benefits. Its effects may be illustrated by the following five changes pertaining primarily, but not exclusively, to benefits from individual retirement accounts, which generally are operated by trustees or custodians, or individual retirement annuities, which generally are operated by insurers:

1. Provide the same protections for benefits from individual retirement accounts as from individual retirement annuities. Thus, protections would not

be affected by whether the benefits are provided by a custodian, a trustee or an insurer.[36]

2. Clearly define the protected benefits from individual retirement accounts and individual retirement annuities.[37] Similarly clarify the definitions of protected benefits from tax-qualified plans and from section 457 plans.[38]

3. Clearly set forth in the supporting memoranda that it is intended that participants and beneficiaries receiver the same debtor protections.[39]

4. Provide that spouses or former spouses may compel an individual to provide benefits from an individual retirement account or individual retirement annuity pursuant to orders that meet the substantive qualified domestic relations order requirements.[40] The law now permits qualified domestic relations orders to overcome the debtor protections for IRAs, but the IRC definition of such orders does not apply to either individual retirement accounts or individual retirement annuities. Thus, spouses and former spouses may not now compel compliance with equitable distribution orders pertaining to such benefits.

5. Eliminate Roth references.[41] Roth IRAs and individual retirement annuities are IRAs and individual retirement annuities which have been so designated pursuant to IRC § 408A(b), and thus need not be mentioned to receive the desired protection.

Endnotes

1. Seymour Goldberg, *Non-Compliant Trusts and Circular 230 Issues*, NYSBA Tr. & Est. J. 7 (Fall 2019). For a more complete description of the treatment of inherited IRAs by the states, *see* ACTEC, 50 STATE INHERITED IRA CHART (Sept. 2018), https://www.actec.org/assets/1/6/50_STATE_INHERITED_IRA_CHART.pdf.
2. *Clark v. Rameker*, 573 U.S. 122 (2014) (holding that there is no bankruptcy exclusion for a non-spousal IRA under 11 U.S.C. §§ 522(b)(3)(C) and 522(d)(12)). For a more extensive discussion of *Clark v. Rameker* and its implications, *see* Keith A. Herman & Jeffrey A. Herman, *Protecting Retirement Assets from Creditors*, 75 J. Mo. B. 172 (July/Aug. 2019), https://news.mobar.org/protecting-retirement-assets-from-creditors/; Albert Feuer, *The Supreme Court Disregards ERISA and Goes Farther Astray in Applying Bankruptcy Law to Retirement Assets*, 33 Tax Mgmt. Wkly. Rep. 995 (July 28, 2014), abstract and link to full article available at http://ssrn.com/abstract=2477546.
3. The proposal and supporting material ("Harmonization Proposal") is available at https://nysba.org/app/uploads/2020/05/Harmonizing-Proposal-Post-Oct-11-2019.pdf (last visited Aug. 13, 2020).
4. CPLR 5205(c) (emphasis added).
5. *Id.* § 5204(c)(3).
6. 11 U.S.C. § 541(c)(2). It can be argued that if the IRA is held by a custodian or an insurer rather than a trustee, the CPLR exclusion is inapplicable despite the New York statutory presumption of treating such IRAs as being held as a spendthrift trust. This would be contrary to the reasoning of *Patterson v. Shumate*, 504 U.S. 753 (1992) (holding that the bankruptcy exclusion is applicable to those ERISA retirement and savings plans required to have an alienation prohibition without any discussion of whether the ruling was limited to those plans funded with trusts rather than by custodians or insurers). It is also contrary to the two court decisions, discussed, *infra*, that explicitly accepted the New York spendthrift trust characterization, but held that no inherited IRA met the New York statutory requirements.
7. Debt. & Cred. L. § 282; 11 U.S.C. § 522(b)(3)(A); *cf. Clark*, 573 U.S. 122 (holding that there is no bankruptcy exclusion for a non-spousal IRA is inapplicable because the Supreme Court was interpreting 11 U.S.C. § 522(b)(3)(C)).
8. Treas. Reg. §§ 1.401-1(b)(ii) and (iii).
9. IRC § 402(c).
10. IRC § 402(c)(8)(B)(i).
11. IRC § 401(a).
12. IRC § 408(a).
13. *In re Todd*, 585 B.R. 297, 306 (N.D.N.Y 2018), *aff'd sub nom. Todd v. Endurance Am. Ins. Co.*, 596 B.R. 79 (N.D.N.Y. 2019).
14. *Id.*
15. *Id.* at 302.
16. *Id.*
17. *Id*. at 303.
18. *Id.* at 302.
19. IRC § 408(a).
20. *In re Todd*, 585 B.R. at 302-06. Beneficiaries are also entitled to better tax benefits than participants. They can take distributions at any age without being subject to an early withdrawal payment. I.R.C. § 72(t) (A)(ii).
21. *See, e.g., Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp*., 320 U.S. 344, 350 (1943) (holding that oil lease assignments qualified as regulated "securities" or "investment contracts" under the statute because sellers were offering exploration services in addition to the leaseholds).
22. *In re Todd*, 585 B.R. at 303-04; L. 1989 ch. 84.
23. *Id.* at 304.
24. *Id*.
25. Memorandum in Support, S. 3567; A. 5753, Ch. 84 (1989).
26. ERISA § 2, 29 U.S.C. § 1001 (Congressional Findings and Declarations of Policy).
27. *Id.* (emphasis in original); *In re Todd*, 585 B.R. at 303-06.
28. This limitation is no longer in the statute. It was removed the following year by L. 1995, ch. 93, §§ 1, 2, so that as with plan benefits all IRA benefits receive debtor protections.
29. Harmonization Proposal, *supra* note 3, at 64.
30. *Todd v. Endurance*, 596 B.R. 79.
31. *Id.* at 84-85.
32. *Id.* at 85.
33. *Id.* at 83 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167 (2001)).
34. *Todd v. Endurance*, at 83.
35. *Id.*
36. Harmonization Proposal, *supra* note 3, Section 6 at 5.
37. *Id.*
38. *Id.* at 5-6.
39. *Id.*, Memorandum in Support of Legislation at 28.
40. *Id.*, Act Section 6 at 6.
41. *Id.*, Act Section 6 at 5.

Conducting a Virtual Estate Planning Execution Ceremony: A Best Practices Primer During a Pandemic

By David J. Spacht

Introduction

Under the present circumstances, when the motivation to complete an estate plan is at the forefront of one's thoughts, formal legal requirements requiring in-person witnessing and notarization can hinder the ability of clients to execute their plans. To address these circumstances, Governor Cuomo and the governors of various other states[1] have issued Executive Orders authorizing the remote execution of estate planning documents through audio-video conferencing technology.

Although this methodology allows practitioners to continue serving clients and relieves some of the anxiety clients are facing during the COVID-19 era, advisors are still encountering challenges in supervising the execution of clients' estate planning documents. Estate planning clients who have fled congested city centers for more remote pastures create additional complexities, especially in those jurisdictions with different procedures for the execution of documents. Advisors will inevitably have to adopt new flexible approaches to advising clients during this period.

Formal Will Requirements

For a will to be legally valid, one must follow certain formalities of execution, whether the will is signed in person or remotely. These formalities vary slightly from state to state. Still, the majority of jurisdictions require that a will be in writing and signed or acknowledged by the testator in the presence of at least two witnesses who sign the will in the presence of the testator and the presence of each other. New York conforms to the traditional will formalities required by the majority of states, i.e., that the testator signs the will in the physical presence of at least two witnesses.[2] Each witness must witness either the testator's signature or the testator's acknowledgment of his or her signature. Also, the witnesses must, within 30 days of the testator's signing, sign their names and affix their residence addresses at the end of the will.[3]

Finding at least two disinterested individuals who are willing to act as witnesses within a close physical distance to the testator and each other is perhaps the most challenging aspect of the transition from a traditional in-office practice to the new normal of social distancing. Many states, including New York, maintain the strict common law requirement that a witness be within the testator's "line of sight." This "line of sight" test requires not only that the witnesses are within proximity of the testator and each other, but also requires that each party maintains an unobstructed view of the signing party. Within such jurisdictions, it may be possible to execute estate planning documents with slight adaptations to the traditional procedure to accommodate social distancing restraints. For example, an attorney and client may be able to schedule a meeting outside of a client's home or gather in an office parking lot where the parties may separately approach a table to sign. A testator may also sign from inside his or her home while the witnessing and notarizing parties witness through a window or screen door.

"Conscious presence" test jurisdictions, like New Jersey, theoretically enable approaches to signing that are more conducive to social distancing measures. Under the conscious presence test, the presence requirement is satisfied if the testator, through general consciousness of events, comprehends that the witness is in the act of signing.[4] The conscious presence test is more forgiving in that the testator and witnesses are not required to be in direct view of the ink touching the paper, but are only required to be aware of the parties' roles in the signing ceremony. In a conscious presence test jurisdiction, the parties may sign from within their vehicles, where the parties are all aware that the witnesses and notary are signing the documents, even though the car may obstruct a direct view of the executed documents.

Remote Notarization / Witnessing E.O.s

Even with precautions, many clients, advisors and potential witnesses may still be concerned about participating in signing ceremonies that require close physical proximity to others. This concern may make it difficult to find witnesses and notaries who are available to sign documents locally.

On March 19, 2020, Governor Cuomo issued Executive Order 202.7[5] authorizing the remote notarization of any notarial act that is required under New York law. Although it was sufficient to facilitate the signing of specific

David J. Spacht is a member of Pryor Cashman's Trusts + Estates, Private Client and Tax Groups. David assists provides legal counsel on domestic, international and charitable tax and estate tax planning and administration for high-net-worth individuals. David provides multi-jurisdictional counsel to individuals in New York, New Jersey and Florida and frequently assists clients with the preparation of structures designed to achieve tax minimization and preservation of assets for future generations.

