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NYSBA

ONEONONE

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

Dude, Where's My License?

A Tax Map to Your MAPT

When To Dabble, When To Not

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General Practice Section

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Message from the Chair

My term is quickly coming to a close. It has been a privilege and a pleasure to be a part of the General Practice Section in this capacity, and it will remain an important part of my life and career going forward. I would like to thank the Executive Committee and all its members for their support and leadership throughout this year.

With this upcoming change and everything else that has been happening, we are working on planning events and meetings for the remainder of the year. Existing in the strange time-dilation scenario we all are living through, I find myself digging to remember when we were meeting in person and what was happening then. Which events were successful? Which events did I find useful and enjoyable? I know that for many people, this time away has led to a reflectiveness about what we would do differently in the future. What happened before is not necessarily what is going to be happening in the future, and that is not a bad thing.

In my practice I have always railed against the phrase, "This is the way we have always done it." As a solo, I have plotted my path based on what works for me and my clients, not always what has often worked before. This topsy turvy world has proven such to be a solid strategy in all aspects of work, and I want our Section to be reflective of this new path. What events work for us? Would people want to be back together? Do you find utility in meeting in person anymore? And if so, what would those meetings look like?

This is not to say that we should all remain hermits. I built my practice on being involved and putting myself out there, even if the introverted part of me screamed violently against it along the way. I just think it will take time to find that comfortable normal of attending the events we took for granted, whether it be an in-person CLE or a night out at a mixer. And we, as a Section, want you there. The main purpose of having these events is not just to get the old gang back together, but make a better, new gang that has relevance for you in your day-to-day work. We want to meet you where you are and do what you want to do.

So, my final ask is to reflect and to show up and get involved. What makes this Section important for you? What do you want out of your involvement? Is it that cutting-edge news about practice changes? Is it a new practice area altogether? Is it those softer skills on marketing and social media usage? Is it the old standby, ethics? Or would you just rather have a happy hour and see what everyone looks like now? I am game for all of this and more, and we are just getting started. Reach out to the Section, reach out to me, and see what it is all about. It is not the same without you.

Sarah Gold

Message from the Co-Editors

Marty Minkowitz

Two years have officially flown by in which the world has shifted on its axis to adapt to the evolving times, yet one constant has remained the same: providing accessible and engaging content and articles to our General Section members as the Co-Editors of *One on One*.

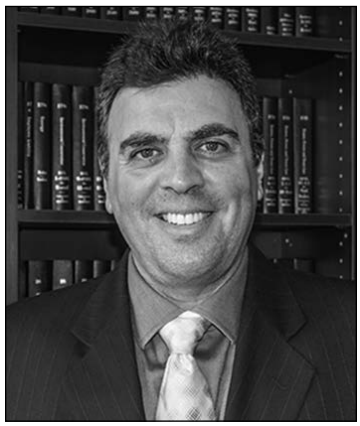
This issue, we are pleased to offer you the following articles, which we anticipate you will find resourceful and fascinating:

- "Dude, Where's My License?": Peter De Vries discusses the passage of the Marijuana Regulation and Taxation Act and the myriad questions that arises from the licensing and enforcement implications under the new law.
- "False Hopes Are More Dangerous Than Fears": Co-Editor Richard A. Klass shares a contract law case that details a cause of action to recover on a promissory note that was entered into by and between two friends.
- "The Use and Abuse of Guns": Co-Editor Martin Minkowitz examines the factors that determine the causal relationship between a gunshot injury and the victim's employment under Workers' Compensation Law.
- "When to Dabble": Nancy Baum Delain gives insight into when it is appropriate for an attorney to practice in new, novel areas of law.
- "A Tax Map to Your MAPT": Christina Lamm delves into the important considerations that attorneys must have when drafting a Medicaid Asset Protection Trust.

We've also gathered the following reprints from other Sections for your interest and information:

- "A Primer on COVID-19 and Insurance"
- "Sports and Recreational Activities – Game Over? Or Let the Games Begin!"
- "The Limited Nature of Article III Standing for Injunctive Relief"
- "The 'Macro' Approach and Other Ways to Take Power in a Negotiation"

Article Submission



Richard A. Klass

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

Your contributions are valuable to each and every aspect of membership in the General Practice Section. 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 communicate their personal viewpoints in our journal. Please address these submissions to sappol@ law.cardozo.yu.edu.

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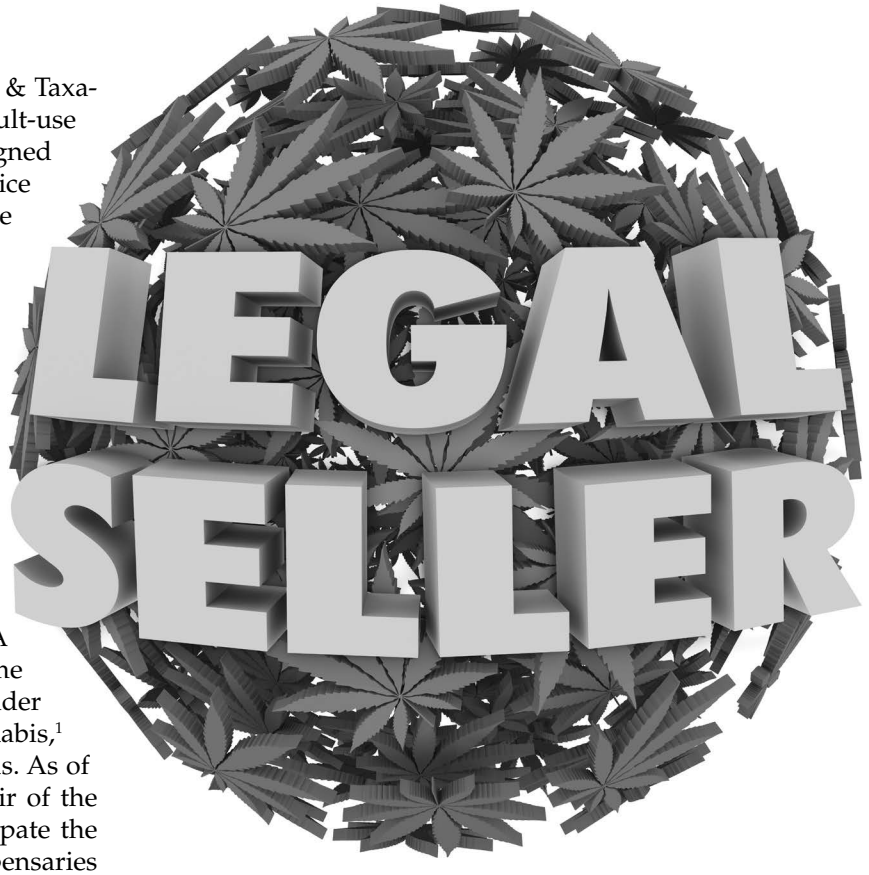
Co-Editors

Dude, Where's My License?

By Peter De Vries



On March 31, 2021, the Marijuana Regulation & Taxation Act (MRTA), which legalized recreational adult-use cannabis throughout the state of New York, was signed into law. Under the MRTA, the state created the Office of Cannabis Management (OC"), governed by the Cannabis Control Board (CCB), which regulates adult-use, medical, and hemp cannabis. This governing body will provide budding entrepreneurs with licenses to cultivate, distribute, and sell cannabis in New York.

The passage of the MRTA addresses New York's historical discriminatory enforcement of marijuana laws through racially disproportionate criminalization and incarceration of people of color.

Although a noble goal, questions remain over how this will be accomplished under the MRTA. A significant issue is that, as of March 2021, it became completely legal for persons 21 years of age and older to purchase and possess up to three ounces of cannabis,[1] but proprietors are not yet allowed to sell cannabis. As of the date of this article, Tremaine Wright, the chair of the CCB, has publicly stated that she does not anticipate the issuing of licenses for recreational marijuana dispensaries until the spring of 2023 at the earliest.[2]

This puts the people of New York in a completely avoidable bind, with the risk of returning full circle to the discretionary enforcement of the laws against participants in the industry. If the police are instructed to enforce the laws, who will they arrest first?

This bind was foreseeable and avoidable because New York was not the first state to make this mistake, and unfortunately, it likely won't be the last. That distinction might go to California,[3] where a legal loophole emerged circa 2005, in which state law allowed persons to transfer cannabis to medical patients and receive a "donation" for their troubles.[4]

This may have been the genesis of the gifting game. You don't buy marijuana; instead, you buy a beach ball for $50, and in return, the purveyor of outrageously overpriced plastic offers you a wonderful token of their appreciation—a beautiful bag of bud.

Enter New York. How is this playing out? The MRTA specifies that April 1, 2022 is the earliest the CCB can provide organizations with the ability to obtain an adult-use license.[5] This may not be soon enough for some. Many proprietors could have used the year between the MRTA's passage and the issuance of the adult-use license to get their pre-rolls in a row in time for a 4/20 grand opening. But a funny thing happened on the way to the dispensary. Well, perhaps it is more tragic than funny. Former Governor Andrew Cuomo was tasked with appointing the staff for both the CCB and the OCM. But he never did, because he was combating a sexual harassment scandal, culminating in his resignation. On September 1, 2021, his successor, Kathy Hochul, confirmed Wright and Christopher Alexander (the executive director of the OCM). To Governor Hochul's credit, these were the first two confirmed nominees of her administration. Precious months, however, were lost.

This delay has now left New York looking at spring 2023 as a licensing start date. Meanwhile, law-abiding stoners across the state are asking, "So, like, when can I go to the store?" Inspired cannapreneurs answered, "How about today?"

Under Penal Law § 222.05(1)(b), adults in New York are legally permitted to "transfer" up to three ounces of cannabis to other adults, but you cannot be compensated for such transfer. Under Penal Law § 222.00(3), the transfer

of cannabis without compensation is specifically excluded from the definition of "sell." Remember the beach ball.

Do these transactions violate the law? Arguably, yes. But rest assured that creative cannabis lawyers are ready to duke this out in court. For her part, Wright has publicly stated that the practice is illegal.[6] A tougher question, however, is whether those who participate in this gifting "gray market" will actually be prosecuted for their actions. And if so, what will happen to them?

This is very unclear. What is clear is that New Yorkers overwhelmingly support recreational marijuana use.[7] The MRTA contemplates social justice as the principal reason for its very existence. Politically, prosecuting weed dealers is a loser, because to do so would be to run the risk of punishing the very same population that the MRTA seeks to protect.

Who doesn't want to be at the forefront of this exciting new industry? Here in New York City, the industry has already sprouted. You can literally smell it in the air. Or, to borrow a phrase from the hit musical *Hamilton*, "look around at how lucky we are to be alive right now." Take "Pizza Pusha" Chris Barrett. The Pusha has been spinning and slinging his cannabis infused pizza dough for years (Ed. Note: you have to give this place a try, if anything for novelty's sake because it is the closest thing you'll ever get to being in a speakeasy). Pop-up shops and mobile vendors, like Uncle Budd's, now call the city their home.[8]

What about enforcement? The New York Police Department, AKA "New York's finest," apparently have bigger problems to manage in the wake of what some call a jump in violent crime, and lately, arrests for marijuana have been virtually non-existent.[9] Even Mayor Eric Adams, a 22-year veteran of New York's finest,[10] symbolically weighed in by appearing on *The Late Show* and gifting host Stephen Colbert some rolling papers and a ceremonial bag of "weed."[11] Things are not rosy for everyone in the industry, however, as the NYPD has cleared weed pushcart vendors from our streets.[12] In fairness, the NYPD's actions in this particular case should be analyzed in the broader context of the city's traditional heavy-handed "quality of life" regulation of mobile vendors.[13]

The immediate future of cannabis sales in New York is, well, hazy. The state has offered New Yorkers an opportunity to start anew by rectifying the wrongheaded approach to regulation that afflicted the state (and the nation) for too long. But if New York cannot move quickly enough to enable proprietors to operate in a fully legal capacity—and if enforcement steps up—it perpetuates the very risk that the MRTA sought to rectify: more penalization of the people plagued by prohibition.

Peter De Vries of the Law Office of Peter De Vries PLLC focuses on landlord-tenant, family law, bankruptcy and more throughout Queens, New York and Bronx counties. Before opening his own firm, Peter worked as a public defender, a provider of legal and business solutions to street vendors, and as a general practitioner. He has also maintained a working relationship with the Brooklyn Volunteer Lawyers Project, providing divorce, bankruptcy, and guardianship services at no cost. Peter can be reached at 646-630-5217, at pedevrieslaw@gmail.com or through his website at brooklynneighborhoodattorney.com.

Endnotes

1. Penal Law § 222.05(1), which became effective on March 31, 2021. Under this statute, people in New York State are given permission to use, smoke, ingest, or consume cannabis or concentrated cannabis.
2. Gino Fanelli, *No Weed Licenses Until 2023, State Cannabis Board Chair Says*, Rochester City Newspaper (October 28, 2021), https://www.rochestercitynewspaper.com/rochester/no-weed-licenses-until-2023-state-cannabis-board-chair-says/Content?oid=13842307.
3. Amanda Chicago Lewis, *The Half-Legal Cannabis Trap*, Politico (February 9, 2021, 4:30 a.m.), https://www.politico.com/news/magazine/2021/02/09/los-angeles-legalization-cannabis-criminalization-467572 .
4. *Id.*
5. MRTA, § 39. Adult-use cannabis licenses encompass licenses for, among others, cultivators, processors, distributors, and retail dispensaries.
6. Rob Hackford, *There Is Not a Gray Market: Chair of Regulatory Board Issues Warning About Gifting Cannabis*. WGRZ (October 22, 2021, 12:06 A.M.), https://www.wgrz.com/article/news/local/there-is-not-a-gray-market-chair-of-regulatory-board-issues-warning-about-gifting-cannabis/71-85ccf586-ef86-4069-9678-73c64d9f7b5e .
7. Kyle Jaeger, *Majority of New Yorkers Support Marijuana Legalization, New Poll Shows as Governor Renews Reform Pledge*. Marijuana Moment (October 27, 2020), https://www.marijuanamoment.net/majority-of-new-yorkers-support-marijuana-legalization-new-poll-shows-as-governor-renews-reform-pledge/.
8. Graham Rayman, Kerry Burke and Larry McShane, *Business Is Smokin' for Harlem Weed Store on Wheels as NY Marijuana Laws Remain in Gray Area*, New York Daily News (November 7, 2021, 12:00 A.M.), https://www.nydailynews.com/new-york/ny-uncle-budd-manhattan-harlem-marijuana-truck-20211107-l5yp42uhxbcxron2dyut4cg22q-story.html.
9. *Id*.
10. https://www.police1.com/local-government/articles/eric-adams-former-nypd-cop-is-elected-mayor-of-nyc-b6Ip8BpDVvMDxe3B/.
11. https://twitter.com/colbertlateshow/status/1460839691305963521?s=20 . Whether or not said "weed" was legitimate cannabis is a matter of dispute. However, said gifting thereof violated neither letter nor spirit of the law.
12. Post Editorial Board, *Drug Dealers Make Washington Square Park Their Home—Thanks to de Blasio's Fuzzy Thinking*, New York Post (October 26, 2021), https://nypost.com/2021/10/26/drug-dealers-make-washington-square-park-their-home-thanks-to-de-blasios-fuzzy-thinking/.
13. http://streetvendor.org/about/.

'False Hopes Are More Dangerous Than Fears'[1]

By Richard Klass

A friend ("Lender") made a $200,000 personal loan ("Loan") to one of his friends ("Borrower). At the time the Loan was made in 2016, the Borrower signed a promissory note[2] ("Promissory Note") in favor of his Lender/friend, promising to repay the Loan within 10 months with interest. According to the terms of the Promissory Note, if the Borrower failed to repay the principal and interest in full by its due date at the end of 2016, any accrued interest would thereafter be calculated at the default rate of 20% per annum. In addition, the Promissory Note stated that "[n]o term of [the Promissory Note] may be waived, modified or amended except by instrument in writing signed by both of the parties."

Default on the Note

The Borrower failed to repay the entire balance due by the due date and was, therefore, in default under the terms of the Promissory Note. Nonetheless, the Lender agreed to allow his friend to continue making monthly payments on the balance due. Finally, the payments by the Borrower became so sporadic that, in 2019, the Lender decided to sue his friend to recover the balance due on the loan.

Action Brought on the Note

I was retained by the Lender to file a claim for breach of contract based upon non-payment of the Promissory Note. As Lender's attorney, Lender established his *prima facie* entitlement to judgment as a matter of law on the cause of action to recover on the Promissory Note through submission of the actual Promissory Note instrument, which contained an unequivocal and unconditional obligation to pay, and an affidavit setting forth the Borrower's default.[3]

There Was No Modification of the Note

In response to the Lender's lawsuit, the Borrower put up the defense that the terms of the Promissory Note were modified through a series of email exchanges between him and the Lender. The Borrower filed an affidavit alleging that he made payments over the course of several years which the Lender accepted, and the loan was thus modified.

As urged by the Lender, the alleged defense of Loan modification, which was based on the fact that the Lender took payments from his friend after the Loan came due, completely missed the point. By its own terms, the Promissory Note became due and owing in 2016. Since the Promissory Note matured by its own terms in 2016, the Lender was well within his rights to pursue collection, since the cause of action had already accrued.[4] The assertion that there was some sort of modification of the Promissory Note or a waiver of same was belied by both the facts and law. While the Borrower attempted to rely on a short exchange of emails in which his friend was basically "chewing him out" for not repaying the Loan, the email exchange did not rise to the level of contract modification required by the terms of the Promissory Note,[5] or established by contract law. The email exchange only showed that the Lender was looking for some good faith from his friend—and his friend couldn't even do that much. The friend couldn't even live up to the supposed offer he made, as evidenced from his small, irregular payments. The email exchange did not constitute an enforceable, written modification setting forth the terms of any extension of the repayment terms of the note. [6]

In *JPMorgan Chase Bank, N.A. v Galt Group, Inc.,* 84 AD3d 1028, 1029-30 [2d Dept 2011], the court rejected a similar claim, that emails were alleged to have modified the terms of a note, holding: To make a *prima facie* showing of entitlement to judgment as a matter of law in an action to recover on a note, and on a guaranty thereof, a plaintiff must establish "the existence of a note and guaranty and the defendants' failure to make payments according to their terms" (*Verela v. Citrus Lake Dev., Inc.,* 53 A.D.3d 574, 575, 862 N.Y.S.2d 96; *see Gullery v. Imburgio,* 74 A.D.3d 1022, 905 N.Y.S.2d 221). Here, Chase submitted the SBA Loan documents, including the relevant promissory notes, the personal guaranties, and evidence of the defendants› default, which together established its *prima facie* entitlement to judgment as a matter of law on the complaint.

Once Chase established its prima facie entitlement to judgment as a matter of law, "[t]he burden then shifted to the defendant[s] to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense."[7] The defendants did not contest the validity of any of the agreements, notes, or guaranties, nor did they dispute that they were in default. Instead, they submitted certain emails into evidence, and argued that they had entered into yet another agreement with Chase—a payoff/paydown agreement—by which Chase agreed to refrain

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from prosecuting the instant action while the defendants were given an apparently unlimited time to obtain a refinancing loan. Contrary to their contention, however, the Supreme Court correctly concluded that the emails contained no evidence of any such agreement between Chase and the defendants.