This article originally appeared in the *Trusts and Estates Law Section Journal* summer/fall 2020 (vol. 53, no. 3), a publication of NYSBA's Trusts and Estates Law Section.

estate planning documents that do not need a witness, it did not enable advisors to facilitate the execution of wills. To address this gap, Cuomo issued Executive Order 202.14 on April 7, 2020, authorizing a nearly identical procedure for the remote witnessing of specified types of estate planning documents, including wills,[6] health care proxies,[7] powers of attorney and statutory gift riders,[8] and inter vivos trusts.[9] The twin orders require that:

i) the person requesting that his or her signature be witnessed or notarized (the "signing party") present a valid photo ID to the witnesses and notary during the video conference (unless such individual is personally known);

ii) the video conference permits live interaction between the signing party, the witnesses and the notary;

iii) the signing party electronically transmits his or her signed pages to the witnesses or notary on the same date as the video teleconference;[10] and

iv) the witnesses or notary sign the electronically transmitted copy of the signature page(s) on the same day as the signing party.[11]

Administrative Challenges and Best Practices

While the remote execution procedures are helpful, one must still address a variety of practical and administrative challenges that they present.

In the Thick of It

Drafting the Documents

When endeavoring to execute a will, many clients will likely also intend to complete a power of attorney, health care proxy, living will, and, perhaps, a revocable trust. Some of these documents require only either witnessing or notarization, and others may need both.[12] Opting not to require notarization for trust agreements[13] or health care proxies,[14] documents that do not require it, gives the client the flexibility to utilize friends and neighbors as witnesses who are not required to possess any special qualification as a notary.

Avoiding the use of a notary also bypasses the provision of Executive Order 202.7 requiring the client to transmit a copy of the entire signed document to a notary. By using documents that only require witnessing, the client must only send a copy of their signature pages to the witnesses. Witnessing avoids the potential for a misstep where a client fails to transmit one or more pages of their document to the notary. A trust agreement, for example, may consist of dozens of pages, not only making it probable that a page or two will be omitted from a scan, but also likely causing practical difficulties with email size and server limitations.[15] Such a minor administrative glitch could invalidate the document.

Preparing for the Teleconference

Advisors must be mindful of the expiration deadlines for the remote execution orders when scheduling meetings to sign documents remotely. The expiration date of Executive Order 202.7 was originally April 18, 2020. However, Governor Cuomo has extended the expiration date of Executive Order 202.7 at monthly intervals.

It is vital to maintain consistent best practices in one's process to ensure that none of the detailed compliance requirements are overlooked and can be supported if later challenged. The following is a sample checklist that can serve as a guideline for developing one's system of best practices.

- Send the client a package enclosing execution copies of the estate planning documents that are bound and ready to be executed. Enclose a prepaid return envelope that the client can drop off or that can be picked up from their home by a courier service. Address the return envelope to one of the witnesses. Coordinate with the witnesses to circulate the original documents.
- On the day before the teleconference, send an email to the signing parties, the witnesses and the notary with the video conference login link and credentials, a calendar invitation, and PDF copies of the documents to be signed. This email will be at or near the top of everybody's email inbox on the meeting date and will serve as a reference guide in preparing for the meeting.
- This email should include a reminder to the signing parties to have their driver's licenses or other valid photo identification cards readily available during the signing ceremony.
- The email should also indicate which persons will be serving as "witness 1," "witness 2" and who is notarizing the documents. This clarity will ensure execution of the documents uniformly (i.e., witnesses will not be signing on the same line for each document) and consistently (i.e., each document will be witnessed on the same line by the same individual).
- The email will also connect the parties so that each party can easily "reply all" with copies of their fully executed documents after the teleconference has ended.
- If using a free videoconferencing service, confirm whether the provider limits the time on the length of the call. For example, a free Zoom account will limit a conference call to 40 minutes.[16]

During the Teleconference

- Advise the client to hold his or her photo identification up to the camera for the witnesses and notary to confirm the client's identity.

- Ask the client to confirm that he or she is physically in New York State.
- Before each document is signed, advise the client which pages to photograph.[17] If the client is signing a power of attorney or statutory gifts rider[18] (which requires notarization to be valid) or is signing a will (and a notary is utilized to sign a self-proving affidavit) advise the client that he should be taking pictures of the entire document.
- If the client is relying on her cell phone camera for the video call, inquire whether the client can borrow another individual's device to make the call—this will free-up the client's device to take pictures of the appropriate pages.[19]

Post-Teleconference Due Diligence

- The client should "reply all" to the email chain immediately after the video conference with his or her executed documents attached. Because the signing party must send the documents on the same date as the execution ceremony (not within 24 hours), the teleconference should be scheduled as early in the day as possible. Planning the meeting earlier in the day will allow the supervising attorney enough time to review the drafts for errors or omissions and to enable the client to cure them (and also to let the witnesses and notary roll out of bed).
- Archive copies of the emails and assemble the digital signature pages.
- Although the witnesses are not required to sign the original documents, originals should also be circulated and signed within 30 days of execution. The client's photographed images will inevitably include fingernails and will be of poor image quality and should be re-signed by all parties on the testator's original signature pages.
- If the notary and signatory are in different counties, the notary should indicate on the notarial acknowledgment the county where the notary and each of the signing parties is located. Assemble digitals as one set and physicals as another set.[20]

After the Dust Settles–Getting Back to the New Normal

There are possible risks that will inevitably arise with keeping remotely executed documents in place for years. Although it is unlikely that financial institutions, medical professionals and others relying on estate planning documents will forget about the challenges we faced during COVID-19 a decade from now, it is foreseeable that many of them will forget about the remote execution privileges in place. As such, when delivering copies of the executed scans, remind the client that it is essential to reconvene to re-execute their documents when things return to normal.

Make sure to keep a log of all executed documents under the remote execution protocol. Prepare a form letter to send to those clients who executed their documents under remote execution procedures.

Choice of Law Issues

Advising New York clients who have temporarily retreated to vacation homes may present an additional and unique set of issues when executing their estate planning documents.

Option 1—Use the Resident State's Remote Notarization Statute

If the client is presently waiting out the storm in another state without access to a locally licensed notary public, the supervising attorney cannot rely on Executor Order 202.7 to permit the use of a New York notary. Under these circumstances, the client may be able to rely on their resident state's remote notarization statute.[21]

If a client is in New Jersey, for example, she may execute her documents by following New Jersey's remote execution procedures, which differ from New York's. On April 14, 2020, the Governor of New Jersey, Phil Murphy, signed executive order A3903, authorizing the use of audio-video technology to notarize certain documents remotely.[22] As such, a client residing in New Jersey can sign her estate planning documents remotely using an officer authorized to take New Jersey oaths.

Option 2—Don't Use a Self-Proving Affidavit Yet; Do It Later

Although a will must be witnessed by at least two witnesses to be valid under New York law, it does not have to be notarized unless a self-proving affidavit is signed contemporaneously.[23] Self-proving affidavits are customarily executed along with wills as they provide prima facie evidence of due execution. Using a self-proving affidavit facilitates the probate of a will without the need for the testimony of any subscribing witnesses, who may have relocated or died.[24]

Although it is unquestionably the best practice to obtain a self-proving affidavit at the time of execution, it may be difficult or even impracticable to find available witnesses or a notary located within New York. Fortunately, the witnesses and notary may execute a self-proving affidavit at any time, even after the death of the settlor. As such, the witnesses to the will may later reconvene with a notary to sign a self-proving affidavit. If the witnesses and notary execute the affidavit during the testator's lifetime, the testator must only request that the witnesses sign the affidavit in the presence of a notary public, but does not have to himself be present or even aware of when the witnesses and notary coordinated to sign the affidavit. For example, the testator could request at the time of the execution of his will, and the witnesses might comply with it at the office of the testator's attorney a few days later.

Option 3—Holographic Will

If a client has exigent needs and is temporarily residing in a state without access to disinterested witnesses or remote execution procedures, the client could take the more drastic approach of signing a holographic will. The supervising attorney should be mindful of applicable state law, as one cannot necessarily rely solely on formalities required by the client's state of domicile at the time of the will's execution. Under common law, the law of the decedent's domicile at death determines the validity of the will to dispose of personal property. In contrast, the law of the state where the real property is located determines the validity of the disposition of such real property.[25] New York's statute, for example, modeled after the Uniform Probate Code, expands on the common law and permits the admission of a will to probate if the testator validly executed it according to the laws of the jurisdiction in its place of execution or the testator's jurisdiction of domicile at the time of the will execution or the testator's death.[26] As such, New York would recognize a holographic will executed in New Jersey.

Also of particular concern is that even states with a choice of law statute sometimes contain exceptions. For example, although Florida recognizes wills that were validly executed under the laws of the state of execution, Florida law carves out an exception for holographic wills, even if it would have been valid in the state where executed.[27] Under the example mentioned above, if a client executed a valid holographic will while residing in New Jersey and then moved to Florida, a Florida probate court would not recognize that will as valid (even though the holograph would have been valid in New Jersey, and many other states).

Conclusion

As individuals and businesses continue to maintain social distancing and work-from-home policies, it is important to be mindful of the tools and options available for remote document signings. Adopting a set of methods and practices now may serve the advisor well through the inevitable transition into a new system that includes permanent and robust remote execution and electronic wills procedures.

Endnotes

1. *See Emergency Remote Notarization and Remote Witnessing Orders*, ACTEC, https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders (listing Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; Washington D.C.; West Virginia; and Wyoming). Note, some states allow only remote notarization, and others, only remote witnessing.
2. N.Y. Est. Powers & Tr. L. (EPTL) 3-2.1.
3. *Id*. § 3-2.1(a)(4); Under New Jersey law, the witnesses must sign the will within a "reasonable time" after witnessing the required aspects of the will's execution. N.J. Rev. Stat. § 3B:3-2.
4. *Id*. § 3B:3-2(a)(2).
5. N.Y.S. Executive Order 202.7 (eff. Mar. 19, 2020).
6. EPTL 3-2.1(a)(2); EPTL § 3-2.1(a)(4); N.Y.S. Executive Order 202.14 (eff. Apr. 7, 2020).
7. N.Y. Pub. Health Law § 2981(a)(2).
8. N.Y. Gen. Oblig. Law § 5-1514(9)(b).
9. EPTL 7-1.17.
10. Executive Order 202.7 requires that the client's fully executed document be transmitted to the notary, whereas Executive Order 202.14 requires that only the client's signature pages be transmitted to the witnesses. "The Witness(es) must receive a legible copy of the signature page(s), which may be transmitted via fax or electronic means, on the same date that the pages are signed by the person." Executive Order 202.14. *Compare* Executive Order 202.7 ("The Person must transmit by fax or electronic means a legible copy of the signed document directly to the Notary on the same date it was signed.").
11. This must be done within the same calendar day, not within 24 hours of the signing.
12. For a power of attorney to be valid in New York, it must be executed in the state and be signed and dated by the principal and notarized, but there is no requirement that the principal and agent both sign within a specified period of time. It must be signed and dated by the agent (the attorney-in- fact) as well. To permit the agent to make significant gifts, the principal must execute a statutory gifts rider, which must be notarized and witnessed by two others. N.Y. Gen. Oblig. Law § 5-1501B.
13. EPTL 7-1.17.
14. N.Y. Pub. Health Law § 2981.
15. If the client is using an iPhone, taking photographed scans with the built-in "Files" app can be 100 megabytes or larger. Apple's mail drop service will allow the client to send large files.
16. Also, be aware that Zoom is eliminating encryption for non-premium users.
17. The Executive Orders are virtually identical. One exception is the requirement that the signing party must send the entire document to the notary and only the signature pages to the witnesses. This distinction makes it apparent that compliance with the remote notarization statute was intended to be more exacting. It is unclear, however, whether the import of the distinction was that signing party personally capture a scan of the fully-executed version of the document or just that the notary receives a full copy of the instrument to confirm the nature of the document being executed. If the client is responsible for distributing a scan of his or her entire signed document, there is the greater potential for error, i.e., that he or she misses one of the dozens of pages of their Last Will and Testament, that the scan is too large for the client to attach to an email with it being, unbeknownst to them, rejected by her email server.
18. For a power of attorney to be valid in New York, it must be executed in the state and be signed and dated by the principal and notarized, but there is no requirement that the principal and agent both sign within a specified period of time. It must be signed and dated by the agent (the attorney-in-fact) as well. To permit the agent to make significant gifts, the principal must execute a statutory gifts rider, which must be notarized and witnessed by two others. N.Y. Gen. Oblig. Law § 5-1501B.
19. The client may not feel comfortable with the images of their sensitive estate planning documents being stored on another person's device.
20. The notary must print and sign the document, in ink, and may not use an electronic signature to officiate the document. The signatory

may use an electronic signature, provided the document can be signed electronically under the Electronic Signatures and Records Act (Article 3 of the State Technology Law). If the signatory uses an electronic signature, the notary must witness the electronic signature being applied to the document, as required under Executive Order 202.7.

21. At the time of this writing, approximately 45 states have some form of remote notarization or witnessing statute.

22. New Jersey Executive Order A3903, April 14, 2020. Executive Order A3903 requires that: (1) the notary or other officer has personal knowledge of the remotely located person, or has satisfactory evidence of the remote person's identification (i.e., seeing two different forms of the individual's government issued identification, such as a state issued driver's license and U.S. passport); (2) the notary or other officer can reasonably confirm that the document before the notary or other officer is the same as what is being signed; (3) the notary or other officer creates an audio-visual recording of the notarial act; (4) the notary or other officer indicates by certificate, that the notarial act was performed remotely; and (5) the recording of the notarial act is retained by the notary or other officer (or his or her agent) for 10 years.

23. The SCPA provides that the attesting witnesses to a will may (i) at the request of the testator or (ii) after the testator's death, at the request of (a) the executor named in the will, (b) the proponent or his attorney or (c) any interested person, make an affidavit before any officer authorized to administer oaths stating such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint. N.Y. Surr. Ct. Proc. Act Law § 1406(1).

24. *See, e.g.*, *In re Castiglione*, 40 A.D.3d 1227 (3d Dep't 2007); Uniform Prob. Code § 2-504 cmt. (amended 1990).

25. *See* Stanley M. Dukeminier & Jesse Johanson, Wills, Tr., and Est. 242 (6th ed. 2000).

26. EPTL 3-5.1(c); *see also* Uniform Prob. Code § 2-506.

27. Fla. Stat. § 732.502(2) provides: "Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida . . . is valid as a will in this state if valid under the laws of the state or country where the will was executed."

Commercial Division Justices Discuss Litigating During COVID-19

By A. Robert Quirk and Muhammad U. Faridi

On Monday, May 11, 2020, three Commercial Division justices from across the state participated in a virtual panel to discuss the state of litigating in the Commercial Division during COVID-19. Justices Saliann Scarpulla (New York County), Timothy Driscoll (Nassau County), and Deborah Karalunas (Onondaga County) discussed the ways in which litigation can move forward while the courts operate in a virtual format. The panel was presented by the New York State Bar Association's Commercial and Federal Litigation Section.

A. Robert Quirk

Muhammad U. Faridi

The key theme throughout the panel was that courts would not be returning to normal in-person operations soon, so attorneys should strive to move cases forward in the new virtual format. While the justices are eager to return to chambers, all three acknowledged that it would not happen in the foreseeable future and virtual operations will likely be in place for New York courts for many months, at least in counties hit hardest by COVID-19.

Availability of Hearings

The first topic directed to the panel was the availability of hearings. All three justices agreed that virtual hearings would eventually be possible. At this time, the primary obstacle is the availability of court reporters. Criminal and emergency matters have priority for court reporter assignment, thus leaving little availability for commercial matters. Justice Karalunas noted that virtual hearings are already being heavily used in family court, and all three justices expected virtual proceedings to expand into the Commercial Division in coming months. With respect to oral argument, Justice Driscoll stated that he recently held oral argument on a motion and it went smoothly, and Justices Scarpulla and Karalunas added that they would be eager to hear argument virtually, as well.

Conferences

The panel next discussed the logistics of court conferences. Justice Scarpulla noted that many lawyers are reluctant to move forward with video conference from their homes, which she understood. She has relied primarily on phone conferences to keep cases moving. Justice Karalunas echoed the preference for phone conferences but noted that she requires videoconference when more than five attorneys will be present to avoid confusion over which party is speaking.

The three justices emphasized the importance of punctuality for virtual conferences and other proceedings. Justice Karalunas noted that late arrival by one party's counsel before the other party's counsel arrives creates a problematic ex parte situation for the court. Justice Driscoll added that one benefit of virtual conferencing is the elimination of the "cattle call," and may allow counsel to appear more efficiently in different courts on the same day. The trade-off for conference scheduled for a matter within a specific time period underscores the need for punctuality. Justice Driscoll also noted that, while he prefers that counsel appear in business attire, the more important thing is to show up on time and prepared.

E-Filing

The panel then turned to the logistics of e-filing. The three justices expressed gratitude that e-filing has been recently expanded to allow filing of most papers electronically. The panel deferred on questions about the timing and logistics of e-filing availability to the Chief Judge, but noted that the e-filing system was not designed to be operated entirely remotely, so it took some time to build a system that did not require on-site staffing. Justice Scar-

---

A. Robert Quirk is an associate and Muhammad U. Faridi a partner at Patterson Belknap Webb & Tyler LLP.
Reprinted with permission from the website of Patterson Belknap Webb & Tyler LLP.

This article originally appeared in the *Commercial and Federal Litigation Section Newsletter,* fall 2020 (vol. 26, no. 2), a publication of NYSBA's Commercial and Federal Litigation Section.

pulla added that the justices do not currently receive a notification when a motion is fully submitted but they do receive notice when a letter is filed, so she recommended writing a short letter to the court noting that a motion is fully submitted to alert the court that the motion is ripe for consideration. The justices encouraged counsel to communicate with the court to clarify any questions about the submission of specific papers.

Trial

Trial was the next topic. The justices expressed eagerness to hold non-jury trials virtually. Justice Driscoll urged parties to considering holding trial virtually "by any means possible," and all three justices noted that it would likely be several months before jury trials resumed.

Justice Scarpulla added that counsel seeking prompt resolution of cases should consider skipping summary judgment and proceeding directly to a non-jury trial. She noted that the time required for considering a summary judgment motion was similar to a non-jury trial, and it is therefore a much more efficient use of attorneys' and the court's time to proceed directly to a trial. Justices Driscoll and Karalunas enthusiastically echoed that advice. The justices noted that case-dispositive summary judgment is rarely granted.

Settlement and Mediation

The panel next turned to the question of how COVID-19 was impacting settlement and mediation. The justices agreed that all forms of ADR were increasing and would continue to increase. Justice Scarpulla reiterated that there was "zero chance of a jury trial" for the next several months, at least in New York County, and that she was strongly urging parties to consider mediation or non-jury trials for the foreseeable future.

Justice Driscoll added that parties should not overlook the role of the judge in helping settle cases. He acknowledged that some judges are reluctant to facilitate settlement in cases in which they would be the finders of fact, but that he was comfortable doing so. The three justices agreed that parties should strive to work toward settlement despite COVID-19.