The Borrower's expressions of hopes and aspirations to repay the Loan set forth in emails, while perhaps well-intended, did not amount to a modification of the terms of the Promissory Note. The Lender was well within his rights to commence this action at the time he did, as the cause of action on the Promissory Note accrued and the action was timely commenced, giving credit for all payments made. The emails, at best, presented Lender's friend with an opportunity to "do the right thing" and repay the debt. [8] It was urged that the emails ought not be interpreted as a binding modification or waiver of any rights.

Doctrines of Waiver and Estoppel Were Inapplicable

The Borrower also asserted affirmative defenses that the action was barred by the doctrines of waiver and/or estoppel. In seeking dismissal of these affirmative defenses, the Lender suggested that these were inapposite to the facts established in this matter and there was no evidentiary basis upon which they could be supported.

The essence of a waiver is when a party intentionally relinquishes a known right. It is well settled that when there is a no oral modification clause, the doctrines of waiver, release and estoppel do not apply. "Waiver is an intentional relinquishment of a known right and should not be lightly presumed."[9] In the case at hand, the Promissory Note clearly contained a provision that no term of the Promissory Note may be waived, modified or amended except by instrument in writing signed by both parties:

> Equitable estoppel prevents one from denying his own expressed or implied admission which has in good faith been accepted and acted upon by another, and the elements of estoppel are with respect to the party estopped: conduct which amounts to a false representation or concealment of material facts, intention that such conduct will be acted upon by the other party, and knowledge of the real facts. The party asserting estoppel must show with respect to himself: lack of knowledge of the true facts, reliance upon the conduct of the party estopped, and a prejudicial change in his position.[10]

In the instant matter, the Borrower did not produce any evidence that there was an expressed or implied admission that was in good faith accepted and acted upon by another. Moreover, there was no false representation or concealment of a material fact. There was simply a binding Promissory Note, and nonperformance by the Borrower.

In granting summary judgment in favor of the Lender, the judge directed that the Borrower be held liable for the balance due on the Promissory Note. The judge also dismissed the affirmative defenses set forth in the answer.

Endnotes

1. Quote by J.R.R Tolkien.
2. "A promissory note is an instrument for the payment of money only, provided that it contains an unconditional promise by the borrower to pay the lender over a stated period of time." *Estate of Hansraj v. Sukhu*, 145 A.D.3d 755, 755, 43 N.Y.S.3d 127, *quoting Lugli v. Johnston*, 78 A.D.3d 1133, 1134, 912 N.Y.S.2d 108).
3. *See Intermax Eco, LLC v. Eco Family Food Mart Corp.*, 172 A.D.3d 1040, 1041 [2d Dept 2019]; *Boro P. Health Mgt., LLC v. Boro for Health*, LLC, 39 Misc 3d 1229(A)972 N.Y.S.2d 142 [Sup. Ct. 2013].
4. § 83:46. Time instruments: Maker and acceptor, 4C N.Y.Prac., Com. Litig. in New York State Courts § 83:46 (4th ed.) ("A cause of action on an instrument payable on a specified date or the occurrence of a specified event (a time instrument) accrues against the instrument's maker (if a note) or acceptor (if a draft) on the day after the specified date or event."); *see* UCC 3-122, which provides in relevant part: "(1) A cause of action against a maker or an acceptor accrues (a) in the case of a time instrument on the day after maturity").
5. "No term of this Note may be waived, modified or amended expect by an instrument in writing signed by both of the parties hereto. Any waiver of the terms hereof shall be effective only in the specific instance and for the specific purpose given."
6. 22A N.Y. Jur. 2d Contracts § 475 (*relevant parts*). A contract may be modified if the contract provides for its modification. Fundamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract. Thus, to be valid under New York law, a contractual modification must satisfy each element of a contract, including offer, acceptance, and consideration. A contract cannot be modified or altered without the consent of all parties thereto. In other words, a contract cannot be modified without the mutual assent of each party. Thus, under general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation. Also, when a contract prohibits modification without the express written consent of a particular party, modification without that party's express written consent is invalid.

   Mere negotiations between the parties are insufficient to constitute a modification, but rather must ripen into a mutual, valid, and enforceable agreement to modify the old contract. (emphasis added).
7. *Gullery v. Imburgio,* 74 A.D.3d at 1022, 905 N.Y.S.2d 221; *see Verela v. Citrus Lake Dev., Inc.*, 53 A.D.3d at 575, 862 N.Y.S.2d 96.
8. *Genger v. Genger*, 123 AD3d 445, 446 [1st Dep't, 2014] "[i]ndulgence or leniency in enforcing a debt when due is not an alteration of the contract" (*Bier Pension Plan Trust v. Estate of Schneierson*, 74 N.Y.2d 312, 316, 546 N.Y.S.2d 824 [1989]).
9. *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 968 [1988]; *Brooklyn Fed. Saving Bank v. 9096 Meserole St. Realty LLC*, 29 Misc 3d 1220(A) [Kings Sup. Ct. 2010].
10. *Airco Alloys Div., Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 71-72 [4th Dep't, 1980].

The Use and Abuse of Guns

By Martin Minkowitz

Stories of gunshots, killing or wounding of people with guns that are licensed or unlicensed, have now occurred on almost a weekly basis. Such injuries have become issues in worker's compensation cases. The Workers' Compensation Law has recognized that such injuries, or even deaths, under the appropriate set of facts can be compensable. The facts need only establish that the injury or death arose out of and in the course of the injured worker's employment. Such establishment is basic to a workers' compensation claim. The claimant has the burden of proof in all such cases to establish that an injury arose out of and in the course of the employment in order to receive benefits under the Workers' Compensation Law.[1]

Sometimes a claimant would prefer to be a plaintiff in a civil action to receive potentially greater benefits or compensation from the injury. That is possible if the evidence reveals existence of a tort by the employer. However, if an injury does arise out of and in the course of the employment, a third-party action against the employer cannot be sustained in tort by an employee.[2] Exclusive remedy of the Workers' Compensation Law prohibits suit by an employee against an employer in tort if the action arose from an injury that occurred in the course of the employment and arose out of that employment. The only remedy for such an employee against his or her employer is a claim under the Workers' Compensation Law, limited to compensation benefits.

Gunshot wounds have been found to be compensable under the Workers' Compensation Law for decades. Usually, the injury to an employee is in defense of the employer's workplace whereby the employee is injured in the course of a robbery of the business, or where two employees have a dispute relating to some aspect of the employment and one injures the other. Those situations have been found to be compensable under the Workers' Compensation Law as they would have arisen out of and in the course of the employment. A recent case is far more complex, however, in making a determination of a causal relationship between the injury and the employment.[3]

The facts in this recent decision by the Appellate Division, Third Department, are that the shooting occured at a hospital in New York City where a doctor who had been on staff at the hospital returned with an automatic rifle and began to shoot, injuring and killing members of the medical staff in addition to a patient. The claimant, who is the subject of this case, was wounded. The claimant was a member of the medical staff of the hospital and was admitted to the hospital for his injuries.

The Workers' Compensation Board was notified, not by the claimant but presumably by the hospital, that an injury had occurred to one of its employees and a Workers' Compensation Board file is opened. The correspondence to the claimant was returned without delivery. Claimant then commenced a tort action against the hospital employer as a plaintiff in the federal district court in New York. That court could not make the decision as to whether the case arose out of and in the course of the employment because that is an issue that can only be determined by the Workers' Compensation Board in New York.

The Appellate Division in fact does discuss this issue of jurisdiction and concludes correctly that the Workers' Compensation Board is the only body that can make that determination. The board makes that determination finding that the claimant had sustained an injury which arose out of and in the course of the employment and was entitled to worker's compensation benefits. As noted above, the Board's decision precludes any third-arty action specifically in this matter of the federal district court's proceeding.

The factors that the board considered in making its decision whether there was a causal relationship between the injury and the employment were that the injury was (i) caused by a former employee of the hospital, (ii) to an existing employee of the hospital, and (iii) on hospital grounds. There is a statutory presumption that an injury that occurs in the course of the employment occurs out of the employment.[4] That being said, the Appellate Division reversed the board's decision, however, and found the case not to be compensable. The result is that the federal district dourt proceeding could go forward.

The Appellate Division's decision to reverse the award of the Workers' Compensation Board was based upon an analysis that the facts did not support an injury that has arisen out of and in the course of the employment. Since the attack was by an individual who was not employed by the hospital at the time of the attack, who had not worked there for over two years, who was not a coworker of the claimant, and who in fact did not even know the claimant, there was no sufficient nexus to the employment. There was therefore no basis to establish a causal relationship of the injury to the employment. The basic element of a claim for worker's compensation being lacking, the Appellate Division found itself with no choice but to reverse the Workers' Compensation Board and render a decision to dismiss the worker's compensation claim.

Endnotes

1. § 2 (7) WCL.
2. § 11 WCL. See also § 29 WCL.
3. *Timperio v. Bronx-Lebanon Hospital*, AD3d___ (2022).
4. § 21 (1) WCL.

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When To Dabble, When To Not

By Nancy Baum Delain

I suspect that every general-practice lawyer—especially as a solo just starting out—dabbles sometimes in areas of law that he or she is not as competent to practice in as he or she is in other areas.

As we start out or as we grow in our legal careers, dabbling is perhaps the best way to learn. We get our feet wet in an area of law that we're unfamiliar with, we learn those ropes, we figure out that we have a passion in this area, or we loathe that area. And this is all fine, so long as we know that we have little or no knowledge about this new area of law and we make reasonable effort to learn how to practice in this area.

The New York Rule of Professional Conduct 1.1 provides:

> (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
>
> (c) A lawyer shall not intentionally:
>
> > (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
> >
> > (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.
>
> Comment: Legal Knowledge and Skill
>
> [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.
>
> [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.[1]

Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question."[2]

Thus, the New York Rule of Professional Conduct 1.1 allows us to learn and practice new areas of law, if our learning does not prejudice a client's matter and the lawyer does not hold himself or herself out as an expert in that area of law. We can become competent to practice through self-study, through CLEs, through reading, and/or through attaching ourselves to an attorney who is knowledgeable in that field and learning from them.

There exist areas in which you may not dabble. For example, to file and prosecute a patent application in the U.S., you must be admitted not only in a state, but also before the U.S. Patent and Trademark Office (USPTO). However, while you cannot file and prosecute a patent application without that USPTO admission—unless, of course, you are the inventor and you're filing the application on your own behalf since an inventor has the absolute right to represent himself or herself—the USPTO allows any attorney to practice trademark law as no special admission is required for that. In addition, the U.S. Copyright Office allows any attorney to practice copyright law whereas again, no special admission is required.

But should you, a divorce or bankruptcy lawyer, take on a trademark or copyright case just because you can? Probably not.

In other jurisdictions, attorneys have fallen into some difficulties by dabbling. In Kansas, for example, a patent and trademark lawyer became disenchanted with her practice area and decided to "try her hand" at criminal law. Her first court-appointed client threatened her with physical harm (the client had already had his prior attorney's fingers broken, so this new lawyer took the threat seriously). The Kansas lawyer had guns fired at her home by persons unknown during the representation, and she quickly realized that she and criminal law did not fit together well. The lawyer got a couple of extensions of time in the case, but then apparently dropped the matter and went back to school to become certified in another area of law, even failing to respond to the court's order to show cause as to why she had apparently deserted her client. The lawyer admitted her misconduct and neglect in open court: "I was over my head and did not seek proper advice about getting another attorney to replace" her in handling the appeal. The Kansas Supreme Court imposed the agreed-on sanction: indefinite suspension. This lawyer no longer practices law.

As of 2016, The American Bar Association

> estimates that 46 percent of all legal malpractice claims are based on the attorney's failure to understand substantive law or specialized procedures, and that more than 60 percent of all malpractice claims involve an area of the law in which the subject attorney works less than 20 percent of the time. Attorneys who practice in a single area of the law account for less than 7 percent of all claims.[3]
>
> This is not a healthy statistic for a lawyer seeking to handle just a case or two in a new area of law.

A common reason that a lawyer might start to dabble in other fields of law is that an established client in the attorney's own field of expertise comes to that attorney and asks for representation in another, entirely different, aspect of that client's legal life (i.e., a patent client asking his or her patent attorney to represent him or her in a divorce). The lawyer's alarm bells may scream "DANGER DANGER DANGER!" but the lawyer does not want to put the client off or offend him or her, so the lawyer agrees to the additional representation.

This is likely to be a very, very bad move unless the lawyer does the following:

- Treat the matter like any new matter: require the client to produce the same information you would require of any new client before you accept the representation;

- Explain to the client that yes, you absolutely want to help him/her, but this new area is not your area of expertise and therefore you will need the help of another attorney who is more experienced in the new area of law;
- Run (do not walk) to affiliate with another lawyer whose area of expertise is in the new area in which your client seeks representation. Of course, in doing so, you must explain to the client that this will involve additional expenses and probably some duplication of effort between attorneys;
- Do not accept the representation unless the client agrees to the additional lawyer in writing; and
- Get a new engagement letter with the client that spells out the fact that this is not your area of expertise, that you will be seeking the help of another attorney and that this will increase the client's expenses for the case.

Of course, in the best of all possible worlds, you will refer the client to someone who handles these cases regularly, and the client will accept the referral.

The legal malpractice insurance carrier CNA states, ". . . since dabbling in unfamiliar practice areas can lead to unreasonable legal fees and disgruntled clients—as well as potential ethics violation—attorneys should accept only those cases that they are competent to handle."[4]

Thus, the answer to the "should you dabble?" question depends on your competence with the new field and, very importantly, on whether your malpractice insurance would cover any errors or omissions you make in your dabbling foray into this new area of law. Most carriers require a rider if you plan to dabble in trademarks or copyrights. Such rider can add, probably significantly, to the cost of your policy.

If your malpractice carrier does not cover a particular area of law and your dabbling would lead you into that particular area of law, do not dabble in that area. If you make a mistake and get yourself sued, you stand to lose everything.

Also, it is a big mistake to dabble without letting your carrier know that you're dabbling. Without letting your carrier know, you run the risk of the insurer refusing, quite rightly, to cover you in that instance. Since the insurer was unaware of the additional practice area, the insurer has no duty to insure the attorney against claims resulting from the attorney's practice in that area.

Do I dabble? You bet I do. I hold myself out as an IP and business attorney, but I have handled several Chapter 7 and 13 bankruptcies. Bankruptcies are not my main area, but over the years I have acquired some expertise. I essentially hang bankruptcy from "business law." I started doing Chapter 7 filings as my pro bono thing when I first started practicing law in 2004. I've done a smattering each year since, and I intend to maintain that practice. I once handled a remarkably simple divorce which was successful, but I will never do that again. I was also a court-appointed attorney for the child for several years. Again, this was not my area of expertise, but I went through the required training and mentorship and kept up with the CLEs and handled several matters quite successfully. I even write the occasional simple will. I have studied up on all these supplemental areas enough to competently handle them. And yes, my malpractice carrier is fully aware that I branch out.

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Endnotes

1. *New York Rules of Professional Conduct*, Effective April 1, 2009, as amended through April 1, 2021, with Commentary as amended through April 1, 2021, accessed on 14 February 2022 at https://nysba.org/app/uploads/2021/05/Rules-of-Professional- Conduct-as-amended-04072021.pdf. 3.
2. *Id.*
3. https://www.law.com/thelegalintelligencer/almID/1202759657347/?slretur n=20220114115138, accessed 14 February 2022.
4. https://www.cna.com/web/wcm/connect/a2997b14-a8a9-4818-bfcb 3bdd29bfba23/Taking+Stock+of+a+Potential+Fee+Collection+Suit.pdf?MOD=AJPERES&CACHEID=a2997b14-a8a9-4818-bfcb-3bdd29bfba23, accessed 14 February 2022.

A Tax Map to Your MAPT

By Christina Lamm

A Medicaid Asset Protection Trust (MAPT) is an irrevocable trust that allows an individual to protect his or her assets from Medicaid. Once the MAPT is established, assets are transferred into the trust, which contains specific language to allow the trust to be considered an exempt asset for Medicaid purposes once the applicable look-back period has expired. Simply put, the MAPT assets will not count as a resource when making an application for Medicaid if the transfer of assets into the MAPT is beyond the applicable look-back period.

Drafting the MAPT is not so simple. The attorney drafting it has to ask himself or herself many questions, such as:

- Have the assets being placed in the trust appreciated in value, thus necessitating a step-up in basis and estate inclusion?
- Are the assets being placed in trust expected to appreciate in value, making removal from the estate desirable and necessitating that the transfer be a completed gift?
- Will the client need access to the income in the trust?
- Will the client potentially need to gain access to some of the principal in the trust? and
- Should the trust be a grantor trust so that income is taxable at the grantor's tax rate?

These are just some of the questions that the drafter must take into consideration when preparing a MAPT. The attorney draftsman of the trust needs to make sure that he or she understands the needs of the client to evaluate which tax-friendly terms to include in the trust. While the client's only goal may be Medicaid eligibility, tax savings opportunities should also be examined.

This article will focus on the effects that different provisions in a MAPT have on gift tax, estate tax and income tax, as well as the potential benefits and drawbacks to the provisions based on the individual client's needs. Some provisions will overlap and cause estate inclusion and grantor trust status, so it is very important for the estate planning attorney to be familiar with the Internal Revenue Code (IRC) sections that govern in this realm.

Income Tax Implications

The Trustee of a MAPT is responsible for reporting all income generated by the MAPT and ensuring that any income tax due is paid. The question is, who pays the tax? Is it the trust, the grantor, or the beneficiary? That answer can differ depending on the client's goals and financial picture. If the trust is set up as a grantor trust,[1] the grantor will be

the one paying the tax on the trust income, regardless of whether any income is actually distributed to the grantor.[2]

One advantage to having a MAPT set up as a grantor trust is that grantors are usually taxed at a lower tax rate than trusts. This is due to the income tax brackets for trusts being compressed. In 2021, where the taxable income of a trust exceeds $13,050, it is taxed at the maximum rate of 37%. In contrast, an individual's taxable income is not taxed at the maximum rate until it exceeds $523,600. Thus, substantial income tax savings may be available if the MAPT includes grantor trust provisions, allowing the grantor to be taxed on the income generated as opposed to the trust bearing the burden of paying the income tax.

Certain sections of the Internal Revenue Code must be incorporated into the MAPT for it to be deeded a grantor trust for income tax purposes and for the income to be taxed to the grantor (or a third party in certain instances).[3] IRC § § 671-679 are commonly known as the grantor trust rules. We will now take a deeper look at a few of these code sections and whether to include them in a MAPT.

Under IRC § 673, entitled "Reversionary Interests,"the grantor is treated as the owner of any portion of the trust in which he or she has a reversionary interest and the interest exceeds 5% of the value of such portion.[4] Giving the grantor a reversionary interest is not advised when the goal is to protect the assets from Medicaid or gain Medicaid eligibility. If the grantor can or will reacquire at least a portion of the assets, this may make the trust assets available to Medicaid. A provision granting a revisionary interest should not be included in the MAPT to obtain grantor trust status.

IRC § 674 deals with the power of the grantor and/or a non-adverse party to control beneficial enjoyment of the transferred property.[5] This section of the IRC applies in instances where the power is over principal and/or income. There is a list of exceptions to the rule that the drafter of the trust should familiarize himself or herself with if trying to achieve (or avoid) grantor trust status.[6] If the attorney, as draftsman, wants to gain grantor trust status through this IRC section, a limited lifetime power of appointment retained by the grantor to change the income beneficiaries or the remainder beneficiaries of the trust can be included in the MAPT. If the trust is being created to protect the assets from Medicaid or other governmental benefit programs, the attorney needs to make sure that the power is limited to a general power of appointment. A general power of appointment allows for the grantor to exercise the power of appointment in favor of the grantor, the grantor's estate, or creditors of the grantor, and would cause the trust to be a countable resource for Medicaid purposes.

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IRC § 675 deals with administrative powers reserved by the grantor or a non-adverse party.[7] For the purposes of a MAPT, the most useful provision to add to the trust is the power of substitution.[8] This power allows the grantor to transfer trust property to himself or herself in exchange for property of equivalent value. While this power can be largely illusory and most often is used exclusively to gain grantor trust status, it has an additional advantage. When the transfer of assets to the trust is a completed gift (as discussed below) and the transferred property is not included in the grantor's estate, the ability to swap out appreciated assets for unappreciated assets—thus preserving a step-up in basis that would otherwise not be available—is a valuable bonus.[9]

One last grantor trust provision often used to trigger grantor trust status in a MAPT is IRC § 677.[10] This section of the IRC states in pertinent part that the trust will be a grantor trust if the income is or may be payable to the grantor (or the grantor's spouse). It is important to note that when income payable to the grantor under IRC § 677 is the provision used to deem the trust a grantor trust, then the drafting attorney needs to take into account that any income generated by the trust will be countable for Medicaid purposes. This can be problematic as the income generated by the trust will be included in the calculation of the Medicaid recipient's total income, whether or not income is actually distributed. It may also be included in the calculation if the grantor only has a discretionary right to income generated by the trust.[11]

One way to avoid this potential pitfall is to have the income payable to a beneficiary of the trust and use a different provision to make the trust a grantor trust. For instance, income could be payable for life to the grantor's children. As long as the trust is a grantor trust (based on another grantor trust provision), the income will still be taxed at the individual's rate, but will not be countable for Medicaid purposes.

Gift Tax Implications

If the transfer of assets to the MAPT is deemed a completed gift,[12] a gift tax return must be filed. The filing of a gift tax return will be an added expense, but no gift tax is due[13] as long as the total value of taxable gifts during the grantor's lifetime are under the estate tax exclusion amount (which for 2021 is $11,700,000). Since the combined estate and gift tax exclusion amount is currently so high, imposition of gift tax is not a major concern; however, depending on the value of the grantor's assets, it can play a role. If the grantor's assets are such that there may potentially be a taxable estate upon death, transferring assets to a MAPT and making sure the transfer is a completed gift will have the effect of removing the growth on those assets from the grantor's taxable estate as of the date of the completed gift.

Additionally, the political winds are uncertain and tax laws, including the current high estate tax exclusion amount, can change at any time. If the trust is being drafted

for a high-net-worth client, it may be prudent to have the transfer deemed a competed gift even if a tax is assessed, but not due until death if under the exclusion amount. The IRS has clarified that even if the gift tax exclusion amount gets lowered to pre-2018 levels, the higher exclusion amount in effect at the time of the gift will be applied.[14]

In order to make sure that the transfer into the MAPT is a completed gift, the grantor cannot retain any of the so called "strings of ownership."[15] These provisions will be discussed in the following section as they also pertain to estate tax implications.

Estate Tax Implications

If the transfer of assets to a MAPT is not a completed gift for tax purposes, then the value of the assets will be included in the grantor's taxable estate upon his or her death.[16] Here, the attorney draftsman needs to be aware of the client's goals in order to determine if this is right for the client. It is important to remember that while the federal estate tax exclusion amount is $11,700,000 for 2021, it is due to sunset in 2026 and revert to the pre-2018 level of $5,490,000, indexed for inflation. It is also critical that the attorney consider whether the client will have a taxable New York estate ($5,930,000 estate tax exclusion amount in 2021).

With all of that said, many clients do not have to worry about the implementation of an estate tax.[17] Particularly, if your goal is to protect assets from Medicaid, it is likely your client will not have assets that exceed the estate tax exclusion amounts. If this is the case, the drafter should think about including provisions in the MAPT so that the assets are included in the grantor's estate upon his or her death.

One major benefit of estate inclusion is to allow for a step-up in basis upon the death of the grantor.[18] For many clients, their most valuable asset is their real property, which can have a large looming capital gain. If the real property is deemed transferred at death, it will receive the IRC § 1014 step-up (or step-down) in basis. For example, if the client purchased a home for $90,000 which is valued at $900,000, at the time of death, the cost basis of the property receives a step-up to $900,000, thus eliminating or reducing any capital gains tax due upon the sale of the property post-death.[19] This is also true when the house is transferred into a MAPT where the grantor retains some incidents of ownership. In such a case, upon the death of the grantor, the beneficiary will receive the property with a cost basis of $900,000, just as if the grantor continued to own the property in his or her name until his or her death, thus eliminating the capital gain that would be imposed if the property was transferred into the MAPT as a completed gift.

The question is, how does the attorney draftsman make sure that the transfer of assets into a MAPT is an incomplete gift for estate tax purposes? This is where the string provisions of IRC § 2036–2038 come in. These provisions are referred to as "string" provisions because they are thought of as strings that the grantor retained over the trust assets. These strings pull the assets transferred into the MAPT back into the grantor's estate. For purposes of drafting a MAPT, § 2036 and § 2038 are the most relevant.

Section 2036 is titled "Transfers with Retained Life Estate." In pertinent part, it states that a person's gross estate will include any property transferred for less than adequate consideration in which the person retains for his lifetime the "(1) the possession or enjoyment of, or the right to the income from, the property or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."[20] In the irrevocable trust context, this boils down to if the grantor retains a lifetime right to live in the property owned by the trust; has the lifetime right to receive income from property owned by the trust; acts as trustee with the discretionary right to distribute income or principal not based on an ascertainable standard; or even the right to change beneficiaries of income and/or principal interests. In such cases, the value of the transferred assets will be included in the grantor's gross taxable estate upon his or her death and the assets will receive a step-up in basis.

If a drafter wants to make sure that the transfer of assets to a MAPT is treated as an incomplete gift, the drafter can include a limited lifetime power of appointment over the assets. As discussed earlier, this power would allow for the grantor to change the beneficiaries of the trust. It is important to keep in mind the Medicaid implications, previously discussed, detailing why the power must be limited.

If the grantor's residence is being transferred into the MAPT, the lifetime right to reside in the property can be included in the trust. Including a lifetime right to possession of real property that is the grantor's personal residence has other added benefits. The grantor can retain any real estate tax credits he or she is receiving and also still remain eligible for the IRC § 121 exclusion of $250,000 ($500,000 for married couples) of capital gain if the residence needs to be sold before the death of the grantor.[21]

The grantor can also retain a lifetime income interest over the property transferred into the MAPT. As discussed earlier, reserving an income interest is one of the provisions that would also trigger grantor trust status, causing the income to be taxed to the grantor. So, if the goal is to avoid grantor trust status, this needs to be kept in mind. There could also be negative Medicaid consequences as previously mentioned.

Section 2038 is entitled "Revocable Transfers," but that is a misnomer. The retention by the grantor of the power to alter, amend, revoke or terminate the trust will all cause estate inclusion of the transferred assets.[22] Many of the powers that would cause estate inclusion under IRC § 2036

would also cause estate inclusion under IRC § 2038, but a separate discussion of § 2038 is still merited.

It goes without saying that a trust revocable by the grantor would fall under § 2038 (and many other provisions previously discussed) and be included in the gross estate of the grantor, but a MAPT cannot be revocable in order to serve its purpose. The attorney draftsman of a MAPT needs to understand which powers to alter or amend under § 2038 will cause estate inclusion.

A limited testamentary power of appointment would cause estate inclusion under § 2038. This provision would give the grantor the right to change the beneficiaries by exercising the power in his or her will. Again, this must be a limited power and the grantor must not be able to exercise this power in favor of the grantor, the grantor's estate or the grantor's creditors.

As with IRC § 2036, the unrestricted power to remove and replace a trustee with the grantor or a person who is related or subordinate to the grantor, as defined under IRC § 672(c), will cause estate inclusion. The unrestricted power by the grantor to remove a trustee, without the restriction to appoint a trustee who is not related or subordinate, is not recommended for a MAPT as it will cause the grantor to be seen as having access to the trust assets because he or she can remove the trustee and appoint himself or herself or someone related or subordinate as trustee. This is viewed as having the ability to direct the assets back to oneself and the value of the trust assets will be included as an available resource for Medicaid purposes.

Conclusion

Determining which tax related provisions to include in a MAPT is very case-specific. Careful thought should be given to what tax provisions will provide the best result for the particular client while achieving other objectives such as asset protection from creditors like Medicaid.

Endnotes

1. I.R.C. §§ 671-679.
2. I.R.C. § 671.
3. *See* I.R.C. §§ 671-679.
4. I.R.C. § 673.
5. I.R.C. § 674.
6. I.R.C. § 674(b).
7. I.R.C. § 675.
8. I.R.C. § 675(4)(c).
9. I.R.C. §.1014.
10. I.R.C. § 677.
11. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, August 10, 1993, 107 Stat. 312.
12. I.R.C. § 2511.
13. I.R.C. § 2505.
14. https://www.irs.gov/newsroom/estate-and-gift-tax-faqs.
15. I.R.C. §§ 2036 -2038.
16. *Id.*
17. *See* https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax.
18. I.R.C. § 1014.
19. *Id.*
20. I.R.C. § 2036(a).
21. I.R.C. § 121.
22. *Id.*

A Primer on COVID-19 and Insurance

By James A. Johnson

> "It is common for insurance policies to give with the right hand and then take away with the left."
>
> —Richard Posner, Chief Judge of the 7th Circuit Court of Appeals, *Curtis-Universal Incorp. v Sheboygan Emerg. Med, Services, Inc*., 43 F. 3d 1119, 1123 (7th Cir. 1994).

The ongoing coronavirus (COVID-19) pandemic and variants are the most devasting and disruptive forces in recent history. The COVID-19 pandemic will lead to numerous lawsuits involving insurance coverage and commercial disputes. In commercial cases, should a party be excused for its non-performance of its contractual obligations? The answer depends on the terms of the contract, the particular facts surrounding the non-performance and the law of the jurisdiction.

Commercial Cases

A party whose operations are compromised by the pandemic has potential defenses such as impossibility and force majeure. The impossibility doctrine excuses a party's performance when the destruction of the subject matter of the contract or the means of performance is objectively impossible. The impossibility must be the result of an unanticipated event that could not have been foreseen or guarded against in the contract. Section 2-615 (a) of the Uniform Commercial Code requires only commercial impracticability.[1] The commercial impossibility doctrine requires a party to show impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.[2]

Force Majeure

There is no single standard force majeure clause. The iterations of specific events of force majeure can vary widely, particularly between industries. The force majeure defense applies only if the contract contains a force majeure clause. A force majeure clause is a provision that excuses non-performance due to certain circumstances beyond the parties' control. What constitutes a force majeure event varies by contract but typically includes events such as riots, strikes, war, governmental orders and acts of God. Compliance with a governmental order has been held to be a sufficient excuse because the government has the power to compel compliance.[3] However, whether a force majeure clause that specifically references acts of God will apply to coronavirus cancellation or interruption is highly fact- and jurisdiction-specific. Most jurisdictions require the act of God to be unforeseeable.[4] In addition, courts construe force majeure cases narrowly. Generally, a party's performance will be excused only if the clause specifically contemplates the particular event which prevents performance.[5] Also, a party must comply with conditions attached to the exercise of that clause—for example, to notify affected parties within a specific time period following a force majeure event.

Business Interruption Claims

A typical business interruption clause or endorsement will provide coverage for certain business loses for a temporary closure. This coverage is subject to policy dollar limits and certain specific exclusions.[6] The typical Insurance Service Office (ISO) BI insurance requires a specific triggering event-direct physical loss or damage.[7] There are limitations on what scenarios trigger business interruption coverage, the duration, amount and type of coverage. In addition, there are often specific exclusions for damages caused by viruses, bacterium or other microorganism that induces physical distress, illness, pollutants or disease. It appears that these exclusions bar damage resulting from the COVID-19 virus.

Civil Authority

The civil authority clause provides limited coverage where operation of civil authority shuts down access to a business's premises. The access to the described premises must be due to particularized reasons as defined in the policy. Thus, a governor's order requiring businesses to close does not generally trigger the coverage because the specific conditions are not met.

Business Losses and Insurance

One of the most important questions to a business owner in this pandemic is: "Can I recover damages under the commercial general liability (CGL) or all risk insurance policy?" The answer depends on the language in the insurance policy. In most property liability policies, the loss or damage must be caused by or result from a covered loss that is not excluded under the policy. In addition, the loss or damage must be caused by a *direct and tangible physical injury to the insured property.* Therefore, in most jurisdic-

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tions physical loss does not cover a virus because a virus does not result in tangible damage to property. Thus, if a business files a claim for a COVID-19 related interruption, insurers may dispute whether a physical loss has occurred.

The plaintiff in *Gavrilides Mang. Co. et al. v. Michigan Insurance Co*.[8] operated the Soup Spoon restaurant and sought loss profits from its insurer due to reduced business during the pandemic. The insurer cited *Universal Image Products, Inc. v. Chubb Corp*.,[9] stating that there was no coverage unless the insured premises was physically damaged. The plaintiff failed to allege that the physical integrity of the Soup Spoon was altered by the coronavirus. The plaintiff's civil authority claim also failed because of lack of any physical loss or damage.

Also, in *Ross 1, LLC v. Erie Ins. Exch*.,[10] the Superior Court in the District of Columbia found no coverage in a lawsuit by District of Columbia restaurants whose polices lacked a virus or pandemic exclusion. The court stated that the plaintiffs offered no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close.

Similarly, in the Western District of Texas in *Diesel Barbershop, LLC et al. v. State Farm Lloyds*[11] the court dismissed a claim by various barbershops. The plaintiff failed to allege that COVID-19 was actually within their properties or caused damage. Tangible injury to property must be established.

However, an argument can be made that the words physical loss could include businesses' inability to use their property during the pandemic. For example, in *Hughes v. Potomac Ins. Co*, the insurer denied coverage where erosion swept the earth from underneath a house and left it standing on the edge of a 30-foot cliff.[12] The insurer denied coverage because the house itself was not damaged and there was no physical loss or damage.[13] The California Court of Appeals disagreed, finding the insured's interpretation reasonable:

> To accept the insurer's interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been damaged so long as its paint remains intact and its walls still adhere to one another. Despite the fact that property might be rendered completely useless to its owners, the insurer would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.[14]

Other state courts have rejected similar arguments by insurers where the insured was ordered to vacate a church because of gasoline in nearby soil[15] or where unstable rocks perched at the top of a hill induced a government evacuation order.[16] A case can be advanced that the term *physical loss* is not precise enough to bear the single meaning that insurers assign to it. Cases have held that the words physical loss are broad enough to encompass situations where the insured loses the use of a physical asset.[17]

All Risk Policies

All risk policies allow recovery for fortuitous loses unless the loss is excluded by a specific policy provision.[18] Insurers promise to pay for direct physical loss or damage to property caused by or resulting from any covered cause of loss or some variant of that language.[19] The Sixth Circuit espoused that one would struggle to think of damage not covered by this language.[20] The breadth of all risk polices are intended to insure against all fortuitous losses not specifically excluded.

The Coronavirus Aid, Relief and Economic Security Act

To help mitigate the financial crisis created by the COVID-19 pandemic, the federal government has issued guidance relating to employee benefit plan operation and administration.

The Coronavirus Aid, Relief and Economic Security (CARES) Act signed into law in March 2020 provides for substantive financial and administrative relief to participants, sponsors and administrators of certain employee benefits plans.[21] Subsequently, the Internal Revenue Service clarified and expanded upon the relief offered in the new law. The new guidance relaxes the generally rigid regulatory scheme in employee benefit plan operation and administration. For example, CARES Act, § 2202, together with IRS Notice 2020-50, provides relief from tax rules for *qualified individuals* who obtain a coronavirus-related distribution. The 10% additional penalty of the Code § 72(t)20 may be avoided.[22] The distribution may be reported in gross income ratably over three years. Or, the funds may be restored into a retirement fund within a three-year period beginning on the day after the date on which the distribution was received.[23] A coronavirus-related distribution (CRD) is any distribution or distributions not exceeding $100,00 from an eligible retirement plan to qualified individuals.

Duty To Defend

One of the first decisions concerning the duty to defend for COVID-19 claims under a CGL policy is *McDonald's Corp. et al. v. Austin Mutual Insurance Co*. A federal district court in Chicago recently held that a claim for injunctive relief constituted a claim for damages because of bodily injury triggering a defense obligation. A claim for injunctive relief to require McDonald's to enact more stringent safety

protocols and provide additional training for franchisees and their employees on preventive measures to avoid the spread of COVID-19 thus also constituted a claim for damages for bodily injury. This case has other implications and deserves watching.[24]

Conclusion

There is no conclusion because coronavirus cases and the resulting effects on businesses continue. Keep in mind many commercial property policies that contain business interruption coverage have hidden contractual limitation periods that purport to require insureds to bring suit much sooner than would otherwise be required under applicable law. For example: "No suit, action or proceeding for the recovery of any claim will be sustained in any court of law or equity unless legal action is started within two years after the loss." Other policies require that suit must be commenced within 12 months after the denial of the loss.

Also, a bevy of legal issues will arise in the wake of the global pandemic. Businesses may encounter tort claims from patrons and employees alleging that they contracted COVID-19 on their premises. This primer on COVID-19 is a guide as to what to expect and to provide basic information for consideration in civil disputes. The decisions involving insurance, commercial cases and tort claims will in large measure be jurisdictional.