Emergency/Essential Matters

The panel was asked whether any Commercial Division cases had qualified as emergency or essential matters. None of the justices had received any such matters, and Justice Driscoll noted that very few Commercial Division cases involve true emergencies even in the normal course. Justice Scarpulla added that treating commercial cases as emergency or essential matters would take court reporters away from criminal and family courts, where they are currently in short supply. For existing matters with emergencies situations, parties should contact the part handling the matter directly.

Concluding Remarks

The panel closed with the justices again urging the bar to continue moving cases forward by whatever means possible. The three justices reiterated that some variation of the current virtual format for court operations would continue for the foreseeable future—at least in certain counties—but that no details about the specific details are "set in stone." Given this reality, counsel were urged to remain adaptable and patient in finding ways to continue moving matters forward using virtual tools. To that end, all three justices encouraged counsel to reach out to the court to propose ways to move cases forward or to request tools to allow for efficient resolution.

An Interview With Judge Charles Ramos (Ret.)

By Orna Artal

Q. Can you share a little about your legal background and the process you experienced to become a judge?

A. After graduating from Fordham Law School, I joined a firm that was as small as you can get without being a single practitioner. It was the office of Benedict Ginsberg. There were three of us doing commercial and civil litigation exclusively. Benedict, the senior partner, was one of the best trial lawyers I have ever seen. Smart, good looking, a real charmer. We would typically be retained to save the day when a transactional attorney was over his or her head.

Judge Charles Ramos

Orna Artal

By the time I was 40, I had a career's worth of trial experience. Benedict semi-retired and I became the senior partner. So, I asked Mayor Koch to appoint me to an interim vacancy in the Civil Court. I was 41 years old. That was supposed to last until the end of the year, and I would always be referred to as "Judge Ramos." Nice try, but no cigar. I fell in love with judicial service, and so Mayor Koch appointed me for a second year. I managed to get myself elected for a full 10-year term. The rest is history . . . I could write a book about it, but I won't. I am not John Bolton. I served a total of 35 years on the bench, including 23 years in the Commercial Division until my retirement in 2018.

Q. In all your years on the bench, what case stands out as the most impactful in your life?

A. The 11-year litigation involving AIG and its former CEO, Hank Greenberg. Halfway through the case, I started to realize that Mr. Greenberg might not be the devil that three NYS Attorneys General were claiming he was. During the trial, it became so clear that I was not pleased with the state's case that it settled. I was humbled by the experience and came to realize what unrestrained power prosecutors sometimes wield.

Q. Do you have any mentors? What is the most important lesson they taught you?

A. First, you learn from everyone and every case. Benedict Ginsberg was my greatest mentor, by far. Most important lesson: The practice of law would be so much simpler without clients.

Q. What are you doing professionally post-retirement?

A. I cofounded an ADR firm with my former law clerk of many years, Orna Artal. We do private mediations, arbitrations and draft expert reports. We have a great working relationship and we really enjoy it.

Q. After serving on the bench for so many years, why do you think that ADR "called" to you rather than litigation?

A. After being a neutral for 35 years, I do not think I could be an effective advocate. I could never represent a point of view that I could not adopt as my own. No junk science, nothing misleading. Rubs me the wrong way.

Q. What do you think is the biggest challenge facing the bench and bar in this pandemic climate, and can you offer any advice as to how we can meet the challenges?

A. The biggest challenge is due process concerns. Our system of law has been fine-tuned over centuries with juries, witnesses' testimony at trials, and oral argument—all conducted in-person and usually in one room. COVID-19 is changing all of that so we must rely on technology. That in turn changes everything. The potential is here for an uneven playing field. There are disparities in resources and technical experience that will put many solo practitioners and small firms at a great disadvantage. An entire new body of law will emerge that will test the limits of virtual hearings. I wager that almost every unsuccessful litigant will raise at least one due process challenge on appeal.

My advice is: we must focus on fairness not expediency.

Q. What book is sitting on your nightstand?

A. Anything on science. "Solid Clues," by Gerald Feinberg, "The Hidden Reality," by Brian Greene and "A Stubbornly Persistent Illusion, the Essential Scientific Works of Albert Einstein," edited by Stephen Hawking.

Q. Are there any changes in the legal community that you are excited about?

A. Diversity. Our profession must reflect the best in all of our society. That means everyone. I am not going to list them, you know who they are, they are all of you.

Virtual Mediation: Learning the Ropes

By Orna Artal

On June 2, 2020, JAMs and the Commercial and Federal Litigation Section co-hosted an interactive mock virtual mediation. The event was organized by Section Chair-elect Daniel K. Wiig and Niki Borofsky of JAMs, who also served as moderator.

Viewers were led through a hypothetical, but very real, virtual mediation session on Zoom. The event explored the pressing question on every attorney's mind: given the reality of an extended lockdown, a gradual return to "normal," and the likelihood of disrupted court operations lasting many months, should we mediate remotely or wait? The answer is that virtual mediation is a viable, safe, and cost-effective alternative. Nonetheless, important questions must be addressed: which videoconference platform is best suited to our needs, how can we ensure that communications are truly confidential, and how effectively can participants conjure the magic of in-person interaction when sitting at home and staring at their computer screens?

JAMs mediator/arbitrator Vivien Shelanski served as mediator, expertly leading the parties through a mock virtual mediation based upon a hypothetical breach of a joint venture agreement. At the virtual negotiating table was an all-star cast featuring Vincent Syracuse of Tannenbaum Helpern and Mark A. Berman of Ganfer Shore as general counsel for the respective adversaries; Orna Artal of Ramos Artal and Maryann Stallone of Tennenbaum Helpern served as outside litigation counsel.

During the mediator's opening, Vivien addressed privacy and confidentiality concerns and explained how security enhancements can be enabled on most videoconference platforms in order to ensure greater cyber-security, such as by requiring meeting passwords, enabling the waiting room function when invited participants have joined, and disabling the recording function. After brief opening statements from litigation counsel, Vivien enabled the breakout room function and sent the parties to virtual breakout rooms to privately caucus and discuss opening offers. Vivien then met with general counsel in another virtual breakout room where initial offers were exchanged and terms negotiated. Tenneh Ogbemudia of JAMs served as technical facilitator and deftly stepped in to assist when technical issues arose.

After several rounds of negotiation, the parties reached agreement on major terms. Vivien closed the breakout rooms and sent the parties back to the virtual main conference room, where she used the screen sharing function to display a proposed term sheet on her computer. With the parties participating remotely, Vivien updated the term sheet to include the agreed-upon settlement terms. Utilizing Docu-Sign, the parties affixed their electronic signatures to the settlement agreement.

Orna Artal

Members watching from home were even able to submit questions in real time via the chat function while simulated negotiations were underway in the virtual breakout rooms. With technology, the possibilities are endless.

As we witnessed from the event, impactful human interaction can be conjured remotely and lead to the resolution of legal disputes, provided that key decision-makers with authority are present and facing one another on screen. The critical functions of the breakout room and enhanced security protocols render virtual mediation by videoconference a viable, safe, and cost-effective ADR solution.

Orna Artal is the cofounder of Ramos & Artal LLC, a dispute resolution firm based in New York City, where she serves as a mediator and neutral in a wide variety of commercial disputes. She also serves as the editor of the *N.Y. Litigator*, the Section's journal, and co-chairs the Section's Publications Committee.

The preceding two articles originally appeared in the *Commercial and Federal Litigation Section Newsletter,* fall 2020 (vol. 26, no. 2), a publication of NYSBA's Commercial and Federal Litigation Section.

New York State Bar Association Committee on Professional Ethics

Note: These and other opinions are available on the NYSBA website at NYSBA.ORG/ETHICS.

Opinion 1202 (10/01/2020)

Topic: Legal fees

Digest: A lawyer may charge a fixed fee for a matter as long as it is not excessive, and the lawyer specifies the services that are included in the engagement. The client must remain liable for costs, other than as permitted by Rule 1.8(e). The lawyer may require advance payment of fees, which is not to be considered a minimum fee unless specified in the retainer agreement. Although a lawyer may charge a non-excessive minimum fee, the lawyer may not charge a non-refundable fee. If the lawyer is discharged, the lawyer must return any unearned fees. The lawyer may agree with the client that the client need not pay a portion of the legal fee if the client believes the lawyer's services do not merit the additional amount.

Rules: 1.5(a), 1.5(b), 1.5(d)(4), 1.8(e), 1.16(e)

FACTS

1. The inquirer is starting an immigration law practice and is considering how to structure client payment obligations based upon a flat fee. Two possible arrangements are proposed. In the first proposal, 50% of the fee would be payable up front, when the client signs the retainer agreement. The remaining 50% would be payable in two equal payments—one to be billed halfway into the engagement, and the final payment to be billed upon completion of the engagement. In the second proposal, after payment of an initial retainer, the balance would be paid in monthly installments, with final payment payable upon completion of the engagement. In both arrangements, the client would remain responsible for filing fees and other costs, and in both arrangements the retainer agreement would provide that, in full satisfaction of the client's fee obligation, the inquirer would accept payment for some designated portion of the final balance in an amount that the client unilaterally determined that the legal services had been worth.

QUESTION

2. What ethical considerations apply to inquirer's proposed fee agreements?

OPINION

3. Rule 1.5 of the New York Rules of Professional Conduct (the "Rules")—the fee rule—prohibits a lawyer from charging a fee that is illegal or excessive, and it explicitly recognizes fixed fees in its listing of the considerations that determine whether a fee is excessive. *See* Rule 1.5(a)(8) ("whether the fee is fixed"). *See also* N.Y. State 942 ¶ 11 (2012) (whether a flat fee is excessive depends on the facts; a flat fee is not necessarily excessive but neither is it necessarily reasonable); N.Y. City 2015-2 (a flat fee is ethically permissible if it satisfies the other requirements of Rule 1.5). A fixed fee is often appropriate in matters frequently performed by the lawyer, where it is possible for the lawyer to accurately estimate the cost of performing the services. It is beneficial to the client since the client knows in advance the cost of the services and is not subject to inefficiencies that may increase the fee in the case of hourly billing. As in all representations, the lawyer should communicate to the client the services the lawyer will perform for the fixed fee. *See* Rule 1.5(b) (the lawyer shall communicate the scope of the representation).