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Endnotes

1. *Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts*, 817 F. 2d 1094, 1099 (4th Cir. 1987).
2. *Hemlock Semiconductor Operations, LLC v. Solar World Indus. Sachsen GmbH*, 867 F. 3d 692, 702 (6th Cir. 2017) (applying Michigan Law).
3. *Harriscom Svenska, AB v. Harris Corp*., 3 F. 3d 576, 580 (2nd Cir. 1993).
4. *United States v. Winstar Corp*., 518 US 839, 905-907 (1996).
5. *Kel Kim Corp. v. Cent. Markets, Inc*., 70 N.Y. 2d 900, 902-903 (1987).
6. *Dye Salon, LLC v. Chubb Indemnity Ins., Co*., No 4:20-cv-11801 (E.D. Mich. Feb. 10, 2021)
7. *Salon XL Color & Design Group, LLC v West Bend Mut. Ins. Co*., No 8:20-cv-11719 (E.D. Mich. Feb 4, 2021); *See e.g. Source Food Technology v. U.S. Fidelity & Guaranty Corp.*, 465 F. 3d 834 (8th Cir. 2006), *United Airlines Inc. v. Ins. Co. of State of Penn*, 385 F. Supp. 3d 343 (S.D.N.Y. 2005), *aff'd*, 439 F. 3d 128 (2nd Cir. 2006).
8. *Gavrilides Mang. Co et al. v. Michigan Ins. Co.*, No 20-258 CB (Ingham Cnty, Mich – July 2020); *Selane Products, Inc. v. Continental Casuality Co.*, No 2:20-cv-07834 (N.D. Cal. Feb 8, 2021); *Soundview Cinemas, Inc v. Great American Ins. Co*, No. 605985-20 (N.Y. Sup. Ct., Nassau Cnty. Feb. 8, 2020) – insurer's motion to dismiss granted based on the determination that there was not a physical loss.
9. *Universal Image Products, Inc v. Chubb Corp*., 703 F. Supp. 2d, 705, 709-10 (E.D. Mich. 2010); *Soundview Cinemas, Inc v. Great American Ins. Co*., No. 605985-20 (N.Y. Sup. Ct. Nassau Cnty, Feb. 8, 2020).
10. *Ross 1, LLC v. Erie Ins. Exchange*, No. 2020 CA 002424 B (Aug. 6, 2020).
11. *Diesel Barbershop. LLC et al v. State Farm Lloyds*, No. 5:20-cv-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020).; *SAS International, Ltd v. General Star Indemnity Co*., No. 1:20-cv-11864 (D. Mass. Feb. 19, 2021).
12. *Hughes v. Potomac Ins. Co.*, Cal Rptr. 650, 651 (Cal Ct App 1962).
13. *Id*. at 652
14. *Id*. at 655; *see Goodwill Industr. of Orange Cnty, Calif. v. Phila Indmn. Ins. Co*., No.30-2020-01169032-CU-IC-CXC (Cal. Super. Ct. Jan. 28, 2021), denied insurers motion to dismiss Goodwill's COVID-19 business interruption claim based on respiratory droplets on surface of property and in the air.
15. *W Fire Ins. Co. v. First Presbyterian Church*, 437 P. 2d 52, 55 (Colo. 1968).
16. *Murray v. State Farm Fire & Cas. Co*., 509 SE 2d 1, 4-5, 16-17 (W. Va. 1998).
17. *Port Authority NY & NJ v. Affiliated FM Ins. Co*., 311 F. 3d 226, 236 (3d Cir. 2002); *Mellin v. N. Sec Ins. Co.*, 115 A3d 799 (NH 2015); *Bdof Educ Township High School Dist. No 211 v. Int'l Ins. Co*., 720 NE 2d 622, 601-02 (Ill.Ct. App. 1999); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co*, 1, 968 A2d 724 (N.J. Ct. App. 2009); *TRAVCO v. Ward*, 715 F. Supp. 2d 699, 701 (ED Va 2010); V*andelay Hospitality Grp., LP v. Cinn Ins. Co.*, court grants insured second chance to amend to allege covered COVID-19 claim.
18. *Frosch Holdco, Inc. v. Travelers Indemnity Co,* No. 4:20-cv-01478 (S.D. Tex. Feb. 11, 2021); *Redenburg v. Midvale Indmn., Co*, No 1: 20-cv-05818 (S.D.N.Y. Jan. 27, 2021), insurer's motion to dismiss granted based on policy's virus exclusion.
19. *K.V. G. Props, Inc v. Westfield Ins. Co.*, 900 F. 3d 818, 820 (6th Cir. 2018).
20. *Id*. at 821.
21. 15 U.S.C. 116.
22. 26 U.S.C. 72(t).
23. *Id*.
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Sports and Recreational Activities—Game Over? Or, Let the Games Begin!

By Glenn A. Monk

"It's all fun and games until somebody loses an eye." (Unknown. A long time ago.)

The phrase is said to originate from ancient Rome, where the only rule to wrestling matches was no eye gouging. There was immediate disqualification if you poked your opponent's eye out. Today, it may be more accurate to say, "it's all fun and games until somebody gets sued."

Brief Overview of Premises Liability

In New York, it is well settled that landowners have a duty of care to maintain their property in a reasonably safe condition, whether the property is open to the public or not, and it does not matter if plaintiff was an invitee, licensee, or trespasser.[1] Reasonableness is determined by viewing all of the "circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[2] In the arena of sports or recreational activity, the property owner's duty of care is to make the conditions as safe as they appear to be.[3]

Primary Assumption of Risk

Numerous cases involving sporting or recreational activity have been decided regarding the application of the primary assumption of risk doctrine. The Court of Appeals has limited the expansion of the doctrine to those cases that present a social value and those that occur within a designated recreational venue. However, the courts still look to the inherent dangers of the sport, whether the plaintiff appreciated those risks, the skills of the plaintiff, and if the condition was open and obvious. If found to apply, the assumption of risk doctrine, provides a complete defense to property owners, overriding an application of plaintiff's comparative negligence. The Court of Appeals has drawn distinctions as to what type of activities will permit an application of the assumption of risk doctrine, and where those activities took place.

The assumption of risk doctrine arises when one is aware of and appreciates the risks inherent in the activity and "voluntarily assumes the risk" by participating.[4] The participant must have knowledge and appreciation of the risk. Awareness of the risk should be measured against the "background of the skill and experience of the particular plaintiff."[5] The assumption of risk doctrine has been applied to the layout and construction of a playing field,[6] as well as the activity. It has also been applied to where there is an open and obvious conditions where the sport is played.[7] Determining if a defendant violated a duty of care to participants in sports and activities "should include whether the conditions caused by defendants' negligence are 'unique' and created a dangerous condition over and above the usual dangers that are inherent in the sport."[8]

Assumption of risk is not justified for reckless or intentional conduct by property owners.[9] If a plaintiff can show the defendant acted negligently, or a defendant's inaction was a "substantial cause of events which produced the injury," plaintiff will not have assumed the risks of the sport.[10]

In *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392 (2010), the Court of Appeals held that while assumption of the risk protects the social value of athletic and recreative activities, it does not apply outside of this limited context.[11] Thus, in *Trupia*, an infant-plaintiff sliding down a banister was not an activity of the kind of social value that warranted the protection afforded under the assumption of the risk doctrine.[12] The Court found that if the plaintiff's harm was attributable to his own actions and not to negligence on behalf of the defendants, his actions would be taken into account under the comparative fault provision of the CPLR.[13]

In *Custodi v. Town of Amherst*, 20 N.Y.3d 83 (2012), the Court of Appeals declined to apply the assumption of risk doctrine to those cases where the activity did not take place within a "designated venue."[14] Therefore, the plaintiff, who fell while rollerblading across a height differential in the street, did not assume the risks inherent to rollerblading as she would have had she been in a rink, skating park or competition.[15]

Field of Play Participants

Courts look to plaintiff's skills and experience to evaluate an application of primary assumption of risk

The assumption of the risk doctrine will apply when a defendant can prove that the plaintiff's skill and experience afforded the plaintiff an appreciation of the risk involved in his or her sport.

In *Maddox v. City of New York*, plaintiff, New York Yankee outfielder, Elliot Maddox, suffered a career-ending injury when he slipped and fell on a wet and muddy

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field.[16] The Court of Appeals found that his experience of playing professional baseball coupled with his testimony that he was aware of the condition (he had complained to groundskeepers about the condition) and his playing in the field constituted plaintiff assuming the risk of his injury.[17]

Similarly, in *Morgan v. State*, plaintiff was driving a two-person bobsled during a national championship race, when their bobsled tipped over and his teammate fell out of the bobsled. Plaintiff was an Olympic bobsledder who had over 20 years of experience and had raced down the very same run at issue numerous times.[18] The Court of Appeals held summary judgment was properly granted to defendants under the assumption of risk doctrine, based on plaintiff's over 20-year experience in bobsledding, and familiarity with the bobsled course at issue.[19]

In *Lomonico v. Massapequa Public Schools*, 84 A.D.3d 1033 (2nd Dep't 2011), plaintiff, an 11th-grade cheerleader, alleged she suffered from post-concussion syndrome when she was struck in the head by another student when practicing a stunt. The stunt involved one girl (the flyer) being lifted into the air by three other girls. The flyer is lifted on one foot and then to dismount, rotates 360 degrees and lands cradled in the arms of the bases and backstop. Plaintiff alleged a lack of instruction and supervision and failure to provide protective mats.[20] The Second Department found the cheerleader could not demonstrate the school district's liability due to the extent of her cheerleading experience and with this stunt in particular. She clearly knew of the risks inherent in the activity.[21]

The effects of conditions of the field or facility under assumption of risk

A property owner or facility operator can be awarded a defense under assumption of the risk when the condition is open and obvious. A defense will not be awarded when a property owner or facility operator was found to have neglected, or intentionally created, the condition, increasing the dangers over and above the usual dangers inherent to the sport.

The Court of Appeals held in *Turcotte v. Fells* that plaintiff assumed the risks of his injuries when he participated in three prior races on the same day, observed the conditions of the track prior to the eighth race, and his general knowledge of the possibility of "cupping" conditions on the track.[22]

In *Sykes v. County of Erie*, 94 N.Y.2d 912 (2000), the Court of Appeals held that plaintiff, injured when he stepped into a recessed drain while playing basketball, had assumed the risk as the condition of the court was open and obvious. Further, there was no evidence that the drain was defective or improperly maintained.

The plaintiff, in *Siegel v. City of New York*, 90 N.Y.2d 471 (1997), was injured when he caught his foot in the bottom of the net dividing the indoor tennis courts.[23] Plaintiff had been a member of the club for 10 years, and had been playing tennis there once a week.[24] Plaintiff testified that he knew the net had been ripped for over two years; although he never notified the facility's management about the issue, he knew others had.[25] Defendants were granted summary judgment on the grounds that plaintiff assumed his risk by electing to play on a tennis court that he knew had a torn net for a long time.[26] The Court of Appeals reversed the decision, finding that the torn net was not "inherent" to tennis, it was more of an "allegedly negligent condition occurring in the ordinary course of any property's maintenance . . . ."[27]

Plaintiff, in *Siegel v. Albertus Magnus High School*, 153 A.D.3d 572 (2d Dep't 2017) (*lv denied*, 30 N.Y.3d 906 (2017)), was assisting the coaches of his son's baseball team and alleges when he was running from third base into foul territory, he slipped and fell on a tile mat that was covering a drainage grate.[28] Plaintiff argued the tile was negligently placed by defendants, which caused a defect in the playing field as the tile was not a part of the playing field.[29] The Appellate Division, Second Department found that summary judgment was properly granted against the defendants as the 12" x 12" white/creamish-colored tile was an open and obvious condition and starkly contrasted the color of the grass.[30] Additionally, plaintiff could not show that the tile was defective. Further, the court relied upon plaintiff's testimony—that he had previously been to, and played/coached on the field; sat on the sideline near the tile; and had volunteered to be on the field at least three prior occasions—and found that plaintiff by volunteering "assumed the obvious risk of slipping on the grass or on the tile by electing to play baseball on that field."[31]

Bystanders and Spectators

In the past five years, publicity surrounding major league baseball (MLB) parks due to the number of serious injuries spectators have incurred while attending baseball games has led to increased scrutiny surrounding spectator safety. According to a September 9, 2014 *Bloomberg* article, there were roughly 1,750 injuries to spectators from foul balls.[32] Further, in a June 1, 2019 *New York Times* article, there have been nearly 14,000 more foul balls hit in the 2018 season than there were in 1998.[33] The issue of bystander and spectator safety has been clearly addressed by the Court of Appeals, which has held "that an owner or operator of an athletic field or facility 'is not an insurer of the safety of its spectators.'"[34] While the assumption of risk doctrine extends to bystanders and spectators, there is still a duty by the landowners or occupiers to take reasonable measures to prevent injury to those present on the property.[35] The assumption of risk doctrine will not apply where there is a "reckless or intentional conduct, or concealed or unreasonably increased risks" to those spectators.[36]

Facilities need to provide protection to spectators where the risk of being hit is the greatest

All baseball parks include some sort of netting to protect spectators in certain parts of the stadium, mainly behind home plate and dugouts, but there has recently been public discussions to extend the netting to protect more spectators in the ballparks, with some MLB teams actually doing so. *In Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325 (1981), plaintiff was hit by a foul ball, but the Court of Appeals found that because plaintiff chose to stand behind a three-foot fence along the third base line, instead of in the stands behind a 24-foot high fence, she assumed the risk of being hit by a foul ball.[37] Further, the Court of Appeals found that ballpark owners need only provide protection behind home plate where the danger of being hit by a ball is the greatest.[38]

In *Zlotnick v. New York Yankees Partnership*, 154 A.D.3d 588 (1st Dep't 2017), plaintiff was struck in the eye by a foul ball while attending a Yankees' game.[39] Plaintiff was sitting in his assigned seat about halfway down the first baseline and a few rows back. The First Department affirmed the decision granting the Yankees summary judgment, finding there was no breach of duty by the defendants, as there was appropriate netting behind home plate, and there were plenty of seats available in that section. Additionally, the disclaimers on tickets and regular announcements made over the PA system advised spectators to notify a stadium employee of any particular concerns during the course of watching a game, even to request a seat change![40]

Similarly, cases have generally held owners of hockey rinks have not breached their duty to spectators if they have provided "screening around the area behind the hockey goals, where the danger of being hit by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening."[41] However, summary judgment was denied to defendants in *Smero v. City of Saratoga Springs*, where the infant-plaintiff was struck in the head by a puck while watching a youth hockey team practice.[42] It was alleged that defendants were negligent in failing to install proper netting/barriers in the area where she was injured, failure to supervise, control and maintain the activities occurring on the ice, and failure to construct or maintain the ice rink in a safe manner.[43]

In *Smero*, the ice rink had 4'7" boards surrounding the rink, with 3' plexiglass panels on top of the dasher boards running along the sides of the rink, and 6' panels of plexiglass behind the goal nets.[44] Behind the goals there was also protective netting, but the netting did not extend along the sides of the rink.[45] On the date in question though, the goals were not set up lengthwise at the ends of the rink as usual; rather, the goals were set up width-wise to accommodate two different practices.[46] Plaintiff was walking along the side of the rink when a player took a shot at the goal net, launching the puck over the dasher board and

plexiglass and hitting the plaintiff. The Third Department found there was an issue of fact as to whether defendants breached their duty to plaintiff because the goals were set up in an area where there was a significant gap in protective screening, thereby increasing the likelihood of spectators being placed in danger of a flying puck.[47]

The assumption of risk doctrine can extend to consenting bystanders and spectators even if they are not actively watching the sporting event or activity.[48] In *Thomas v. State*, 59 Misc.3d 1234(A) (N.Y. Ct. Cl. 2018), plaintiff, an inmate at a correctional facility, was struck in the eye by an errant softball.[49] Plaintiff had gone out to the recreation yard for a cigarette and walked to a bench behind the fenced off area behind home plate before the softball game was underway.[50] He had been at the bench for around 10 minutes, when someone yelled "heads up."[51] He looked up and was immediately struck in the eye by a softball. The Court of Claims found that the state fulfilled their duty to protect inmate bystanders from softballs by having a fence behind home plate.[52] Although plaintiff was a bystander, he still assumed the risks of his injuries by standing within close proximity to the softball field.[53] Additionally, the court found the state did not have to warn their inmates that the "readily observable softball field may become active if and when other inmates elected to use the field to play softball."[54]

Design/defects inherent to the facility

The condition of the outdoor basketball court came up in *Leitner v. The City of New York*, 60 Misc.3d 1209A (N.Y. Sup. Ct. 2013), where plaintiff was watching his kids play basketball at an outdoor basketball court when a basketball rebounded toward him.[55] He went to get the ball, twisting his ankle in a crack in the court.[56] The City of New York moved for summary judgment on the grounds that they did not breach a duty to plaintiff as he was a spectator to the basketball game.

The court in *Leitner* found that the cracks in the basketball court were not inherent to game of basketball, and the court was not designed with cracks in it.[57] The court found the City of New York was still liable for its failure to maintain the premises in a reasonably safe condition.[58]

Assumption of the risk can extend to bystanders and spectators if the conditions or risks are open and obvious

A plaintiff assumes the risk of injury arising from any open and obvious condition of the place where the activity is being carried out.[59] Mud in front of a dugout was found to be an open and obvious condition and not inherently dangerous when a grandmother who was watching her grandson's little league game fell while walking across the mud to say goodbye to her grandson.[60]

Further, in *Roberts v. Boys and Girls Republic, Inc.*, plaintiff was struck in a head by a bat being swung at her son's baseball practice.[61] The First Department found that bats being swung are inherent to the game of baseball, and knowledge of the sport of baseball is not required to appreciate the risk of an injury from a swung bat, as it is perfectly obvious.[62]

Playgrounds

It is well established that schools "are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances."[63] However, a school is not "an insurer of safety, and cannot be expected to continuously supervise and control all of the students' movements and activities."[64] Where playgrounds are involved, a school district has a duty to supervise students on how to safely use the playground equipment, the breach which can result in liability.[65]

The condition of the playground facility and equipment will be critically assessed by expert proof

In *A.C. by Fajardo v. Brentwood Union Free School Dist.*, 63 Misc.3d 1204(A), 1 (Nassau Sup. Ct. 2019), plaintiff, a second grade student, fell while using the zip line apparatus in the playground of his school.[66] Plaintiff asserted claims of negligent supervision, instruction, and the existence of a dangerous and defective conditions, (i.e., failing to provide proper padding beneath the zip line, and failing to have "proper non-slip material" on the zip line handle).[67] In deciding the unopposed summary judgment motion brought by defendants, the Nassau County Supreme Court found there was a triable question of fact as to whether the plaintiff was properly instructed as to how to use the zip line apparatus.[68] Discrepancies existed in the testimony of the plaintiff and the gym teacher who was on the playground with the students.[69] The plaintiff testified that he did not receive any instruction on how to use the zip line apparatus, and just followed how the other kids were using it.[70] The gym teacher testified that he instructed the students to hold the zip line handle with two hands, to make sure there were no students underneath them and no students standing on the landing dock.[71] According to affidavits provided by defendants' experts, the zip line apparatus was inspected and found to be in "excellent" condition; additionally, the "engineered wood fiber ground cover underneath the apparatus conformed to all applicable safety standards, and was to help prevent life-threatening head injuries, not to prevent all types of injuries.[72] As to the non-slip material on the handle, there were no safety specifications, standards or regulations saying that it was required.[73] The court concluded that the zip line apparatus was not dangerous or defective.[74]

Similarly, in *Valenzuela v. Metro Motel, LLC*, 170 A.D.3d 780 (2d Dep't 2019), an action alleging a defective condition was brought against the landowner on behalf of an infant-plaintiff whose leg became caught in a gap between two platforms on playground equipment.[75] Through an expert affidavit, defendants were able to show that there was no defective condition, the playground was maintained in

a reasonably safe condition, and the gaps did not violate any applicable guidelines or standards.[76]

Summary judgment was denied to defendants in *Adriana G. v. Kipp Washington Heights Middle School*, 165 A.D.3d 469 (1st Dep't 2018), where infant-plaintiff's ring finger was amputated after it got caught in a playground fence.[77] A triable question of fact was found as to whether the fence was in a reasonably safe condition at the time of the accident.[78] Defendants' expert's affidavit asserted the fence was in compliance with the New York City School Construction Authority's (NYCSCA) standards, while plaintiff's expert's affidavit asserted that the fence was not in compliance with the NYCSCA's standards, as the fence had sharp edges that were present at the time of the accident.[79]

New York Statutes

New York General Obligation Law § 9-103 Recreational Use

The New York statute was enacted to limit liability of landowners that allows the use of their land without a fee. The statute provides where a user engages in one or more of a number of enumerated activities that protection can be afforded to a property owner if he can establish that:

1. The injured party was pursuing one of the enumerated activities[80] on the premises;
2. The property was physically conducive to the activity[81]; and
3. The property is of a type that is appropriate for pursuing the activity at issue.[82]

The intent of the statute was to encourage landowners to allow the public to use their land to engage in certain recreational activities without fear of liability for the injuries suffered by those participants.[83] In *Albright v. Metz*, 88 N.Y.2d 656 (1996), plaintiff was injured when he was motorbiking on defendant's property, which was being used as a gravel mine and landfill.[84] The Court of Appeals found that the property was used numerous times by motorbikers and, as such the land was physically conducive for the activity. The plaintiff tried to avoid the statutory bar by arguing that the landfill was hazardous and not appropriate for motorbiking. The Court declined to accept that argument and determined the land was suitable for motorbiking, therefore affording the landowner immunity under the statute.[85]

However, in *Sena v. Town of Greenfield*, plaintiff was injured when sliding down a hill that was supervised by the town for the purposes of sledding.[86] The Court of Appeals held that the statute did not provide immunity to municipalities who still had a duty in the operation and maintenance of a supervised public park and recreational facility.[87]

New York General Obligation Law § 18 Skiing

New York has recognized that skiing is a voluntary activity that may be hazardous, regardless of all feasible safety measures that can be undertaken by ski area operators. New York has also recognized, in § 18-101, that there are inherent risks to skiing caused by "variations in terrain or weather conditions surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps; other persons using the facilities; and rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski facility."[88] Section 18-106 of the statute provides that ski area operators have additional duties to:

1. post at every point of sale or distribution of lift tickets, a "warning to skiers" about the inherent risks of skiing;
2. make ski instruction and education as to the inherent risks of skiing available at a reasonable price; and
3. post a notice to skiers as to the availability of a refund to those who feel unprepared or unwilling to ski due to the inherent risks.