4. Except as permitted by Rule 1.8(e), the client must remain liable for court costs and the expenses of litigation. The inquirer's engagement letter under either proposed arrangement here complies with that requirement by specifying that filing fees are not included in the fixed legal fee.

5. The Rules permit advance payment of fees. *See* Rule 1.5, Cmt. [4] (a lawyer may require advance payment of a fee). *See also* N.Y. State 816 (2007) (discussing, under the Code of Professional Responsibility (the "Code"), whether such payments constitute funds of the lawyer or client); N.Y. State 983 (2013) at note 1 (concluding there is no reason that the Rules would lead to a different result).

6. Rule 1.5(d)(4) prohibits a non-refundable retainer fee. *See also* Rule 1.5, Cmt. [4] (a lawyer may require advance payment of a fee, but is obliged to return any unearned portion). *See Matter of Cooperman*, 83 N.Y.2d 465 (1994). *See generally* N.Y. State 599 (1989) (discussing the prohibition against non-refundable fees under the Code and distinguishing between non-excessive minimum fees and non-refundable retainers). N.Y. City 2015-2

(fees paid to a lawyer in advance are nonrefundable only to the extent they have been earned by the lawyer).

7. Nevertheless, Rule 1.5(d)(4) also permits a lawyer to enter into a retainer agreement containing "a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such a fee may be incurred and how it will be calculated." Comment [4] to Rule 1.5 explains: "A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4)." A minimum fee could also be justified by a description of services to be performed at the outset of the representation, for which the lawyer claims immediate entitlement to payment, even before the work is commenced or completed, subject to the lawyer's obligation to refund any portion the lawyer does not ultimately earn. See Rule 1.16(e).

8. Rule 1.5(a) identifies the factors relevant for determining if a fee is excessive. These factors apply to a minimum fee. *See* N.Y. State 599 (1989) (listing factors in the former New York Lawyer's Code of Professional Responsibility, which are nearly identical factors to the factors in Rule 1.5). The factors in Rule 1.5(a), which are not intended to be exclusive, include:

   (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

   (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

   (3) the fee customarily charged in the locality for similar legal services;

   (4) the amount involved and the results obtained;

   (5) the time limitations imposed by the client or the circumstances;

   (6) the nature and length of the professional relationship with the client;

   (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

   (8) whether the fee is fixed or contingent.

9. Nothing in the these factors, or in any other Rule, precludes client satisfaction as an element in determining whether a fee is excessive, and client satisfaction is consistent with and often related to "the results obtained," which is listed in Rule 1.5(a)(4) as a relevant factor. Generally, a client who gets good results is a satisfied client, and may be willing to express that satisfaction by paying a higher fee.

10. The inquiry does not state whether the initial payment is a minimum fee or a payment on account, but we believe that a fee paid before legal services are rendered is a payment on account unless expressly identified in the retainer agreement as a minimum fee. See Restatement (Third) of the Law Governing Lawyers § 38, Com. g (ALI 1998) (an advance fee payment that is not otherwise identified is presumed to be a deposit against future services). If a minimum fee, the lawyer would have to specify the services covered and the circumstances in which it would be earned. See N.Y. City 2015-2 (a fee paid in advance for services to be performed on a specific matter—sometimes called a special retainer—is not earned unless the services are performed). And if the initial payment is not a minimum fee and the inquirer withdraws from the representation or is discharged by the client before the services are completed, then the lawyer must return any unearned fees. See Rule 1.16(e) (even when withdrawal is permitted or required, a lawyer shall take steps to avoid foreseeable prejudice to the rights of the client, including promptly refunding any part of a fee paid in advance that has not been earned).

11. As a final matter, the fact that the inquirer has effectively incorporated a discount based on client satisfaction into the retainer agreement does not transform the fee arrangement into a contingent fee within the meaning of Rule 1.5(c), because the fee is not contingent on the "outcome" of the matter, and the amount of the final payment is in the sole discretion of the client. It is not unusual for a lawyer to agree to discount legal fees to resolve a client complaint or to retain client goodwill, and the provision giving the client discretion to pay some, all, or none of the final payment has that effect.

CONCLUSION

12. A lawyer may charge a fixed fee for a matter as long as it is not excessive, and the lawyer specifies the services that are included in the engagement. The client must remain liable for costs, other than as permitted by Rule 1.8(e). The lawyer may require advance payment of fees, which is not to be considered a minimum fee unless specified in the retainer agreement. Although a lawyer may charge a non-excessive minimum fee, the lawyer may not charge a non-refundable fee. If the lawyer is discharged, the lawyer must return any unearned

fees. The lawyer may agree with the client that the client need not pay a portion of the legal fee if the client believes the lawyer's services do not merit the additional amount. Such an agreement does not transform the fee into a contingent fee.

(22-20)

Opinion 1203 (10/08/2020)

Topic: Withdrawal from representation based on attorney health concerns

Digest: An attorney may withdraw from representation, with the permission of the Immigration Court, based on fear of contracting COVID-19 as a result of in-person appearances in the proceeding, where such fear renders it difficult for the attorney to carry out the representation effectively.

Rules: 1.0(w), 1.16(c), (d) & (e)

FACTS

1. The committee has received an inquiry from a lawyer admitted to practice in the State of New York who is presently representing a client in Immigration Court proceedings. Despite the current pandemic, the matter has been scheduled for an in-person appearance. Noting that no COVID-19 safety protocols or procedures to mitigate the spread of the coronavirus have yet been established for such in person appearances, inquirer is concerned that appearing in-person presents a substantial health risk for the inquirer and, by extension, the inquirer's family.

QUESTION

2. May an attorney who believes that continued representation of a client before a tribunal endangers the attorney's health withdraw from that representation?

OPINION

3. New York Rule of Professional Conduct 1.16 governs the ethical obligations of a lawyer with regard to the withdrawal from representation of a client. Rule 1.16(b) permits withdrawal when "the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively." The standard is that effective representation becomes "difficult," not impossible, a flexible standard that requires us to consider the ways in which the inquirer's fear of contracting COVID-19 could impede effective representation.

4. The inquirer's fear of contracting COVID-19 could render it difficult to carry out the representation effectively because the inquirer's fear might subtly but powerfully undermine the effectiveness of the Immigration Court representation in a number of ways. For example, the inquirer might be reluctant to spend time with the client in-person to understand the case and communicate the client's options. The inquirer might also consent prematurely to a disposition that ends the proceeding, even though it is likely that a more favorable disposition could be obtained later, following additional appearances, motions, or conferences. In order to limit exposure to the disease, the inquirer might even hasten to complete a hearing without calling witnesses to testify on behalf of the client or by waiving cross-examination of government witnesses. The standard required for Rule 1.16(d) permissive withdrawal would be met by any of these influences, or like influences, to which the inquirer would be susceptible.

5. Independent of the inquirer's fear of contracting COVID-19, withdrawal would also be permitted pursuant to Rule 1.16(c)(1) if the "withdrawal can be accomplished without material adverse effect on the interests of the client," or pursuant to Rule 1.16(c)(10) if the client "knowingly and freely assents to termination of the employment."

6. However, where, as here, a client is being represented before a "tribunal," permission of that tribunal may be required for the withdrawal regardless of the ground for withdrawal. The first sentence of Rule 1.16 (d) provides:

   > If permission for withdrawal from employment is required by the rules of a tribunal a lawyer shall not withdraw from employment in a matter before that tribunal without its permission.

7. The Immigration Court is a "tribunal"—*see* Rule 1.0(w) (defining "tribunal," in pertinent part, as "a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity") and the Immigration Court Practice Manual, version 7/2/2020, Section 2.3(i) ("Change in Representation") requires that when an attorney wishes to withdraw from representation of an individual under the jurisdiction of the Immigration Court, and that individual has not obtained successor counsel, the attorney seeking to withdraw can only do so by motion with consent of the court. Thus, Rule 1.16(d) will require the inquirer to obtain the Immigration Court's permission to withdraw unless the client has already obtained a new attorney.

8. If the Immigration Court grants the inquirer's motion to withdraw, then Rule 1.16(e) will require the inquirer to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including by giving reasonable

notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly repaying any part of a fee paid in advance that has not been earned and complying with applicable laws and rules."

CONCLUSION

10. An attorney may withdraw from representation, with the permission of the Immigration Court, based on fear of contracting COVID-19 as a result of in-person appearances in the proceeding, where such fear renders it difficult for the attorney to carry out the representation effectively.

(21-20)

Opinion 1204 (10/14/2020)

Topic: Law firm letterhead

Digest: A law firm that has purchased a retired (and now deceased) lawyer's practice may list on the purchasing law firm's letterhead the name and dates of operation of the former law firm.

Rules: 7.1(a), 7.5(a)

FACTS

1. The inquiring lawyer is a member of a law firm with two offices. The law firm purchased a law practice from another lawyer who retired, and then shortly thereafter passed away. The law firm intends to keep open the practice it purchased as its third office.

QUESTION

2. May the law firm state "former office of [retired lawyer]" or list "[retired lawyer with dates of practice]" on the letterhead of the third office it purchased?

OPINION

3. On June 24, 2020, and effective on that date, the Appellate Divisions amended Rule 7.5 of the New York Rules of Professional Conduct (the "Rules"). Rule 7.5(a) governs the use of firm letterhead. Rule 7.5(a), which was shortened to a single sentence by the June 2020 amendments, now provides as follows:

> (a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate these Rules or any statute or court rule.

4. The New York State Bar Association amended the Comments to Rule 7.5 at the same time that the Appellate Divisions amended the black letter text of Rule 7.5. Amended Comment [1] to Rule 7.5 explains, "A lawyer's or law firm's name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer's services and must not be false, deceptive, or misleading. They must comply with this Rule and Rule 7.1."

5. Rule 7.1(a) provides:

> A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:
>
> contains statements or claims that are false, deceptive or misleading; or
>
> violates a Rule.

6. We do not believe it would be false, deceptive or misleading to state "Former Office of [Retired Lawyer]" or to list the dates of practice of the retired lawyer (now deceased) on the letterhead of the firm's third office, which is the office that housed the practice purchased by the firm. Accordingly, listing such information on the letterhead of the third office would not violate the prohibition of Rules 7.1(a) and 7.5(a) against the use, dissemination or communication of false, deceptive or misleading statements.

7. This Committee has previously recognized that the purchase of a law firm from a retiring lawyer includes the purchase of the retiring lawyer's good will. In N.Y. State 1168 (2019), we said:

> We have long recognized that the name of a law firm is central to its good will. Branding and reputation are precious commodities in any 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 goodwill of storied names would require blinders on reality. [Citation omitted.]

8. *See also* N.Y. State 45 (1967) ("all of the partners have by their joint and several efforts over a period of years contributed to the goodwill attached to the firm name"). Thus, the law firm's calling attention

on its letterhead to the fact that it has acquired the former law office of the retired (and now deceased) lawyer who sold his practice properly allows the firm to benefit from the good will it purchased. This is fully in keeping with the letter and spirit of Rule 7.5(a).

CONCLUSION

9. Because listing the former law office purchased by the firm on the firm's letterhead, or the dates of practice of the retired lawyer (now deceased), is not false, deceptive or misleading, it complies with Rule 7.1(a) and therefore is allowed under Rule 7.5(a).

(19-20)

Opinion 1205 (10/26/2020)

Topic: Government employee negotiating for private employment

Digest: A lawyer serving as in-house counsel for a federal agency may not negotiate for private employment with an organization that is an adverse party in litigation before the agency where the lawyer is participating personally and substantially in the litigation.

Rules: 1.0(l) & (n), 1.11

FACTS

1. The inquirer serves as in-house counsel for a federal agency. The inquirer would like to apply for a position with a private employer that is an adverse party in litigation before the agency.

2. The inquirer is "personally and substantially" involved in the litigation in which the private employer is an adverse party. The inquirer states, however, that the confidential information he obtained while representing the agency on the matter did not precipitate his interest in the private practice position. Moreover, if the inquirer were offered and accepted a position with the private employer, the inquirer would not participate in the matter.

QUESTION

3. Do the New York Rules of Professional Conduct bar a lawyer in public service from applying for a job with the private employer who is an adverse party in litigation before the agency?

OPINION

4. Our jurisdiction is limited to addressing provisions of the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the inquirer's proposed activities comply with any other applicable laws and regulations, but we do not analyze them. *See* N.Y. State 1148 ¶ 4 (2018).

5. Rule 1.11(d)(2) states that "[e]xcept as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not… negotiate for private employment with any *person* who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially." (Emphasis added.) The Terminology section of the Rules provides: "Person includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity." Rule 1.0(n). The term "matter," which is broadly defined in Rule 1.0(*l*), "includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties."

6. As Comment [4] to Rule 1.11 recognizes, Rule 1.11 "represents a balancing of interests," and notes that a "lawyer should not be in a position where benefit to [a private] client might affect performance of the lawyer's professional functions on behalf of the government."

7. The inquirer's proposed conduct is prohibited by Rule 1.11(d)(2). Under the language in Rule 1.11(d), the inquirer is "currently serving as a public officer or employee." He seeks to "negotiate for private employment with a[] person" (the private employer) "who is involved as a party . . . in a matter in which the lawyer is participating personally and substantially."

8. The fact that the inquirer's desire to join the private employer is not connected to any confidential information obtained while working with the federal agency, and the fact that he would recuse himself from participating in the litigation if hired by the private employer, do not avoid the prohibition in Rule 1.11(d)(2). Furthermore, the restrictions in Rule 1.11(d)(2) cannot be waived by the government or the private employer. *Compare* Rule 1.11(a)(2) (expressly permitting appropriate government agency to give informed consent to former governmental lawyer's conflict) *with* Rule 1.11(d)(2) (not mentioning consent). *See also* ABA 96-400, n. 6 ("[ABA Model] Rules 1.11 and 1.12 are actually more rigorous than 1.7(b), in that they define circumstances in which negotiations for new employment *cannot be pursued at all*") (emphasis added).

9. Although the inquirer's proposed conduct is prohibited by Rule 1.11(d)(2), that does not mean that he is perpetually forbidden from negotiating for employment with the private employer. Once the matter in which he is currently participating personally and substantially concludes, the inquirer will no longer be barred from negotiating for a position with the private employer. Furthermore, if the inquirer leaves the federal agency and is no longer a government officer or employee, he may ethically negotiate for a position with the private employer.

10. If the inquirer is ultimately hired by the private employer, he will need to comport with the requirements in Rule 1.11(a) through (c). *See, e.g.*, N.Y. State 1148 ¶ 11 ("a onetime government lawyer may represent clients adverse to the lawyer's former government employer unless that lawyer had a personal and substantial involvement in the same specific matter in which the lawyer now proposes to challenge the government's position").

CONCLUSION

11. A lawyer serving as in-house counsel for a federal agency may not negotiate for private employment with an organization that is an adverse party in litigation before the agency where the lawyer is participating personally and substantially in the litigation.

(20-20)

Opinion 1206 (11/02/2020)

Topic: Litigation financing

Digest: A law firm may not refer its clients to a company providing litigation financing where the sole owner of the company is married to a lawyer who is "of counsel" to the law firm.

Rules: 1.8(e); 1.8(i); 1.10 (a); 7.5(a).

FACTS

1. The Committee has received an inquiry from a lawyer at a firm with two partners and a former partner with no equity interest in the firm who is listed as both "retired" and "of counsel" on the firm's materials. The law firm's website includes a profile of the former partner under the heading "Our Attorneys," and details the former partner's current legal practice, including the statement that he "maintains a role with the firm in an 'of counsel' capacity." The firm would like to refer clients who need financial assistance to the former partner's wife, who is the sole owner of a company providing litigation financing. The former partner will not be involved in providing the financing and will not have any ownership in the company. The law firm will not participate in financing the litigation or have any ownership in the litigation financing company.

QUESTION

2. May a law firm may refer its clients to a company providing litigation financing when the sole owner of the company is married to a lawyer who is listed as "retired" and "of counsel" on the law firm's materials and who is represented on the law firm's website as maintaining a role with the firm in an "of counsel" capacity?

OPINION

3. As we concluded in N.Y. State 855 (2011):

> A lawyer may not refer a client for whom the lawyer is conducting litigation to a litigation financing company owned by the lawyer's spouse in order to advance financial assistance to the client based on the prospective recovery in that litigation if the lawyer personally would be barred from providing that financial assistance.

4. As we further noted in N.Y State 855: "If the inquiring attorney had asked this Committee whether a lawyer could *personally* form a litigation financing company to advance funds to clients, the Committee would have concluded that such an act violates Rule 1.8(e). Under Rule 1.8(e), the inquirer personally could not advance funds to clients in the form of loans." *See also* N.Y. State 1196 (2020); N.Y. State 1145 (2018).

5. Here, because the former partner and current of counsel lawyer would be personally barred from providing litigation financing to his clients, he may not refer his clients to a litigation financing company owned by his wife. Under Rule 1.10(a), a lawyer's conflicts arising under Rule 1.8 are imputed to all other lawyers "associated in" the firm. Because the former partner maintains an ongoing relationship with the law firm (*i.e.*, he remains "associated" with it), Rule 1.10(a) imputes his conflict of interest arising from referring clients to his wife to the other lawyers in the firm. Thus, the law firm may not refer its clients to the litigation loan company.

6. Arguably, the question posed here raises a slightly different issue from the issues posed in N.Y. State 855, because there the inquiring lawyer was an active lawyer in the firm whereas here the inquiring lawyer is a former partner who is listed as "retired" and "of counsel" on the firm's materials,

and has no equity interest in the firm. This factual distinction, however, does not result in a different result. Under Rule 7.5(a)(4), "[a] lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a *continuing relationship with a lawyer or law firm*, other than as a partner or associate." (Emphasis added.) Indeed, as we noted in N.Y. State 793 (2006): "We have interpreted an of counsel relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" Moreover, the law firm's website lists a profile of the former partner under the heading "Our Attorneys" and says that he "*maintains a role with the firm* in an 'of counsel' capacity." (Emphasis added).

7. Therefore, we conclude that the former partner who is listed "of counsel" on the law firm's materials maintains an ongoing relationship with the firm that imputes his Rule 1.8 conflicts to the other lawyers in the firm and precludes the firm from referring its clients to a company providing litigation financing where the sole owner of that company is the former partner's spouse.

CONCLUSION

8. A law firm may not refer its clients to a company providing litigation financing where the sole owner of the company is married to a lawyer who is "of counsel" to the law firm.

(23-20)

Opinion 1207 (11/09/2020)

Topic: Firm names; trade names

Digest: A law firm may practice in New York using a name that does not include the name of any lawyer currently or formerly practicing in the firm (*i.e.*, under a "trade name") as long as the name under which the firm practices is not false, deceptive or misleading. A law firm may continue to practice under the same name after a name partner retires from the practice of law.