Section 18-106 additionally states that skiers have a duty to seek out information to make an informed decision as to their participation in the sport.

In *Sytner v. State*, 223 A.D.2d 140 (3d Dep't 1996), snow-making was in progress on the right side of Mohican Trail, leaving only the left side of the trail open for skiers.[89] There were no signs at the start of the trail notifying skiers that snow-making was in progress.[90] The left side of the trail however contained an icy patch about 25 feet to 35 feet wide and 40 feet to 50 feet in length.[91] The ice patch also contained a bare spot.[92] Plaintiff, a novice skier, was following her neighbor down the left side of the trail,[93] when she lost control on the ice and was unable to avoid the bare spot, causing her skis to abruptly stop and send her flying into the air.[94] The Third Department noted that although icy patches similar to the one plaintiff skied over are deemed inherent to skiing under § 18-101, the section was not meant to encompass an icy patch as large as the one at issue. Additionally, the defendant did not comply with § 18-103, because it did not maintain the proper signage at the top of ski slopes and trails regarding trail maintenance including snow-making.

In *Fest v. Apel Capital, LLC*, 171 A.D.3d 1016 (2d Dep't 2019), the Second Department determined that the snow mound (commonly known as a snow whale), that infant-plaintiff used to "catch some air" was intentionally placed by the defendant for that purpose and to preserve artificial snow. The snow whale constituted an inherent risk to snowboarding.[95] Additionally, the crevice that plaintiff fell into after catching air was a natural occurrence of "variations surface and subsurface snow conditions," and considered an inherent risk under § 18-101.[96] For these rea-

sons the Second Department granted the defendant's summary judgment motion.

New York General Obligation Law § 5-326 Waivers

Attending a baseball game is perhaps America's favorite pastime, but few patrons read the fine print on their ticket to a major league baseball game. All tickets include a disclaimer generally saying that spectators assume all risks of attending a baseball game. The disclaimers are intended to shield the MLB from liability.

New York's statute addressing waivers provides that a waiver will be deemed to be void as against public policy if:

1. the agreement entered into is between the owner or operator of a recreational facility and the participant;
2 it exempts the owner or operator from liability; and
3. that owner or operator receives a fee in exchange for use of the facility.

The New York General Obligation Law § 5-326 reads:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

Under this section, a waiver can be upheld if the fee paid by a plaintiff was not paid to the owner/operator of the facility, and the language of the waiver must clearly spell out the intent to relieve the defendant of any liability for injuries incurred.[97]

Playgrounds

New York General Business Law § 399-dd

New York's playground statute sets forth the following pertaining to the installation, inspection and maintenance of playgrounds:

> The state shall promulgate rules and regulations for the design, installation, inspection and maintenance of playgrounds and playground equipment in substantial compliance with the handbook for public playground safety produced by the United States Consumer Products Safety Commission; and
>
> Play grounds shall be constructed or installed in accordance to the rules and regulations pursuant to this section. (One, two and three-family residential real property are exempt from the requirements of this section).

In *Boland v. North Bellmore Union Free School Dist*, 169 A.D.3d 632 (2d Dep't 2019), the court found that plaintiff raised a triable issue of fact through her expert's affidavit which opined that the ground cover underneath the apparatus from which infant-plaintiff fell did not meet the standards established by Consumer Product Safety Commission.

Other Issues Surrounding Student Athletes

Recent years of heighted attention to the risk of head injuries to NFL players, and the emergence of chronic traumatic encephalopathy (CTE), has now brought heightened attention surrounding the NCAA student athletes, even K-12 public schools,[98] and how to properly assess and treat head injuries before a player is allowed to return to play. Recently the NCAA has been faced with numerous class actions surrounding the concussions suffered by student athletes of all sports, not just football.

The NCAA governs the rules and regulations of players of over 24 different collegiate sports, including what kind of protective equipment can be worn by student-athletes. The rules may differ between male and female athletes for the same sport, like lacrosse. In 2015, the NCAA passed legislation amending Article 3 of their Constitution, requiring Division I Institutions to submit its Concussion Safety Protocol to the Concussion Safety Protocol Committee by May 1 of each year.[99]

Although landowners and operators of the facilities will be able to assert an affirmative defense under assumption of the risk doctrine, when faced with claims of breaching their duty of care, whether other organizations that set standards and regulate sports activities and equipment such as the NCAA, will be deemed to have a duty of care to the student athletes as well seems to be the next development in this area.

In *Greiber v. Nat.Collegiate Athletic Ass'n*, 2017 WL 6940498 (2017), plaintiff, a student-athlete, alleged she suffered from two concussions from playing women's collegiate lacrosse. The first concussion occurred in 2013, when a ball ricocheted off bleachers, hitting plaintiff in the head.[100] The second concussion occurred almost a year later, when plaintiff and another player slipped on wet grass, colliding heads.[101] Plaintiff brought suit against the NCAA (among others), alleging the NCAA had a duty to plain-

tiff to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize risk of injury to student athletes.[102] In support of her allegations, plaintiff argued that while men were required to wear hard helmets when playing men's collegiate lacrosse, women were not, and by not allowing women to wear helmets, the NCAA exacerbated the risk of sustaining a head injury. The NCAA, in a motion to dismiss for failure to state a cause of action, argued that they did not breach any duty to plaintiff, arguing the NCAA is made up of over 1,000 autonomous member institutions, and did not have a special relationship with plaintiff or any of the other 460,000 student-athletes.[103] The NCAA further argued that plaintiff assumed the inherent risks of participating in contact sports.[104] The Supreme Court, Nassau County, denied the NCAA's motion, finding that the NCAA prohibited plaintiff from utilizing protective head gear, as they had the authority to make rules and exercised those rules over the safety equipment worn by student-athletes.[105]

Conclusion

Before you pick up those golf clubs, attend your kid's little league game, or enjoy a trip to Busch Gardens, make sure you read the fine print on your entry ticket, watch where you step and steer clear of foul balls. "Be safe out there."

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Resources

American National Standards Institute (https://www.ansi.org/)

ASTM International (https://www.astm.org/)

Consumer Product Safety Commission (https://www.cpsc.gov/Regulations-Laws--Standards)

NCAA Sports Science Institute (http://www.ncaa.org/sport-science-institute)

National Operating Committee on Standards for Athletic Equipment (https://nocsae.org/)

Medicine & Science in Sports & Exercise (https://journals.lww.com/acsm-msse/pages/default.aspx)

Statutes

8 N.Y.C.R.R. 136.5 (Concussion management and awareness)

New York General Business Law § 399-dd (Playgrounds)

New York General Obligation Law § 5-326 (Waivers)

New York General Obligation Law § 9-103 (Recreational Use)

New York General Obligation Law § 18-101 (Skiing)

New York General Obligation Law § 18-103 (Skiing)

New York General Obligation Law § 18-106 (Skiing)

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Bowler, T. (Spring, 2015), *Legal Corner. The NCAA softball bullpen without a backstop*, The Bulletin, 61 (2), 15-16.

Bowler, T. (Spring, 2013), *Legal Corner. Crawford v. Prosser Consolidated School District, failure in planning for an emergency*, The Bulletin, 59 (2), 12-15.

Bowler, T. (Fall, 2012), *The "big wooden slide" has a giant splinter leading to litigation*, The Bulletin, 59 (1), 11-14.

Endnotes

1. *Peralta v. Henriquez*, 100 N.Y.2d 139, 143-144 (2003).
2. *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976).
3. *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (1986).
4. *Morgan v. State*, 90 N.Y.2d 471, 484 (1997).
5. *Maddox v. City of New York*, 66 N.Y.2d 270, 278 (1985).
6. *Bryant v. Town of Brookhaven*, 135 A.D.3d 801, 802 (2d Dep't 2016).
7. *Sanchez v. City of New York*, 25 A.D.3d 776 (2d Dep't 2006).
8. *Owen v. R.J.S. Safety Equip.*, 79 N.Y.2d 967, 970 (1992).
9. *Turcotte*, 68 N.Y.2d at 439 (1986) (citations omitted).
10. *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 659 (1989).
11. *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d at 395.
12. *Id.* at 396.
13. *Id.*
14. *Custodi v. Town of Amherst*, 20 N.Y.3d at 89.
15. *Id.*
16. *Maddox*, 66 N.Y.2d at 275.
17. *Id.* at 278-279.
18. *Morgan*, 90 N.Y.2d at 480, 486.
19. *Id.* at 486.
20. *Lomonico v. Massapequa Public Schools*, 84 A.D.3d at 1034.
21. *Id.* (*See, Digose v. Bellmore–Merrick Cent. High School* Dist., 50 A.D.3d 623, 624 (2d Dep't 2008)).
22. *Turcotte*, 68 N.Y.2d at 443. (plaintiff alleged foul riding by another jockey, and that the racetrack was negligently watered and groomed) *Id.* at 436 (cupping comes from over watering of the race track). *Id.* at 443
23. *Siegel v. City of New York*, 90 N.Y.2d at 482.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 488-89.
28. *Siegel v. Albertus Magnus High School*, 153 A.D.3d at 573.
29. (Citing to *Siegel v. Albertus Magnus High School*, 2015 WL 12805935, 3 (Rockland Sup.Ct., 2015).
30. *Siegel*, 153 A.D.3d at 575.
31. *Id.* (citation omitted).
32. David Glovin, *Baseball Caught Looking as Fouls Injury 1750 Fans a Year*, Bloomberg (September 9, 2014, 4:05 PM), https://www.

bloomberg.com/news/articles/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year

33. Billy Witz, *A Foul Ball, an Injured Little Girl and Another Cycle of Anguish*, (June 1, 2019), https://www.nytimes.com/2019/06/01/sports/fan-hit-foul-ball-almora.html
34. *Akins v. Glens Falls City School Dist*., 53 N.Y.2d at 329.
35. *Id.*
36. *Smero v. City of Saratoga Springs*, 169 A.D.3d 1169, 1170 (3d Dep't 2018) (citations omitted).
37. *Akins*, 53 N.Y.2d at 328.
38. *Id.* at 331.
39. *Zlotnick v. New York Yankees Partnership*, 154 A.D.3d at 588.
40. *Id.*
41. *Gilchrist v. City of Troy*, 113 A.D.2d 271, 273-74 (3d Dep't 1985).
42. *Smero*, 169 A.D.3d at 1169.
43. *Id* at 1169-70.
44. *Id.* at 1171.
45. *Id*.
46. *Id*.
47. *Id*. at 1172.
48. *Newwcomb v. Guptill Holding Corp*., 31 A.D.3d 875, 876 (3d Dep't 2006) (*See Roberts v. Boys & Girls Republic, Inc*., 51 A.D.3d 246 (1st Dep't 2008)).
49. *Thomas v. State*, 59 Misc.3d at 2.
50. *Id*.
51. *Id.*
52. *Id.*
53. *Id.* (*See, Starke v. Town of Smithtown*, 155 A.D.2d 526 (2d Dep't 1989)).
54. *Id.* (*See, Cherry v. Hofstra Univ*., 274 A.D.2d 443 (2d Dep't 2000)).
55. *Leitner v. The City of New York*, 60 Misc.3d at 1.
56. *Id.*
57. *Id.* at 2.
58. *Id.*
59. *Maddox*, 66 N.Y.2d at 277.
60. *Sirianni v. Town of Oyster Bay*, 156 A.D.3d 739, 740 (2d Dep't 2017).
61. *Roberts*, 51 A.D.3d at 247.
62. *Id*. at 248.
63. *David v. County of Suffolk*, 1 N.Y.3d 525, 526 (2003).
64. *Mirand v. City of New York,* 84 N.Y.2d 44, 48 (1994).
65. *Merson v. Syosset Central School District*, 286, A.D.2d 668 (2d Dep't 2011).
66. *A.C. by Fajardo v. Brentwood Union Free School Dist*., 63 Misc.3d 1204(A), 1. (Note, a motion to reargue/reconsider is currently pending in Nassau County).
67. 67. *Id.*
68. *Id.* at 2.
69. *Id.*
70. *Id*. at 3.
71. *Id*.
72. *Id.*
73. *Id.*
74. *Id.* at 2.
75. *Valenzuela v. Metro Motel, LLC*, 170 A.D.3d at 780.
76. *Id.* (*See Moseley v. Philip Howard Apts Tenants Corp*., 134 A.D3d 785, 787 (2d Dep't 2015)), *Y.H. v. Town of Ossining*, 99 A.D.3d 760, 761 (2d Dep't 2012), *Newman v. Oceanside Union Free School Dist*., 23 A.D.3d 631, (2d Dep't 2005), *Belkin v. Middle Country Cent. School Dist*., 261 A.D.2d 563 (2d Dep't 1999).
77. *Adriana G. v. Kipp Washington Heights Middle School*, 165 A.D.3d at 469.
78. *Id.* at 470.
79. *Id.* (*See Schmidt v. One N.Y. Plaza Co. LLC,* 153 A.D.3d 427, 428–429, (1st Dep't 2017); *Griffith v. ETH NEP, L.P*., 140 A.D.3d 451, (1st Dep't 2016), *lv denied* 28 N.Y.3d 905, (2016)); (*see also*, *Berr v. Gran*t, 149 A.D.3d 536, 537, (1st Dep't 2017); *Alvia v. Mutual Redevelopment Houses, Inc*., 56 A.D.3d 311, 312, (1st Dep't 2008)).
80. Hunting, fishing, organized gleaning as defined in § 71-Y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs.
81. In determining if a property is conducive to the activity in question, courts should look to see if the property has been used by recreationists in the past for the same activity. (*Iannotti v. Consolidated Rail Corp*, 74 N.Y.2d 39, 45 (1989).
82. *Id*.
83. *Sena v. Town of Greenfield*, 91 N.Y.2d 611, 615 (1998) (*see Franham v. Kittinger,* 83 N.Y.2d 520,523 (1994), *Ferres v. City of New Rochelle*, 68 N.Y.2d 446, 451 (1986)).
84. *Albright v. Metz*, 88 N.Y.2d at 660.
85. *Id.* At 662-663.
86. *Sena*, 91 N.Y.2d at 613.
87. *Id*. at 615 (*citing Ferres v. City of New Rochelle*, 68 N.Y.2d at 452).
88. New York Obligations Law § 18-101.
89. *Sytner v. State*, 223 A.D.2d at 142.
90. *Id.*
91. *Id.*
92. *Id.*
93. Plaintiff's neighbor was able to maneuver over the ice and avoid the bare spot. *Id.*
94. *Id.*
95. *Fest v. Apel Capital, LLC*, 171 A.D.3d at 1017-18.
96. *Id.* at 1018.
97. *Bufano v. National Incline Roller Hockey Assn*., 272, A.D.2d 359, 360 (2d Dep't 2000) (*See also, Brookner v. New York Road Runners Club*, 51 A.D.3d 841-842 (2d Dep't 2008)).
98. In 2012, New York enacted 8 N.Y.C.R.R. 136.5, which lays out the minimum standards for public schools and concussion management. (The regulation is mandatory for public schools and charters, and may be implemented by nonpublic schools, if they choose). See Appendix for full statute.
99. Prior to 2015, the NCAA's Constitution only required that Division I institutions have a Concussion Management Plan for student-athletes. The plan did not have to be submitted to the NCAA for approval.
100. *Greiber v. Nat. Collegiate Athletic Ass'n*, 2017 WL 6940498, at 2.
101. At the time of plaintiff's accidents, schools were not required to submit their Concussion Management Plan for review.
102. *Id.*
103. *Id.* at 4.
104. *Id.*
105. *Id.* at 5.

The Limited Nature of Article III Standing for Injunctive Relief

By Benjamin R. Nagin and Sarah Goodfield

Many lawsuits appear to take standing for granted. If you've been directly injured by alleged wrongdoing, you can sue for damages and an injunction to stop any similar, future harm, right? Not so fast. In recent years, the Second Circuit has repeatedly reaffirmed the principle that, in order to pursue injunctive relief, a plaintiff must face an *imminent* likelihood of future harm. In this regard, "[a]lthough past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way."[1] These decisions have significant implications for plaintiffs' demands for injunctive relief to prevent the resumption of allegedly objectionable conduct.

For example, in *Berni v. Barilla,* the Second Circuit concluded that a group of past purchasers of allegedly underfilled "iconic blue boxes" of Barilla pasta could not maintain a class action for injunctive relief against the pasta manufacturer.[2] The district court below had approved a class settlement where, in exchange for a release, Barilla had agreed to include, among other things, a minimum "fill-line" on its boxes and packaging that would inform its customers that its product is sold by weight rather than volume.[3] The Second Circuit vacated the district court's approval of the settlement, finding that injunctive relief was not the appropriate remedy for "each and every member of the group of past purchasers of Barilla pasta."[4] The court reasoned:

> [I]njunctive relief is only proper when a plaintiff, lacking an adequate remedy at law, is likely to suffer from injury at the hands of the defendant if the court does not act in equity. The prospective-orientation of the analysis is critical: to maintain an action for injunctive relief, a plaintiff 'cannot rely on past injury . . . but must show a likelihood that he . . . will be injured in the future. . . . If the injury occurred in the past . . . then plaintiffs will lack the kind of injury necessary to sustain a case or controversy, and necessary to establish standing, under Article III.[5]

Because the Barilla purchasers are not likely to purchase the product again "once they become aware they have been deceived," and, "even if they do purchase it again . . . will be doing so with exactly the level of information that they claim they were owed from the beginning," the Second Circuit found that the plaintiffs are "not likely to encounter future harm of the kind that makes injunctive relief appropriate."[6]

District courts in the Second Circuit have likewise confirmed in recent decisions that the principles articulated in *Berni v. Barilla* in the class certification context apply with equal force at the motion to dismiss stage.[7] In *Gilleo v. J.M. Smucker Co.*, for example, Judge Halpern held that plaintiffs in a putative class action could not plead around Article III standing requirements by alleging that they "intend to, seek to, and will purchase the product again when [they] can do so with the assurance that the product's label . . . is lawful and consistent with the product's ingredients."[8] The court "interpret[ed] this conditional statement to mean that" the plaintiffs would "only purchase the Product if and when the allegedly misleading label is fixed," which does "not plausibly allege a risk of future injury."[9] Similarly, in *Rivera v. S.C. Johnson & Son, Inc.*, Judge Abrams dismissed an injunctive relief claim alleging deceptive and misleading packaging on Windex cleaning products.[10] The court found that the plaintiffs' allegation that they intended to buy the cleaning products again only "if assured [they] did not contain components which were toxic" did "not suffice to surmount" the standing requirements articulated in *Berni*, "or to establish that future harm is sufficiently imminent to support standing for an injunction."[11]

These principles are applicable outside of consumer products cases as well. In *Rivera v. Navient Solutions, LLC*, for example, Judge Liman dismissed a borrower's claims against a student loan servicer where, "[b]ased on [the borrower's] own allegations, his loans were discharged and [the defendant was] no longer servicing them."[12] The court determined that *"Berni* [was] dispositive" and held that the plaintiff did not have standing to seek injunctive relief with respect to the defendant's billing practices.[13] Likewise, in *Powell v. Ocwen Financial Corporation*, Judge Broderick found a lack of standing to pursue injunctive relief where the defendant was no longer the insurance vendor for the mortgages at issue in the case and had ceased the challenged financial arrangements years prior to the plaintiffs' allegations.[14]

It is important to note that Article III standing is distinct from the question of mootness, which the Supreme Court has described as "the doctrine of standing set in a time frame."[15] While "the prospect that a defendant will engage

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in (or resume) harmful conduct may be too speculative to support standing," such allegations may not be too speculative to overcome mootness.[16] Put differently, a plaintiff is unlikely to have standing to sue a defendant for injunctive relief where the defendant ceased the offending conduct *before* the lawsuit was initiated, but may still be able to pursue injunctive relief against a defendant who ended the harmful conduct only *after* the complaint was filed if there is an applicable exception to the mootness doctrine.[17] While plaintiffs shoulder the burden of establishing Article III standing,[18] defendants bear the "heavy burden" of establishing that the voluntary cessation of their allegedly wrongful behavior moots a given case,[19] thereby denying plaintiffs the opportunity to pursue injunctive relief.