Rules: 7.5(b); 8.4(c).

FACTS

1. In the wake of the recent amendment to Rule 7.5(b) of the New York Rules of Professional Conduct, three inquiries have come to the Committee asking closely aligned questions.

2. The first inquiry comes from a national law firm that maintains offices in several states where trade names are permitted and currently practices in those states under a trade name we will call "LONG Legal Group." LONG is an acronym for "Law Office of Norman Grant" (also fictional) who is the sole owner of the firm. In New York, Grant and two New York-admitted attorneys, who we will call Hudson and India, practice in a law firm we will call "Grant, Hudson & India, P.C."

3. The second inquiry comes from a firm located in New York that maintains a physical location on a street we will call "Maple Street," and wishes to practice under the trade name "Maple Street Law Group."

4. The third inquiry comes from a lawyer named Jones who informs us that Smith, one of the name partners in a law firm we will call "Smith & Jones, LLP," will soon be retiring. The remaining name partner, Jones, wants to continue practicing under the same name.

QUESTIONS

5. May a law firm practice under a name that does not contain the name of any lawyers (in other words, under a trade name)?

6. May a law firm practice under a trade name based on its street address?

7. May a law firm continue to practice under a firm name that includes the name of a retired name partner?

DISCUSSION

8. For decades, lawyers have been required to practice under a firm name that contains the name of one or more of the lawyers in the firm or 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. Prior opinions issued by this Committee under this Rule have stressed the purpose of the requirement is to protect the public from being deceived or misled as to the identity of lawyers using or practicing under the firm name.

9. On June 24, 2020, however, the Appellate Divisions issued a Joint Order amending Rule 7.5(b) so that it now reads, in pertinent part:

> (a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, provided the same do not violate these Rules or any statute or court rule.
>
> (b) (1) A lawyer or law firm in private practice shall not practice under:
>
> (i) a false, deceptive, or misleading trade name;

(ii) a false, deceptive, or misleading domain name; or

(iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

(2) Specific Guidance Regarding Law Firm Names

(i) Such terms as "legal aid," "legal service office," "legal assistance office," "defender office," and the like may be used only by bona fide legal assistance organizations.

(ii) A law firm name, trade name, or domain name may not include the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law.

(iii) A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.

(iv) The name of a professional corporation shall contain "PC" or such symbols permitted by law.

(v) The name of a limited liability company or limited liability partnership shall contain "LLC," "LLP" or such symbols permitted by law.

(vi) A lawyer or law firm may utilize a telephone number that contains a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules**.**

***

10. The June 24, 2020 amendment deleted language in former Rule 7.5(b) that prohibited a "firm name containing the names other than those of one or more of the lawyers in the firm" except "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." Thus, had the Rule remained unchanged, the Committee would have concluded that practicing under a trade name, whether an acronym or a street name, was prohibited.

11. The clear implication of the additions to and deletions from Rule 7.5(b) is that law firm names no longer need to contain the names of lawyers practicing in the firm. However, the Rule as amended reaffirms and makes explicit the longstanding principle that law firm names must not be false, misleading, or deceptive.

12. This principle is reflected in Comment [2] to the Rule 7.5 as amended, which states,

[2] A lawyer or law firm may not use any name that is false, deceptive, or misleading. It is not false, deceptive, or misleading for a firm to be designated by the names of all or some of its current members or by the names of retired or deceased members where there has been a continuing line of succession in the firm's identity. A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading.

13. Comments [3], [4] and [5] give examples of deceptive or misleading firm names. Among other things, they interpret Rule 7.5 to prohibit a law firm name that (i) falsely implies a connection with a government agency, (ii) contains the name of a deceased or retired lawyer not in a continuing line of succession, (iii) contains the name of a lawyer holding public office, or (iv) implies that lawyers are partners when in fact they are not partners. Those Comments provide:

[3] By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as "Legal Services," "Legal Assistance," or "Legal Aid" unless the lawyer or law firm is a bona fide legal assistance organization.

[4] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a "firm" as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership

with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

14. In these inquiries before us, the proposed names do not fit any of the examples of names that would be prohibited as false, deceptive, or misleading. In the first inquiry, the proposed name is merely an acronym using the abbreviated form of the name of the owner of the firm and, in the second inquiry, the proposed name is the name of a street where the law office is located.

15. The third inquiry is slightly different. In the firm of Smith & Jones, LLP, we are told that Smith will soon be retiring but Jones wants to continue practicing under the same name. In former Rule 7.5(b) (*i.e.*, before June 24, 2020), the black letter text expressly provided that, "if otherwise lawful, 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." That language was deleted by the recent amendments, but only because it was unnecessary now that the amended black letter text permits trade names that are not false, deceptive, or misleading.

16. In any event, essentially the same language appears in Comment [2], which says: "It is not false, deceptive, or misleading for a firm to be designated by . . . the names of retired or deceased members where there has been a continuing line of succession in the firm's identity." While the Comments are adopted only by the New York State Bar Association and not by the New York Courts, they are accepted as reliable guides to interpreting the Rules as long as they do not contradict the black letter text. See Preamble, ¶ 13 ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative"). Here, Comment [2] does not contradict the black letter text. Accordingly, it is not false, deceptive or misleading for the law firm of Smith & Jones, LLP, to continue practicing under the same name after Smith retires.

17. Whether a particular firm name is false, deceptive or misleading is a heavily fact-based inquiry, and the outcome will depend on a close context-based examination of the proposed name.

18. In circumstances where a contrary result might be reached, Rule 7.5(b) is not the only relevant rule. Using a firm name or domain name that is false, deceptive or misleading, or using a name that misrepresents the identity of the lawyer or lawyers practicing in the firm, might also constitute conduct involving deceit or misrepresentation in violation of Rule 8.4(c).

19. The general principles set forth in this opinion govern the ethical analysis of the myriad trade names that New York admitted attorneys may choose for their firms now that the use of trade names is no longer prohibited. The ethical propriety of each name under Rules 7.5(b) and 8.4(c) will always turn on the particular facts and circumstances.

CONCLUSION

20. A law firm may practice in New York using a name that is not the name of any lawyer practicing in the firm—in other words, under a trade name—so long as the name under which the firm practices is not false, deceptive or misleading. A New York law firm may continue to include the name of a retired partner in its name.

(16-20 & 17-20)

Opinion 1208 (11/16/2020)

Topic: Solicitation and referral of real estate matters by real estate broker employed by lawyer as paralegal

Digest: A lawyer who has no financial interest in the commission generated by a real estate transaction may accept referrals for real estate closings from her paralegal who is also a real estate broker, provided such referrals will not present a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests. However, if a significant risk exists, then the lawyer may accept the referral only if the lawyer satisfies the exceptions set forth in Rule 1.7(b), including informed client consent. The lawyer must also ensure that the paralegal's conduct complies with Rule 7.3 governing attorney solicitation whenever the paralegal recommends or refers a client to the lawyer.

Rules: 1.7(a)(2); 1.7(b); 5.3(a); 5.4(c); 7.3(a)(1); 7.3(b); 8.4(a)

FACTS

The inquirer is a transactional real estate attorney. She employs a paralegal who is also a real estate broker. The paralegal wants to refer his real estate clients to his attorney/employer to represent them in real estate closings. As a real estate broker, the paralegal will earn a percentage of the sale price only if the transaction closes. The attorney has no financial interest in the commission that the paralegal/broker will receive. Rather, the attorney will charge a legal fee to the real estate client on the same basis that she bills other real estate transaction clients. The paralegal will not assist his employer in those closings and will not provide any paralegal services relating to real estate transactions that he has referred.

QUESTIONS

May a lawyer who has no financial interest in the closing of a real estate transaction accept a referral of a real estate closing from the lawyer's paralegal, who is also a real estate broker, where the paralegal will earn a brokerage commission upon the closing of the transaction but will not provide any legal services relative to that transaction?

Would the paralegal's referral or recommendation of real estate clients to the lawyer constitute improper solicitation?

OPINION

Independent professional judgment: Rules 1.7 and 5.4

Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer may not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

In N.Y. State 1043 (2015), we noted that "we have long and consistently stated that a lawyer may not act as a lawyer and a broker in the same real estate transaction, with or without client consent, and whether or not the lawyer charges for legal services." In N.Y. State 916 (2012), we explained that where a lawyer acts as both broker and a lawyer in the transaction, "the broker's personal and financial interest in closing the transaction interferes with the lawyer's ability to render independent legal advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a)…." *See also* N.Y. 919 (2012) (quoting from N.Y. State 753 (2002) and stating, "The rationale for these opinions is that a lawyer should not have a personal stake in the advice rendered, and a broker who is paid only if the transaction closes cannot be fully independent in advising the client as a lawyer.").

In these prior opinions, the ethical concerns primarily derived from "the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal service." N.Y. State 1043. "This rationale applies as long as the lawyer has a financial interest in the real estate broker's commission whether or not the lawyer is acting as a broker." *Id*. Here, however, the inquirer has no financial interest in the broker's commission, and thus does not trigger the *per se* non-waivable conflict that was present in N.Y. State 916 and N.Y. State 1043. If the inquirer had a financial interest in the commission, then representing the client in the closing would be impermissible.

Given that the inquirer lacks any financial interest in the broker's commission, the question is whether referrals of these real estate matters by the inquirer's paralegal are so significant to the inquirer's practice financially, or to the inquirer's relationship with the paralegal personally, that these financial or personal considerations would create a conflict of interest under Rule 1.7(a)(2). In other words, are the lawyer's financial and personal interests likely to adversely affect the inquirer's professional judgment regarding each transaction? In terms of Rule 1.7(a)(2), would the inquirer be seriously tempted to close a transaction referred by the paralegal in order to keep the paralegal incentivized to keep the referrals flowing, even if it would be in the client's interest not to close the transaction? In N.Y. State 919 (2012), we explained that even where a lawyer himself will not materially benefit from the consummation of a real estate transaction, "the totality of the lawyer's personal interests might still pose a 'significant risk' that his judgment in representing the client at the closing will be "adversely affected" within the meaning of Rule 1.7(a)(2)."