In light of these cases, both plaintiffs and defendants should not too quickly assume that standing will easily be met for injunctive relief claims. And, as noted, the question of standing, particularly in the class action context, can arise at the motion to dismiss or certification stage and even for the first time on appeal. Like subject matter jurisdiction, parties cannot simply "check the box," but must rigorously assess whether standing for injunctive relief truly exists in the matter at hand.

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Endnotes

1 *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016).

2 *Berni v. Barilla S.p.A.*, 964 F.3d 141, 143 (2d Cir. 2020); *see also Nicosia*, 834 F.3d at 239 (holding that purchaser of weight loss product removed from online retailer lacked standing to pursue injunctive relief).

3 *Berni*, 964 F.3d at 144.

4 *Id.* at 146-47.

5 *Id.*

6 *Id.* at 147-48.

7 *See, e.g, Gilleo v. J.M. Smucker Co.*, No. 20-CV-02519 (PMH), 2021 WL 4341056, at *4 & n.3 (S.D.N.Y. Sept. 23, 2021); *Campbell v. Whole Foods Mkt. Grp., Inc.*, 516 F. Supp. 3d 370, 396 (S.D.N.Y. 2021) ("The analysis of future harm does not change depending on whether the Court is considering a motion to dismiss or a motion for class certification.").

8 2021 WL 4341056, at *4.

9 *Id.*

10 No. 20-CV-3588 (RA), 2021 WL 4392300, at *8-9 (S.D.N.Y. Sept. 24, 2021).

11 *Id.* at *8.

12 No. 20-cv-1284 (LJL), 2020 WL 4895698, at *14 (S.D.N.Y. Aug. 19, 2020).

13 *Id.*

14 *See* No. 18-CV-1951 (VSB), 2019 WL 1227939, at *6 (S.D.N.Y. Mar. 15, 2019).

15 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 698 (2000).

16 *Id.* at 699.

17 *See Amador v. Andrews*, 655 F.3d 89, 93 (2d Cir. 2011) (holding that "claims for injunctive and declaratory relief" by former inmates no longer in custody were not moot because their class claims were "capable of repetition, yet evading review"); *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993) (plaintiffs could pursue injunctive relief on behalf of class of public assistance recipients because "inherently transitory" claims regarding delayed applications could "almost always" be processed "before a plaintiff [could] obtain relief through litigation").

18 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

19 *Friends of the Earth, Inc.*, 120 S. Ct. at 189.

The 'Macro' Approach and Other Ways To Take Power in a Negotiation

By Steven N. Joseph

Whether you are in a face-to-face negotiation or a negotiation through mediation, you will have one thing in common with your opposition: you both want to do a deal. Even if one party thinks that the negotiation will be a complete waste of time, they want to do a deal, but they believe that the opposing party will not take a realistic view of the case. On the other end of the spectrum, in the rare case of a very easy negotiation, all parties may be very agreeable and have very little to negotiate.

Most negotiations fall in a huge middle ground. Each party has a goal where they want to end up at the end of the negotiation. Some negotiators have a range of where they want to go. The number or the range may be based on similar cases they have handled. It may be based on other factors: the desire of a client to settle, the lack of desire to do battle in a heated and contested litigation, the cost of the litigation, or knowledge of a bad witness or damaging evidence that may later come up in a case.

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In many of these negotiations, one side finds out or decides from the initial back and forth that the goal they had set at the beginning of the negotiation will become impossible to achieve. Because of what has been said in the first go-arounds of the negotiation, the negotiator knows that the goal that he or she had set is completely "out the window." Yet, the negotiator does not walk away and instead continues to negotiate in a new range—the one that had been set by the other side.

In a majority of negotiations, this shift toward one party's goal happens because one party took power by the choice of words that were used. One party took power by the mannerisms—the body language or the tone. One party was more certain. The other party was tentative. One party successfully identified "negotiation shifters" to get the opposing side to give up on their goal for the negotiation.

Arguments Do Not Work

The biggest difference is that while one side negotiating would argue and argue till they were blue in the face and completely frustrated, the other side calmly stated a position. I am reminded of the days when I played racquet-

ball. I was a very bad player. I would play against people way worse in their physical condition. I would get a good workout running all around the court. My opponent would stand still and calmly place the ball where I couldn't reach it. I got killed in racquetball.

Arguments rarely work in a negotiation. Whatever argument you can come up with, I can come up with a counter-argument. We can volley back and forth with our arguments, and at the end of the day it may look like an excellent tennis match, but neither side will score many points.

Arguments do not have the same weight as facts. The more you argue a point, the more power you lose in a negotiation. However, the same arguments can be stated factually. You can then take an additional step of identifying the conclusion you reach because of this fact you have presented.

Making argument after argument is what I call the "micro" approach to negotiation. You are just looking at the case in front of you and the entire discussion revolves solely around the facts of the case.

While having a "micro" approach is necessary (since you need to know the case you are negotiating), you can be the racquetball player staying in one spot if you also adopt the "macro" approach. The "macro" approach means that you take into consideration the fact that this case is similar to many other cases you have handled, and the position you have in this case is consistent with the position and the result you had in prior cases. "When I have 'x', I do 'y'." This is not an argument. You are now stating fact.

Here's an illustration of how one fact can be made into argument, and the same fact and conclusion method can lead to a different outcome. In one scenario, one party is arguing and the other side states facts and positions, and then we reverse it:

The negotiation here is over a slip-and-fall claim. There were no witnesses to the fall. Further, the plaintiff did not seek medical treatment until two weeks after the fall occurred.

Here's a negotiation that occurs when the defense tries to argue those facts and the plaintiff's attorney states facts and positions:

Scenario 1

D: I will make you an offer of $15,000.

P. Well, that is unacceptable. I have a client with a severe stress fracture and medicals of $50,000. You will need to get into six figures!

D. That's crazy. Your client has no witnesses, and didn't even see a doctor for two weeks after the accident!

P. Look. I have a client who is a very sweet lady. A jury will love her. I will get my doctor to testify that it is the result of the fall. I will have pictures of the sidewalk that was in disrepair, and I have my medicals. Given what I have, I will need something in the six figures.

D. How about if I offered you $50,000?

Now, we reverse the negotiation. The defense side will state the facts and position:

Scenario 2

D. I will make you an offer of $15,000.

P. That's not even in the ballpark! My demand to settle is $250,000. I have $50,000 in medicals here! You have to get me something better than that!

D. The problem here is that your client did not have any witnesses and did not seek medical treatment until two weeks after the fall. We have lots of these cases and the value you have put on this case is probably in the range of cases where we have witnesses and there was immediate medical treatment. Without those two factors in play the case has a lower value.

P. Well, can you get me $100,000? My lady is a very sweet lady! She's in bad financial shape.

D. Unfortunately, you are describing a case I have had many times before. With these facts, it does not have the value you have put on this. The best we can do here is $25,000.

In the first dialogue, the defense side was making valid arguments. However, no matter how valid an argument may appear, it leaves an opening for the other side with facts and conclusions drawn from those facts. The plaintiff's attorney took power.

With the first situation, the response could have even been: "Quite frankly, I am not worried about that." "I don't care." If you put out your best argument and that does not concern the opposing side one teensy bit, where does that leave you? Stating the facts as an argument gives the opposing side the opportunity to take power in the negotiation.

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More importantly, once power is taken in this manner, it is hard to take it back. One side made a very valid argument. But, if the other side just dismisses the argument and provides a reason why it is being dismissed, you can't just go back and make the same argument. This is where a lot of frustration sets in for the negotiators.

The frustration is based on the reason why arguments generally do not work. They are anticipated. The opposing side already considered this argument in their own evaluation. If you are simply conveying something that is expected and they already know, how effective can you expect the argument to be?

Threats and Scare Tactics as Opportunities To Take Power

There are numerous pronouncements that can be made in a negotiation that suggest an attempt at taking power. "It will cost you a lot to litigate this matter." "I have a very emotional client." "We are not afraid to try this case." "This is a matter of principle." "If we do not settle, we will file a motion for summary judgment." "This is a case with a large punitive damage exposure." These are all threats to get you to move off of your position. Each statement says, "I want to shift the negotiation."

While these can have an effect on shifting a negotiation, they are statements that merely test the opposing side. They can be, but do not have to be, "negotiation shifters." However, they do have to be recognized as an attempt to take power. Once you recognize the statement as an attempt to take power, you then have to devise a response that sends back a stronger signal that can actually result in you having the ability to take greater power and can become the "negotiation shifter."

In the examples above, most of these attempts at taking power are threat based. The negotiators picked them because of other weaknesses in their case. In fact, it is rare to have a perfect case. Even with a good case, there may be insecurities involving time, money, control of witnesses. As such, it is rare to have any negotiation without one party and usually both parties partaking in these sorts of attempts to take power and shift the negotiation. But threat-based attempts to take power actually result in some giving up of power.

Think of what happens if you can completely douse the fire of a threat-based attempt to take power (or any attempt to take power for that matter). The opposition has made an attempt and they see that it has provided no value. If you succeed, you have taken power and made a negotiation-shifting move.

Here's an example of an attempt to take power, and how you can shift the negotiation:

> "Unless you make a more substantial offer, I will advise my client to roll the dice at trial (or file a lawsuit)."

Everyone who does what we do has heard someone saying how they will roll the dice.

Here, plaintiff's counsel is trying to take power. The comment says that "I am not afraid," or "I'll make you spend lots of money defending this case," or "I am challenging you."

When you see this as an attempt to take power, you can see this comment in a much more interesting and useful way. Just look at the word "dice." There's an implication here that, when this comment is made, the attorney is only talking about two dice. If a case is completely frivolous and would not get beyond a summary judgment motion, the case can be a thousand to one shot, so by this reference to the dice, the attorney is trying to take power by knocking it down to 11 possibilities (or a 36-1 shot, I believe).

But there is some giving up of power. The statement says "I concede that I have a weak case."

We can react in a number of ways here—by giving power, by taking power, or both giving and taking.

One way is to give all the power the attorney was trying to take here. We go ahead and make the substantial move or a quasi-substantial move. Issues are dropped and it is all about the fear of rolling those dice.

Alternatively, we may give a little power by making a nominal move. But, we do want to take full advantage of the power that has been handed to us. "I have a weak case." We literally can have a conversation on what "rolling the dice" means in this context. We can again go through the hoops that the attorney on the other side will have to jump through. The reference to "rolling the dice" may not be a reference to two, but rather eight, or 12, or 20 dice.

In the 1000-1 shot, identify both the attempt to obtain power, as well as the attempt to obtain what may be undeserved power. The attempt at taking "undeserved power" is your opportunity here to take power of your own.

When They Go "Macro," You Go "Micro"

Another example can be seen when plaintiff's counsel goes "macro," which is when the attorney you are negotiating with gets away from the facts of the case. One story I like to share is a legal malpractice mediation I attended many years ago. The mediator spent two hours with the plaintiff's counsel, and when the mediator came back, we asked the mediator what the plaintiff's counsel had to say.

The mediator shook his head and said:

"Juries do not like lawyers."

Needless to say, I had handled hundreds of legal malpractice cases so how a jury viewed lawyers was not "breaking news" to me. We then shifted the focus back to the facts of the particular case we were mediating.

Similarly, plaintiff's counsel sometimes provides jury verdict awards. Of course, the facts and attorneys were different and they all tell a story of something going south in that particular case. We move away from this "worst-case scenario" jury verdict award and focus on what I call a "reasonable home run." Both sides do a good job presenting their case. That means that the plaintiff does not get everything.

The point here is if we effectively lower the ceiling in a negotiation, we will then lower the number we end up with at the end of the negotiation.

Using Surprise To Take Power

We previously talked about one party showing up at the mediation, and for the first time, they advise the opposing side that they have new damages that they did not previously disclose.

Even more suspect, there is the announcement that they have now obtained an expert who will provide the necessary testimony to make the case look a lot different than either side had previously thought. There was no mention of this expert in the mediation brief, but the party shows up with the expert report at the mediation.

The first natural reaction of a lawyer is to indicate that the new evidence has to be evaluated. This may end the mediation quickly and the parties go off to another round of depositions.

They then reconvene two months later at a new mediation and there are three possibilities here: One, discovery determines that there is no merit to the new evidence; two, discovery shows that there is some merit to the new evidence and new settlement position; or three, discovery confirms the new evidence and that there is merit to a new settlement position.

It is rare that the new discovery will establish that there is a complete lack of merit to the surprise evidence. Even if it is questionable, it ends up as another question of fact, or swearing contest for a jury to decide. There is going to be value allotted to the surprise "new evidence."

So, the best way to take power here may be counter-intuitive for the lawyer. Attack the "newness" of the evidence. Why did they not have the evidence earlier? Do they believe that it is even a good faith negotiation to show up at the last minute? They may have not even fully evaluated the new evidence. Take an opportunity in the private caucus session to determine the weaknesses in the new evidence. If this is in fact "new," you will have a better opportunity to make arguments that stick than you may later have when a number of depositions are taken.

Looking at the three possibilities that you will face in agreeing to an impasse, try the 10-15% rule. Is it worth it to give the other party 10-15% additional value based on the new evidence? In most cases, if you consider the cost

of a wasted day with a mediator, the cost of the additional discovery, and the risk that you may face an additional 25-100% change in the value on this new evidence presented, it is a bargain.

Also, realize that you maintain control of the negotiation. Two months later, the opposing party will likely be on the offensive. They have now taken power. Use this "surprise" as an opportunity to take the power in the negotiation.

Using Experience To Take Power

The word "experience" brings up a lot of different implications that can be explored for a negotiator's benefit. The analogy I draw on is looking at a battlefield between an invading force and natives to the land. The invader goes into foreign territory. They are not familiar with the terrain. The natives are. The natives know where to hide, where to attack, how to exploit the weakness of the invader not being familiar with the land. The natives are confident and calm. The invaders are nervous. The invaders' morale is low. The supplies that have to be sent across many miles are running out.

If you were choosing sides in a negotiation and you can pick between "invader" and "native," as described above, which side would you pick, assuming of course that the resources are equal. Most likely, you would pick the side of the native.

The reason that you picked "native" is that you probably believed that the native had the best chance of winning

and you just would like to be on the winning side. But, think what attributes the natives have here. They are familiar. They have experience with the land. They are prepared. They are confident. They are calm.

Bring all of these attributes to a negotiation. I am presenting my position backed with a lot of experience with this kind of case. I am prepared to discuss this case. I can draw on other cases that I have handled to support my position. My voice is calm. I am not rattled. My body language is relaxed. I also can show that I can walk away from the table if I do not get the deal I desire.

Here, I have the power in the negotiation. Ask yourself, if you can have all of these attributes, would you even be arguing with the other side? Is there any doubt that you will be negotiating in the range you determined as the correct settlement range? Now, stick a mediator into the situation, and you have to use the mediator to your benefit, and the other side is taking on the role of "invader." Who do you think will be able to sway a third party as to the correctness of their position?

Experience can be used effectively as a "negotiation shifter" even when you do not have the experience. An illustration of this is a mediation I handled a number of months ago.

It was a "whistleblower" claim brought by these fired volunteer firefighters who blew the whistle of "ghost payrollers"—people who did not show up for a fire, but got paid.

Now, I have handled dozens of employment matters over the years, but never had a whistleblower case. Unfortunately for me, neither did defense counsel. So, when we got together the night before, I said to them that if I walked into the mediation and I said that I had tons of experience with these cases, the question would then be how would I describe my experience. I surmised that whistle-blowing cases that involved public health and safety issues would have a greater value, and if the whistleblower was a woman, that would engender more sympathy and have a greater value.

Here, we were dealing with whistleblowers who complained about firefighters who were stealing beer and pizza money. It did not have the same value.

The next day, that became our theme. I talked about all the whistleblower cases we had seen, and where exactly this particular case fit in. It quickly became the mediator's theme, and the case settled in my desired range.

We did not present arguments here. All we did was present some facts, come up with a conclusion related to these facts, and tied in our collective supposed experience. This became the "negotiation shifter."

Using Concessions To Take Power

I am facing a negotiation in a case in which my client has a number of problems. As a negotiator, I have two choices. I can make bad arguments or deny the problem altogether. Or, I can concede those issues that I will not be winning for my client.

I never want to pick the first choice. If I make bad arguments on the bad parts of my case, I also make the negotiation about the bad parts of the case. I lose that negotiation. I also lose credibility when I try to discuss the positive aspects of my client's case. Not only will I have no credibility, I have given up a chance to have the other side even listen and consider what I have to say. Even worse, I have created animosity with my negotiating partner, and now, the negotiation takes on a personal tone, and it's about me, and not the client's case.

If I concede on the weak points, I gain credibility and confidence as a negotiating partner with the opposing party. I show that I heard what they have to say and this allows me to gain some traction on my issues.

It is also reflective of someone who is experienced and in control. I am a voice of reason. Since this is how I am viewed, I am more likely to be handed over power in the negotiation. I get to make my points. I get to be heard. I get to be trusted.

Looking at Every Negotiation Through the Power Telescope

Write down five negotiation situations that you have had recently. Identify statements or actions that were taken that can be perceived as an attempt to take power. We may phrase positions in a certain way to take control over the negotiation. Our body language and our tone are very intentional and serve a purpose. We give power and take power intentionally. Putting a statement, a phrase or any situation in the context of a "power move," ask yourself the following questions: "Was there an attempt to take power? Is there a way to make that into a positive? Can we turn this attempt around and shift the negotiation completely? Do we give them something in return so we maintain control?"

Ask yourself what are the choices that you have in each situation. Think about the choices in terms of taking and giving power. Think about the different outcomes depending on the choices made. Think about the huge difference this can make for your client.

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 1228 (08/30/2021)

Topic: Submitting draft complaint with demand letter

Digest: A lawyer who sends a demand letter to a potential civil defendant may include a draft complaint and a statement that the draft complaint will be filed if the matter is not settled by a certain date, except in unusual circumstances where the threat would violate the prohibition against false statements of fact or law, the prohibition against conduct involving deceit or misrepresentation, the prohibition against threatening frivolous litigation, or a specific prohibition in substantive law.

Rules: 3.1(a) & (b), 3.4(e), 4.1, 8.4(a), 8.4(c)

FACTS

1. The inquirer represents a party who has a potential civil claim against a business. A previous lawyer for the client sent a demand letter to the principal of the business but received no response. The inquirer has called the principal and left voicemails, but no one has answered the calls or responded to the inquirer's voicemails.

2. The inquirer proposes to "draft a complaint and send it to the company named as the defendant without commencing a lawsuit against the defendant." The inquirer "would provide a deadline by which they must settle or the lawsuit will be filed against them," but would "prefer to file the complaint only as a last resort … because the complaint becomes public record."

QUESTION

3. May the attorney for a potential civil plaintiff enclose a draft complaint in a demand letter to the potential defendant and state that the complaint will be filed if the matter is not settled by a certain date?

OPINION

4. It is a common practice for attorneys to send demand letters asking for redress of their clients' grievances on a voluntary basis, prior to filing a civil claim in court. Such demand letters can serve useful purposes of informing potential defendants of allegations against them, framing the issues of a dispute, and starting a process of resolving the dispute, possibly without needing to resort to litigation.

5. Rule 3.4(e) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer shall not "threaten to present criminal charges solely to obtain an advantage in a civil matter," but that rule applies only to threats of criminal charges. See N.Y. State 772 (2003); N.Y. City 2017-3 (2017); ABA 94-383 (1994). Nothing in the Rules would specifically prohibit the proposed conduct here, which is to threaten a civil suit.

6. Nevertheless, the Rules do impose some restrictions on a threat to file a civil suit. Thus, the Rules generally prohibit falsehood and deception. See Rule 4.1 (in course of representing a client, lawyer "shall not knowingly make a false statement of fact or law to a third person"); Rule 8.4(c) (lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); ABA 06-439 (2006) (it may be "knowingly false or misleading to seek an advantage" by making "a threat that is baseless … because the lawyer has unequivocally stated an intention that does not exist," especially if the threat is made to a non-lawyer).

7. Whether a particular statement should be regarded as one of fact can depend on the circumstances." Rule 4.1, Cmt. [2]. For example, "a party's intentions as to an acceptable settlement of a claim" will ordinarily not be taken as a statement of fact subject to the rule against false statements, Rule 4.1, Cmt. [2]. Nor will "statements regarding … willingness to compromise." ABA 06-439. Similarly, threatening a legal proceeding "may not rise to the level of an express or implied assertion of fact or law or of the lawyer's intended future conduct." ABA 06-439.

8. The Committee recognizes that the line between a threat and a statement of fact can sometimes be difficult to discern and that negotiators typically use hyperbole, cajolery, exaggeration, and even strategic deception to achieve their objectives. The Committee also recognizes that experienced negotiators are typically not surprised when such tactics are employed against them. But we also agree with N.Y. City 2017-3 (2017) that "care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements 'of fact,' are not conveyed

in language that converts them, even inadvertently, into false factual representations."

9. With these principles in mind, we will focus on one particular statement that the inquirer proposes to include in his letter – namely, that if the matter is not resolved by a certain date, the inquirer "will" file the draft complaint in court. On the one hand, if the inquirer's client has authorized the inquirer to file suit unless the adversary gives an acceptable response to the demand letter, then the threat to file suit presents no issue of falsehood or deception. On the other hand, if the inquirer knows that the client will never authorize such threatened litigation under any circumstances, then the threat that the inquirer "will" file suit may be false or deceptive.

10. There are also many gradients in between these extremes. For example, some clients who are contemplating filing suit might be awaiting fee estimates, further legal research, or additional factual investigation. Other clients will file suit only if an adversary fails to respond or denies any responsibility. Still others may be willing to authorize a suit as a last resort, but want to take every possible step to avoid litigation. Even among clients in these categories, client objectives may be shifting, ambiguous or tentative, and are rarely fixed in stone.

11. For all these reasons, we believe that an attorney's threat to file suit if a dispute is not resolved by a certain date will in most cases not rise to the level of a false statement of fact. Yet we can certainly conceive of circumstances where a lawyer's specific threat to sue, despite the client's unequivocal and irrevocable determination not to sue under any circumstances, could rise to the level of factual misrepresentation – and presenting a draft complaint that the client has no intention of ever filing would compound that misrepresentation. Such circumstances, however are in our view infrequent, and we think it would be an unusual situation in which a lawyer's threat to file suit would constitute a "false statement" in violation of Rule 4.1 or a "deceit" or "misrepresentation" in violation of Rule 8.4(c).

12. A separate ethical guardrail is that a lawyer may not threaten to file a lawsuit where such a threat would constitute "frivolous conduct" within the meaning of Rule 3.1(b). That would be an "attempt to violate" Rule 3.1(a), and an attempt to violate a rule is prohibited by Rule 8.4(a). See Rule 3.1(a) & (b)(3) (prohibiting assertion in proceedings of frivolous issues and material factual statements known to be false); Rule 3.1 Cmt. [2] (noting that filing a claim "or similar action taken for a client" is not frivolous "merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery," but also noting that lawyers are required to "determine that they can make good-faith arguments in support of their clients' positions"). These standards would apply to statements in the draft complaint that the inquirer proposes to send, as well as to statements in the demand letter itself.

13. In particular contexts, substantive law may also place additional constraints on threatening legal action. See, e.g., Fair Debt Collection Practices Act, 15. U.S.C. §1692(e)(5) (providing that for a debt collector to threaten to take an action that is not intended to be taken is a prohibited false, deceptive or misleading representation or means in connection with debt collection). Such legal constraints, however, are beyond our purview, which is limited to interpreting the Rules of Professional Conduct.

CONCLUSION

14. A lawyer who sends a demand letter to a potential civil defendant may include a draft complaint and a statement that the draft complaint will be filed if the matter is not settled by a certain date, except in unusual circumstances where the threat would violate the prohibition against false statements of fact or law, the prohibition against conduct involving deceit or misrepresentation, the prohibition against threatening frivolous litigation, or a specific prohibition in substantive law.

(12-21)

Opinion 1229 (09/21/2021)

Topic: Lawyer's rights and duties after death of a client

Digest: A lawyer may not settle a claim for a client after the client has died absent authorization from a duly qualified representative of the decedent.

Rules: 1.2(a), 1.16(d)

FACTS

1. The inquirer is a New York lawyer who practices personal injury law in New York. Some years ago, a client retained the inquirer on a contingency-fee basis to pursue a claim arising out of a vehicular accident. With the client's approval, the inquirer opted not to commence an action but instead to engage in negotiations directly with the alleged tortfeasor's insurer to achieve an out-of-court resolution of the dispute. The inquirer characterizes the client's claim as weak, an assessment apparently shared by the insurer, whose initial very modest settlement offers the client rejected.

2. More recently, the inquirer negotiated a somewhat higher albeit still modest settlement sum from the insurer, which the inquirer considers both fair and

the maximum the insurer is likely to tender. In seeking to obtain the client's approval of the deal, the inquirer learned, for the first time, that the client had passed away from causes unrelated to the accident animating the claim, and that the client had died before the lawyer received the most recent settlement offer. The inquirer notified the insurer of the client's demise. At the time of this notice, the insurer had already forwarded a release to the inquirer for the client's signature with the amount of consideration set forth in the release. Upon learning of the client's death, the insurer did not rescind the offer; according to the inquirer, the insurer said that the coronavirus pandemic has occasioned other similar circumstances. Nevertheless, no binding commitment exists that the insurer will pay the offered amount, and no money has yet been exchanged.

3. As far as the inquirer has been able to ascertain, the client died intestate and with little if any assets. The inquirer retained an investigator in an effort to locate the client. This effort resulted in the discovery of a companion who confirmed both the client's death and the client's lack of meaningful assets. Neither the late client's companion nor the lawyer's investigator have been able to produce a death certificate, which the inquirer sought as a prerequisite for a possible petition to the Surrogate's Court. To the best of the inquirer's knowledge, no probate or like proceedings have been started to dispose of the deceased client's assets.

4. The inquirer holds a power of attorney authorizing the lawyer "to execute documents necessary for the prosecution of the [client's] legal affairs," including such documents as "pleadings," "releases," and "settlement drafts," but this authorization requires that the client be notified "in advance of each such document that is being executed on [the client's] behalf and consent orally to the execution of said documents."

5. The inquirer's contingency-fee agreement with the client entitles the inquirer to a third of the client's recovery after deduction of expenses. Had the client survived and accepted the offer, this agreement would entitle the client to at least half the tendered settlement amount. The inquirer wishes to abandon the matter based on the client's death.

QUESTION

6. May a lawyer cease to pursue a client's matter, which was never the subject of a judicial proceeding, when the client dies before conclusion of the matter?

OPINION

7. Our answer is yes. The N.Y. Rules of Professional Conduct ("Rules") say that whether an attorney-client relationship exists is a question of law not ethics. Rules, Preamble ¶ [9]. Nevertheless, we have said that "the death of the client terminates the attorney-client relationship." N.Y. State 1211 ¶ 4 (2020) (citing cases). "As a consequence, '[t]he lawyer . . . may not take any further steps in connection with the matter unless and until [the lawyer] is authorized to do so by the deceased's duly qualified personal representative.'" *Id.* (quoting ABA 95-397). "A client's death terminates a lawyer's actual authority," and any "rights of the deceased client pass to other persons—executors, for example, who can, if they wish, revive the representation." Restatement (Third) of the Law Governing Lawyers § 31 cmt. e (2000).

8. Rule 1.2(a) allocates to the client the sole decision on whether to settle a matter. Without a client, the inquiring lawyer has no right to accept the proposed settlement offer, no matter whether the counterparty is prepared to proceed. Here, the inquirer's power of attorney only reinforces this conclusion, because, while interpretation of such documents are issues of law not ethics, the document unambiguously invests the client with the power to decide whether to settle. Accordingly, in our judgment, the lawyer has no right to effect the settlement, and as a result is not only free but also ethically obligated to forbear from further steps to obtain the settlement proceeds in the absence of a duly qualified personal representative of the client to instruct the lawyer otherwise.

9. A lawyer in the inquirer's position may, but need not, attempt, as the inquirer did, to identify a personal representative to act on the deceased client's behalf in furtherance of judicial proceedings in an appropriate court to effect the proposed settlement. We note the absence of any pending court proceedings that the personal injury matter never matured into an action—only to make clear that the lawyer here required no judicial permission to terminate the attorney-client relationship because there was no tribunal involved. Rule 1.16(d) prohibits a lawyer from withdrawing without tribunal permission where required by a tribunal's rules.

CONCLUSION

9. When a client dies before conclusion of the matter, the lawyer has no right to proceed with the matter and may not accept a settlement offer, made after the client died and without the deceased client's approval, absent the separate endorsement of the decedent's duly qualified personal representative.

Opinion 1230 (10/06/2021)

Topic: Firm names; trade names

Digest: A law firm may not include on its letterhead the name of deceased attorney who does not stand in a continuing line of succession with the firm.

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

FACTS

1. The inquirer is a solo practitioner who, for sentimental reasons, would like to include his deceased father's name on the firm's letterhead, but not in the firm name. The letterhead would indicate the year his father was born and the year he died, as well as the fact that the inquirer's father had been admitted to practice law in Canada as a "Q.C." (i.e., Queens Counsel).

QUESTION

2. May a law firm include on its letterhead the name of a deceased attorney who does not stand in a continuing line of succession with the firm?

OPINION

3. On June 24, 2020, the Appellate Divisions issued a Joint Order amending Rule 7.5. As amended, Rule 7.5(b), which addresses the names under which a lawyer may practice, now provides in pertinent part:

> (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.

4. The June 24, 2020 amendment to Rule 7.5(b) 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." As this Committee stated in New York State 1207 ¶ 11 (2020), "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."

5. Comment [2] to amended Rule 7.5, recognizes the longstanding tradition that "[i]t 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." Comment [3] to amended Rule 7.5, however, gives examples of firm names that are deceptive or misleading, and one such example is a firm name that "contains the name of a deceased or retired lawyer not in a continuing line of succession" (emphasis added). Accordingly, despite the 2020 amendments to Rule 7.5(b), a law firm is still prohibited from using a firm name that includes the name of an attorney who is not in a continuing line of succession with the firm, because such a name would be deceptive or misleading.

6. If including the name of an attorney who is not in a continuing line of succession with the firm would be deceptive or misleading in a law firm name, then including such a name would also be deceptive or misleading on a law firm's letterhead. Rule 7.5(a), which was not amended on June 24, 2020, applies to letterhead (as well as web sites, business cards, announcements, signs, and professional notices). Rule 7.5(a) states:

> 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. [Emphasis added.]

7. Among "these Rules" is Rule 8.4(c), which provides that a lawyer or law firm may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

8 Although Rule 7.5(b) applies by its terms to firm names and not to letterhead, we extend the prohibition against deceptive or misleading firm names to names on a letterhead, both by analogy and pursuant to Rule 8.4(c). If it is deceptive and misleading to list an attorney in the firm name who has had no prior professional affiliation with the firm or its predecessors (i.e., is "not in a continuing line of succession" with the firm), then it is, perforce, equally deceptive and misleading to list the attorney on firm letterhead in a manner that suggests just such a prior professional affiliation. Accordingly, the inquirer may not include the name of his deceased father on his letterhead in the particular fashion that he has proposed.

9. Our opinion does not foreclose the inquirer from honoring his deceased father in some other manner that is related to the inquirer's practice. For example, the inquirer may use the firm website, firm brochures, or even firm letterhead to include an encomium to his late father. The inquirer can pay homage to his father's professional achievements or reputation as a Canadian lawyer, even noting the inquirer's aspiration to model his own professional conduct and career after his father, provided the inquirer makes clear (through a disclaimer or other language) that the inquirer's father never practiced or associated with the inquirer's firm.

CONCLUSION

10. A law firm may not include on its letterhead the name of deceased attorney who does not stand in a continuing line of succession with the firm.

(21-21)

Opinion 1231 (10/06/2021)

Topic: Estate-planning lawyer's financial interest in a company that manages trust assets

Digest: An estate-planning lawyer who has an interest in a nonlegal financial management company that the lawyer hopes to recommend to estate-planning clients as financial manager for the trust assets, has a conflict of interest requiring clients' informed consent, confirmed in writing, at the outset of the representation. Further, if the financial management services and the legal services provided to clients are not distinct from each other, the lawyer is subject to the Rules governing the attorney-client relationship with respect to the nonlegal financial management services. Whether the legal services and nonlegal services are distinct or nondistinct from each other, the lawyer must also comply with the Rules governing business transactions with clients whenever an entity with which the lawyer is affiliated or owns an interest in offers nonlegal services to a client.

Rules: 1.0(e), (j), (q) & (r), 1.7(a) & (b), 1.8(a), 5.7(a).

FACTS

1. The inquirer provides legal services to clients with respect to estate planning. In that connection, the inquirer sometimes assists clients in establishing revocable or irrevocable trusts. These trusts might subsequently benefit from the inquirer's professional assistance in managing trust assets, and the clients have sometimes expressed interest in receiving that assistance from the inquirer. Rather than providing this assistance through the inquirer's law firm, the inquirer proposes establishing a separate financial management company in which the inquirer would have an ownership interest to be retained by the trustees. The trustees ordinarily are the client-settlors of the trust or the client's family members. The financial management company would charge each trust a fixed percentage of the value of the total assets under management and would not charge any transaction or product-based fees or commissions. The company would disclose to clients that members of the law firm have an interest in the company, and that the company is not rendering legal services. In some cases, the inquirer and the inquirer's law firm would provide ongoing estate planning services to its clients while the financial management company provided financial management services to those same clients or their family members in their role as trustees. The inquirer believes that the inquirer's holding an ownership interest in the financial management company will not affect the advice the inquirer gives in estate planning matters.

QUESTION

2. Under the New York Rules of Professional Conduct ("Rules"), may a lawyer who provides estate planning advice and assistance, and who establishes revocable and irrevocable trusts for clients, have a financial interest in a separate company that manages the assets held in the trusts?

OPINION

3. In N.Y. State 1155 (2018), this Committee recognized that, in many circumstances, a lawyer may provide both legal and nonlegal services to the same client, and that Rule 5.7 provides a framework for a lawyer to provide nonlegal services to a client through a separate entity. However, the lawyer must initially determine whether doing so would violate Rule 1.7, which addresses conflicts of interest arising out of a lawyer's personal interests, including the lawyer's business and financial interests. Further, providing both legal and nonlegal services, if otherwise permissible, may also implicate Rule 1.8(a), which concerns lawyers' business transactions with clients. This opinion addresses each of these Rules.

Rule 1.7

4. Rule 1.7(a) provides that a lawyer has a concurrent conflict of interest if a "reasonable lawyer would conclude that … there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial [or] business interests." In that event, the lawyer may undertake the representation only if, pursuant to Rule 1.7(b)(1), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" and, pursuant to Rule 1.7(b)(4), the client gives "informed consent, confirmed in writing". In some circumstances, how-

ever, the conflict of interest created by the lawyer's financial or business interest may be so severe that it cannot be cured by consent.

5. In N.Y. State 1155 ¶ 5, we recognized that a lawyer's interest in an ancillary business does not invariably give rise to a conflict of interest under Rule 1.7(a): "In many circumstances, whether there is a significant risk that the lawyer's professional judgment will be adversely affected will depend on the size of the lawyer's financial interest in the nonlegal services, and whether the lawyer's actions in the legal matter may affect the lawyer's ability to receive the nonlegal fees."

6. In other situations, even if a reasonable lawyer would conclude that there is a "significant risk" that a lawyer's professional judgment in representing a client will be adversely affected by the lawyer's financial interest in the nonlegal services, it may be reasonable for the lawyer to believe that competent and diligent representation can nonetheless be provided. In that event, it would be permissible under Rule 1.7 for a lawyer both to practice law and to own, operate or otherwise affiliate with an entity that provides nonlegal services to some of the lawyer's clients. However, before providing both legal and nonlegal services to a client, the lawyer must disclose the lawyer's financial interest in the nonlegal business, as well as the material risks posed by using a nonlegal entity in which the lawyer has an interest, and reasonably available alternatives to using that entity. *See* Rule 1.7(b)(4) (requiring a client's informed consent to a consentable conflict of interest) and Rule 1.0(j) (defining "informed consent") and Comments [6] and [7] to Rule 1.0 (explaining "informed consent"). After making that full disclosure, the lawyer must secure the clients' informed consent before proceeding further. *See, e.g.*, N.Y. State 784 (2005) (addressing the provision of nonlegal services to the lawyer's clients through an entertainment management company in which a lawyer has an interest).

7. We have also recognized, however, that lawyers sometimes have an incurable conflict of interest when they refer clients to their businesses or provide services to clients through their businesses. An early decision, predating the adoption of the Rules of Professional Conduct, is N.Y. State 619 (1991), which concluded that a lawyer engaged in estate planning may not recommend or sell life insurance products to clients if the lawyer has a financial interest in selling those products. We reasoned:

> Where a lawyer advises a client on trust and estate matters, a central object of the representation is how best to satisfy the financial needs of the client and of those for whom the client wishes or is obliged to provide. A frequent topic in trust and estate planning is whether and to what extent life insurance products should be used to satisfy some of the client's financial objectives and, if so, which ones. Where a lawyer has a financial interest or affiliation with a particular life insurance agency or company, the lawyer's independent professional judgment would unavoidably be affected in considering the appropriateness of or recommending, life insurance products for a particular client. . . .