Here, a disabling personal financial conflict of interest is likely to arise if the paralegal refers enough matters to the inquirer that those referrals, in the aggregate, constitute a significant portion of the fees earned in the inquirer's practice as a whole. *See* N.Y. State 919 (2012) (lawyer's receipt of multiple referrals from a brokerage office where lawyer was employed part time "magnified risks" of a personal interest conflict); *see also* N.Y. City 2014-1 (2014) (expressing concern that the proposed referral arrangement could create the risk of "divided loyalties" if the lawyer was "dependent" on the referring third-party for "case referrals and

legal fees."). Thus, we cannot assess the level of risk that the referral arrangement here poses to the lawyer's exercise of independent professional judgment. We do not know whether those referrals are material to the inquirer's total fee income, and we do not know whether the inquirer's personal and professional relationship with the referring paralegal might increase the risk that the lawyer's independent professional judgment on behalf of the referred real estate clients would be compromised. For example, are the referrals from the paralegal a major source of profit for the inquirer? Is the paralegal a trusted and valuable key employee with respect to paralegal services unrelated to their referral relationship?

Unlike the *per se* non-waivable personal interest conflict that occurs whenever a lawyer has a financial interest in the consummation of a real estate transaction; however, personal interest conflicts are fact-specific and require us to assess all of the circumstances. In each case the lawyer must evaluate whether a reasonable lawyer would conclude that his or her other business or personal interests will pose a "significant risk" of adversely affecting the lawyer's judgment in the matter on behalf of a client. Absent such a significant risk, the lawyer has no personal interest conflict, Rule 1.7(a)(2) does not apply, and the inquirer may accept the representation without the client's consent. *See* N.Y. State 919 (2012). Conversely, if such a significant risk does exist and Rule 1.7(a)(2) does apply, then the inquirer cannot accept the referred matter unless the conflict is consentable and the inquirer obtains the client's informed consent, confirmed in writing, per Rule 1.7(b).

Specifically, Rule 1.7(b) permits a lawyer who has a personal interest conflict under Rule 1.7(a) to represent a client when: "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and "(4) each affected client gives informed consent, confirmed in writing." If these requirements can be satisfied, the lawyer can accept the representation.

11. Even if the inquirer complies with Rule 1.7 and accepts the referral, the inquirer should also be mindful of the obligation to maintain professional independence. The inquirer must not allow the referring paralegal to direct or regulate any advice rendered to the referred real estate client. *See* Rule 5.4(c) ("unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services").

Restrictions on solicitation by the paralegal: Rules 5.3, 7.3, and 8.4

12. This inquiry also raises a significant question of improper solicitation. Rule 7.3 regulates solicitation and recommendations of professional employment. Rule 7.3(a)(1) explicitly prohibits in-person or telephone contact or real time or computer-accessed communication unless the recipient is "a close friend, relative, former client or existing client." Rule 7.3(b) defines "solicitation," in part, as "any advertisement *initiated by or on behalf of the lawyer* or law firm that is directed to, or targeted at, a specific recipient or group of recipients, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive of which is pecuniary gain." (Emphasis added.)

13. Rule 7.3(b) distinguishes between communications initiated by the lawyer and those initiated by a potential client. *See* N.Y. State 1049 ¶ (2015) ("A response invited by the potential client does not constitute 'solicitation'"); N.Y. State 1150 ¶ 7 (2018) ("The definition of 'solicitation' in Rule 7.3(b) makes an important distinction between communications initiated by the lawyer and those initiated by a potential client"). Thus, if real estate clients merely ask the paralegal/broker to recommend a lawyer to represent them in real estate transactions, and the paralegal responds by referring them to the inquirer, that practice would not run afoul of Rule 7.3(b). Conversely, if the paralegal on his own initiates "unprompted" recommendations of the inquirer to handle the real estate transactions, it would violate Rule 7.3(b).

14. Moreover, Rule 8.4(a) provides that a lawyer must not "knowingly assist or induce another" to "violate or attempt to violate the Rules of Professional Conduct," and a lawyer must not "do so through the acts of another." In other words, if the Rules prohibit a lawyer from doing something directly, then the lawyer cannot do it indirectly through someone acting on the lawyer's behalf or because of the lawyer's direction or inducement. Thus, if the inquirer assists, directs, or induces the paralegal to solicit real estate clients for the inquirer in a manner that violates Rule 7.3(a)(1), then the lawyer would be violating Rule 8.4(a). *See* N. Y. State 1150 (2018) (where lawyer's spouse who was also a real estate broker wanted to refer her real estate clients to her husband (the inquiring lawyer), "any outreach by the broker/spouse initiated by or on behalf of the lawyer/spouse, the broker/spouse recommending the inquirer as a lawyer in a real estate transaction stands in the shoes of the inquirer as if the inquirer were personally making the outreach.").

15. Finally, the inquirer has a duty under Rule 5.3(a) "to ensure that the work of non-lawyers who work for the firm is adequately supervised, as appropriate." If the paralegal engages in solicitation that would violate Rule 7.3 if done by a lawyer, then under certain circumstances Rule 5.3(b) may hold the inquirer responsible for the paralegal's conduct.

CONCLUSION

16. A lawyer who has no financial interest in the commission generated by a real estate transaction may accept referrals for real estate closings from her paralegal who is also a real estate broker, provided such referrals will not present a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests. However, if a significant risk exists, then the lawyer may accept the referral only if the lawyer satisfies the exceptions set forth in Rule 1.7(b), including informed client consent. The lawyer must also ensure that the paralegal's conduct complies with Rule 7.3 governing attorney solicitation whenever the paralegal recommends or refers a client to the lawyer.

(24-20)

ONE ON ONE

This *Newsletter* is published for members of the General Practice Section of the New York State Bar Association.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

Subscriptions
Subscriptions to *One on One* are available to non-attorneys, universities and other interested organizations. The subscription rate is $135.00. Please contact the New York State Bar Association, One Elk Street, Albany, NY 12207 or call (518/463-3200) for more information.

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

General Practice Section Committees and Chairpersons

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

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

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

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

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

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

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

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

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

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

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

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
New Rochelle, NY 10801
rstpaul@thestpaullawfirm.com

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

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

To update your information, contact the NYSBA Member Resource Center at 1-800-582-2452.

Welcome New Section Members

The following members joined the Section between: Sept. 4 – Nov. 17, 2020

Charles Case
Robert I. Frenkel
John Theodore Hilscher
Christopher Thomas Laizure-Metz
George D. McHugh
Jeremy Andrew Millard
Morgan Murray Miller
Casey Raskob
Philip Sivin
Jimmy Wagner
Brian Thomas Whipple

The New York State Bar Association thanks the 200 Attorney Volunteers who have taken a Client through the Unemployment Insurance and Surrogate's Court Pro Bono programs. Your extraordinary service exemplifies the best of the legal profession to do the public good.

Visit **nysba.org/covidvolunteer** to view the list of Attorney Volunteers and for more information on the COVID-19 Pro Bono Network.

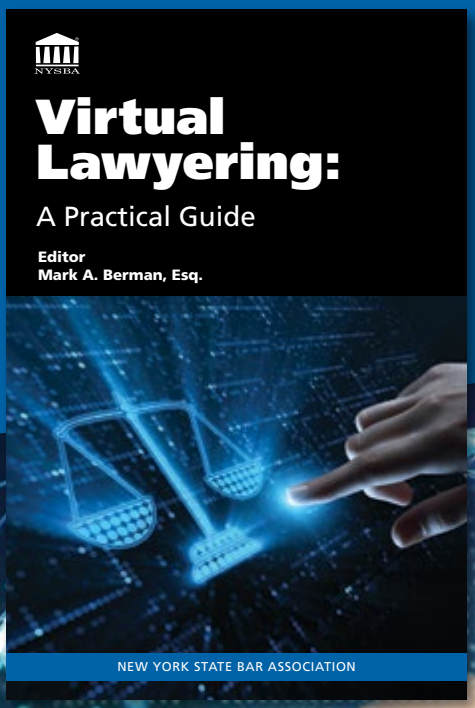
NYSBA PUBLICATIONS

Now Available!

Virtual Lawyering:

A Practical Guide

Editor: Mark A. Berman, Esq.



As a result of the public health crisis created by COVID-19, the legal profession is operating virtually more and practicing in person less. The legal profession will never be the same: attorneys will be litigating, arguing, closing transactions, and counseling individuals and corporate clients over virtual platforms, from the most commonplace tasks, such as a virtual notarization or executing a will, to holding virtual hearings before a court or closing on multi-million dollar transactions. Whether you are a litigator, transactional attorney or in-house attorney, *Virtual Lawyering: A Practical Guide* will provide you with practical advice as you navigate through the virtual legal world and confront new issues.

eBook (413720E)

NYSBA Members $45.00
Non-Members $60.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

NEW YORK STATE BAR ASSOCIATION
GENERAL PRACTICE SECTION
One Elk Street, Albany, New York 12207-1002

New York State Bar Association

ANNUAL MEETING

A TWO-WEEK VIRTUAL CONFERENCE

JANUARY 19 – 29, 2021

GENERAL PRACTICE SECTION & COMM. ON PROFESSIONAL DISCIPLINE

TUESDAY, JANUARY 19, 2021

8:30 a.m. – 1:30 p.m.

NYSBA.ORG/AM2021

NYSBA

Special Early Bird Pricing Ends 12/31/20

*Date and time is subject to change