8. Although we recognized the general principal that disqualification of a lawyer is ordinarily not required if the client consents to the conflict after full disclosure of the circumstances, based on the particular facts presented in N.Y. State 619, we stated:

> Given the wide array of life insurance products sold by various companies at differing prices, not to mention the threshold question of whether life insurance products are the most appropriate or economical way to best satisfy the client's needs, however, we do not believe that there could be meaningful consent by the client to the lawyer having a separate business interest of this kind. Since the client is entitled to rely upon the lawyer's independent professional judgment, the opportunity for overreaching by the lawyer is too great to be tolerated. We do not believe that a lawyer can, consistent with the duty of competent representation . . ., solicit or accept a client's consent to a direct and substantial conflict between the client's and the lawyer's interests.

9. Although other states' ethics committees have taken a different view, for the past three decades this committee has adhered to the view that providing certain types of nonlegal services to law firm clients is fundamentally incompatible with the duty and ability to render independent professional judgment in the provision of legal services. For example, in N.Y. State 1200 (2020), we addressed whether a lawyer may "offer legal services for a fee and wealth management services to the same clients from a separate entity for a separate fee -- the creation of the life insurance trust coupled with the sale of an insurance policy being only an illustration." We reviewed prior opinions where we concluded that "the conflict between the legal and non-legal services is so severe that informed consent cannot cure it," in particular, where the lawyer would serve as both a lawyer and a real estate broker in the same transaction, with the result that "the broker's personal financial interest in losing the brokerage transaction [might] inter-

fere[] with the lawyer's ability to render independent advice with respect to the transaction." *Id.*, ¶¶ 5-6 (citations omitted). With respect to the lawyer providing wealth management services, we concluded: "This dual practice creates a conflict that, in our opinion, is not amenable to consent for the same reasons set forth in the foregoing opinions, namely, that the legal fees for creating a life insurance trust are likely modest [compared] to the commissions for selling a life insurance policy. As a result, based on our prior opinions, we believe the dual practice is not subject to informed consent and hence impermissible." *Id.*, ¶ 7.

10. Opinion 1155 emphasized that a lawyer sometimes has an incurable conflict of interest when also serving as a broker of financial products if the lawyer, as a lawyer, is recommending products in which the lawyer also has a financial interest. *Id.* (citing N.Y. State 619 (1991) & N.Y. State 536 (1981)). However, citing N.Y. State 536 (1981), we recognized that engaging in the dual practice as lawyer and financial planner "would not be unethical, as long as the financial planning corporation did not offer any products (e.g. securities, real estate or insurance) for which it would receive a commission or other form of compensation or act as legal counsel and broker in the same transaction." Based on the earlier precedent, Opinion 1155 concluded "that a lawyer may provide both legal and financial planning advice to clients, but could not also receive brokerage commissions with respect to financial products purchased by clients receiving the lawyer's legal advice."

11. In the present situation, the inquirer asks whether an estate-planning lawyer would have a conflict of interest in advising a client and helping to set up a trust for the client if, after the trust is established, the lawyer recommends, and the client then retains, the lawyer's separate financial management company to manage funds in the trust. We note that the inquirer does not propose to serve as trustee, a situation that would call for further analysis and possibly a different outcome.

12. The first question this situation raises under Rule 1.7 is whether a reasonable lawyer would conclude that there is a significant risk that the lawyer's self-interest will adversely affect the lawyer's professional judgment. We answer this question in the affirmative. If the lawyer intends to recommend the financial management company in which the lawyer has an interest, then the lawyer's advice regarding whether to establish a trust for estate and tax-planning purposes, as opposed to pursuing an alternative course, may be adversely affected by the lawyer's interest in the company being retained to manage funds that the client transfers into the trust. A reasonable lawyer could conclude that the lawyer's interest in providing that later service could influence the decision to recommend establishing a trust rather than recommending an alternative, such as purchasing an annuity or life insurance policy that would not result in a profitable retention of the lawyer's financial management company. We think that risk is significant, not de minimis, so this situation creates a "concurrent conflict of interest" under Rule 1.7(a)(2). *Compare* N.Y. State 712 (1999) (de minimis financial interest does not establish a personal-interest conflict).

13. Despite the conflict under Rule 1.7(a)(2), the inquirer may proceed if the conditions of Rule 1.7(b) are satisfied. With respect to Rule 1.7(b)(1)—the most important factor in determining whether a conflict is consentable—the inquirer believes he will be "able to provide competent and diligent representation to each affected client," despite the significant risk. The question is whether the inquirer's belief is "reasonable" within the meaning of Rule 1.7(b)(1) and Rule 1.0(q) and (r) (defining "reasonable" and "reasonable belief"). If so, the inquirer may represent the clients in estate-planning matters, even with the intention of later recommending the company to manage the trust funds, as long as the inquirer obtains each client's "informed consent, confirmed in writing." If not, the representation is "nonconsentable" and the lawyer may not proceed. As explained in Comment [14] to Rule 1.7:

> [14] … [S]ome conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. …

14. We note that lawyers in some other jurisdictions are permitted to provide financial management services to clients whom they represent in estate matters. *See* Arizona Op. 99-09 ("While we recognize that there are significant potential conflicts of interest inherent in the brokerage of securities and insurance products by estate planning lawyers to their clients, in keeping with our previous opinions, the Committee concludes that the Rules of Professional Conduct do not expressly prohibit a lawyer from engaging in such ancillary business activities so long as the requirements of ER 1.7(b) and ER 1.8(a) are met."); Ron A. Rhoades, *The Attorney as "Complete Advisor" – Fiduciary Ancillary Business Models*, Florida Bar J., Mar. 2005, https://www.floridabar.org/the-florida-bar-journal/the-attorney-as-complete-advisorfiduciary-ancillary-business-models/.

15. We conclude that the inquirer's belief that the representation will not be adversely affected is reasonable. This situation is different from one where the legal and financial advice are given simultaneously and intertwined, such as where the lawyer simultaneously gives legal advice about what financial product to purchase and seeks to sell that same product to the client. *Compare, e.g.*, N.Y. State 1200 (lawyer may not simultaneously serve as clients' lawyer and wealth manager). Here, because the decision to retain the Company (and the content of the Company's financial advice) are not intertwined with the inquirer's legal advice about whether to create a trust, the benefit to the lawyer is substantially more attenuated and less likely to influence the lawyer's legal judgment. Moreover, the eventual decision whether or not to retain the lawyer's financial management company will be made by a trustee, who may or may not be or become a client of the law firm. Given these considerations, in our opinion, a lawyer who is mindful of the need to give disinterested advice about whether and how to establish a trust can reasonably avoid being affected by his personal financial interest in serving or having his company serve as financial manager.

16. Accordingly, after the inquirer establishes a separate financial management company with the expectation or hope that the company will manage the assets of client trusts, the inquirer must seek and obtain clients' informed consent at the outset of any estate-planning representation that might lead to advice about whether the client should form a trust, or should pursue any other avenues that might call for employing the lawyer's financial management company. The lawyer must explain the risk that the lawyer's advice will be influenced by the lawyer's self-interest, and the lawyer must explain the alternatives. *See* Rule 1.0(j) (defining "informed consent"). If the informed client then consents to the representation, the lawyer must confirm the client's consent in writing. *See* Rule 1.0(e) (defining "confirmed in writing") and Rule 1.7(b)(4) (requiring a lawyer to obtain "informed consent, confirmed in writing" to a consentable conflict arising under Rule 1.7).

Rule 5.7

17. The inquiry also implicates Rule 5.7, which governs lawyers' provision of nonlegal services through entities separate from their law firms. N.Y. State 1155 sets forth relevant considerations under Rule 5.7 and, in general, we refer the inquirer to the framework set forth in that opinion. However, we underscore one particular question, namely, whether the provision of estate-planning services through the law firm will be "distinct from" the provision of financial management services within the meaning of Rule 5.7(a). A lawyer must always comply with the Rules of Professional Conduct with respect to legal services, but if the legal and nonlegal services are *non*distinct, then the inquirer must also comply with the Rules even with respect to the nonlegal services.

18. Under Rule 5.7(a), a lawyer who provides nonlegal services to a client that are "not distinct" from the legal services provided to that client is subject to the Rules, such as those governing competence, confidentiality, and conflicts of interest, with respect to the provision of nonlegal services as well as legal services. Even if the legal and nonlegal services are "distinct," the lawyer is subject to the Rules with respect to the nonlegal services if the client "could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship," *see* Rule 5.7(a)(3), and it "will be presumed that the person receiving the nonlegal services to be the subject of a client-lawyer relationship" unless the lawyer advises the client in writing to the contrary. *See* Rule 5.7(a)(4). If the legal and nonlegal services are nondistinct from each other, however, then, as Opinion 1155 discussed, the nonlegal services are subject to the Rules no matter what disclaimer the lawyer provides.

19. N.Y. State 1155 recognized that whether legal and nonlegal services are distinct depends on the facts, but that the most significant consideration is whether the services are integrated. Here, for example, the legal and nonlegal services may or may not be integrated. If the lawyer, in the role of financial manager, discusses with the client how to invest trust assets at the same time as the lawyer, as legal advisor, advises about whether to establish a trust, or if the lawyer drafts a trust instrument naming the company as financial manager, then the services will be nondistinct. Conversely, the services are most likely to be distinct if the lawyer does not offer and provide financial management advice or services through the company until after the trust is established. As we stated in N.Y. State 1155, ¶ 15:

> When a patron of the nonlegal service business uses only that service and not legal services, there is no integrated whole and the nonlegal services are by definition distinct. When, however, the patron of nonlegal financial planning services is also using or has received related legal services of the lawyer, whether the legal and nonlegal services are distinct will depend on the nature of the legal and nonlegal services. *When the legal services involve estate planning and the financial planning services including planning investments that would affect the size and composition of the estate*

or the educational or retirement plan, even if the nonlegal services are provided from a separate entity and at times are not overlapping, we believe the services would be nondistinct. Therefore, the provisions of the Rules will apply to the nonlegal services. [Emphasis added.]

Rule 1.8(a)

20. Even if, in any given estate-planning representation, the legal and nonlegal services are "distinct," the inquirer must nonetheless comply with Rule 1.8(a), which governs business dealings with clients. *See* N.Y. State 896 (2011) (a law firm providing nonlegal lien search services and legal services must comply with Rule 1.8(a)). As N.Y. State 896 summarizes: "Rule 1.8(a) requires that: (i) the nonlegal services be provided on terms that are 'fair and reasonable' to the client, (ii) the terms on which the nonlegal services will be provided are fully disclosed to the client in writing in understandable form, (iii) the client is advised to seek the advice of independent counsel about the lawyer's provision of the nonlegal services, and (iv) the client gives informed consent, in a writing signed by the client, to the terms of the transaction in which the nonlegal services are provided and to the lawyer's inherent conflict of interest." *Id.*, ¶11.

CONCLUSION

21. An estate-planning lawyer who has an interest in a nonlegal financial management company that the lawyer hopes to recommend to estate-planning clients as financial manager for the trust assets, has a conflict of interest requiring clients' informed consent, confirmed in writing, at the outset of the representation. Further, if the financial management services and the legal services provided to clients are not distinct from each other, the lawyer is subject to the Rules governing the attorney-client relationship with respect to the nonlegal financial management services. Whether the legal services and nonlegal services are distinct or nondistinct from each other, the lawyer must also comply with the Rules governing business transactions with clients whenever an entity with which the lawyer is affiliated or owns an interest in offers nonlegal services to a client.

(09-21)

Opinion 1232 (11/09/2021)

Topic: Attorney advertising

Digest: A lawyer who contacts a medical fertility clinic to request to be included on the clinic's website as a lawyer who practices in the area of assisted reproduction is engaged in attorney advertising, but not solicitation.

Rules: 7.1, 7.2, 7.3

FACTS

1. The inquiring lawyer would like to contact a medical clinic, which specializes in fertility procedures, to request that he be included on their website as a potential referral for legal representation and consultation in the area of assisted reproduction. The clinic's website mentions a number of attorneys in New York that the clinic suggests could be retained in that area of practice. The lawyer would not be seeking to be retained by the medical clinic.

QUESTION

2. Does the proposed communication to the medical clinic constitute attorney advertising, and if so, is it also a solicitation?

OPINION

3. New York Rule of Professional Conduct ("Rule) 1.0(a) defines "advertisement" as follows:

> (a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

4. The inquirer's proposed communication with the clinic is attorney advertising because the inquirer seeks to communicate his area of practice on the clinic's website in order to be considered for retention by those who view the website. The inquirer must therefore meet the requirements for attorney advertising set forth in Rule 7.1.

5. However, as we will now explain, the communication is not a "solicitation" under the Rules.

6. Rule 7.3(b) provides that "solicitation" is a form of "advertisement" that satisfies certain specific criteria:

> (b) For purposes of this Rule [7.3], "solicitation" includes any advertisement initiated by or on behalf of a lawyer or law

firm; that is directed to, or targeted at, a specific recipient or group of recipients or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

7. The inquirer is seeking the website posting for the "primary purpose" of "retention" for "pecuniary gain," but that posting will not be "directed to" or "targeted at" a specific recipient or group of recipients or their family members or legal representatives. Thus, the website posting does not meet all of the elements of a solicitation. Comment [4] to Rule 7.3 explains:

> Unless it falls within Comment [3], an advertisement in public media such as newspapers, television, billboards, websites or the like is presumed not to be directed to or targeted at a specific recipient or recipients. *** Likewise, an advertisement by a patent lawyer is not directed or targeted within the meaning of the definition solely because the magazine is geared toward inventors. Similarly, a lawyer could advertise on television or in a newspaper to the general public that the lawyer practices in the area of personal injury or Workers' Compensation law. The fact that some recipients of such advertisements might actually be in need of specific legal services at the time of the communication does not transform such advertisements into solicitations.

8. Comment [3] to Rule 7.3 provides that a website-posted advertisement will constitute a solicitation "if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." (Emphasis added.) But Comment [5] to Rule 7.3 makes clear that a "specific incident" within the meaning of Comment [3] involves "potential claims for personal injury or wrongful death" arising from a "particular identifiable event (or a sequence of events of related events occurring at approximately the same time and place) that causes harm to one or more people. Specific incidents include such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like."

9. Because the website posting requested by inquirer does not fall within the circumstances described within Comments [3] [4] and [5] of the Rule 7.3, it would not be a prohibited solicitation.

10. We caution, however, that the inquirer should not offer anything of value to the clinic in exchange for being included on its website as such an offer would constitute an improper payment of a referral fee. See Rule 7.2 (prohibiting, with limited exceptions, compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client").

CONCLUSION

11. A lawyer who contacts a medical fertility clinic to request to be included on the clinic's website as a lawyer who practices in the area of assisted reproduction is engaged in attorney advertising, but not solicitation.

Opinion 1233 (12/07/2021)

Topic: Law firm associates and the phrase "and Associates" in law firm name

Digest: A sole practitioner may not refer to associates of other law firms with whom she works as "associates" of her firm and may not include in her law firm name the phrase "and Associates" when she is referring to associates employed by another firm.

Rule: 7.5(b)

FACTS

1. Inquirer is a sole practitioner who works with other law firms on all of her matters. Inquirer's law firm does not employ any lawyers.

QUESTIONS

2. May the inquirer refer to the lawyers in the firms with which she works as "associates" of the inquirer's law firm? With reference to those lawyers, may the inquirer include in her firm name the phrase "and Associates"?

OPINION

3. Rule 7.5(b)(1)(iii) provides:

> A lawyer in private practice shall not practice under . . . a name that is misleading as to the identity of the lawyers practicing under such name.

4. Comment [5] to Rule 7.5 provides:

> Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a 'firm' . . . because to do so would be false and misleading. . . . It is also misleading for lawyers to hold themselves out as being counsel, associ-

ates, 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.

5. The term "associate" has a recognized meaning in the legal profession. It refers to a lawyer who is a paid employee of a law firm, not a partner or shareholder in that firm. See N.Y. State 1137 ¶ 9 (2017) ("The term 'associate' often conveys the status of a junior lawyer who is not a partner or principal but is regularly employed by the firm.") See also N.Y. City 1996-8 (the term associate "has been interpreted by courts and other ethics committees to mean a salaried lawyer-employee who is not a partner of a firm").

6. Accordingly, a lawyer may not refer to other lawyers as "associates," unless those lawyers are actually paid employees of the lawyer's law firm. It is not sufficient that the inquiring lawyer works with those lawyers and their law firms on a frequent or even exclusive basis.

7. By parity of reasoning, the inquiring lawyer may not include in her firm name the phrase "and Associates" in reliance upon the fact that she works on all her matters with other law firms that do employ associates. Using the phrase "and Associates" when she has no associates would be false, deceptive, and misleading in at least two ways. First, it would falsely imply that inquirer's firm is larger than it actually is and possesses greater professional resources to devote to a client's service. Second, it would falsely imply that inquirer, as an employer of associates, had the capacity to control and give direction to junior attorneys when, in fact, the power to supervise or control the activities of those junior attorneys is vested in their supervisors at the other firms that employ them.

8. Even though the inquirer may not use a law firm name implying that she has "associates" in the traditional sense of employed junior lawyers, her firm might have a sufficiently close relationship with lawyers at other firms to describe them in her marketing materials as "associated" or "affiliated" with her firm. However, whether she may do so without running afoul of the prohibition on "false, deceptive, or misleading" advertising, see Rule 7.1(a), or violating the prohibition against conduct involving "deceit" or "misrepresentation," see Rule 8.4(c), is a fact-based inquiry, and we lack sufficient context to make that determination.

CONCLUSION

9. A sole practitioner may not refer to associates employed by other law firms with whom she works as "associates" of her firm and may not include in her law firm name the phrase "and Associates" when she is referring solely to associates employed by another firm.

(30-21)

Opinion 1234 (12/07/2021)

Topic: Ownership of New York law firm by nonlawyers

Digest: A New York lawyer may not be a partner, associate or employee of a law firm in New York or in another jurisdiction that has direct or indirect ownership by nonlawyers in accordance with the rules applicable in that jurisdiction, unless the lawyer is licensed in the other jurisdiction and principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not in New York. A New York lawyer may be employed in a senior leadership position in a law firm in another jurisdiction that has nonlawyer ownership in accordance with the rules of that jurisdiction, as long as the lawyer principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not in New York. Whether a New York lawyer may practice with a valid license in another jurisdiction after retiring from the practice of law in New York is a question of law on which we cannot opine. If a lawyer may lawfully do so, then whether the New York Rules will continue to apply to the lawyer will depend on the type of retirement the lawyer chooses.

Rules: 5.4(d) and 8.5(b)

FACTS

1. The inquirer is a New York lawyer practicing with a New York law firm. He resides overseas and does not currently have any clients physically located in New York, but other New York attorneys in his firm are apparently practicing in New York and serving New York clients. The inquirer is pending admission to the bars in certain U.S. states and foreign countries which permit nonlawyer ownership of law firms. Recently, a publicly traded law firm based in England (the "English firm") has proposed to purchase the inquirer's New York firm, or to merge with it. The English firm has nonlawyer ownership, although the majority shareholder and other shareholders are attorneys licensed in England and Wales.

QUESTION

2. The inquirer asks questions about three distinct scenarios:

   a. May the inquirer sell his New York firm in its entirety to the English firm if the New York firm would become a wholly-owned subsidiary of the English firm and would employ New York licensed attorneys as employees and not as shareholders? If not, may the inquirer sell a majority interest in the New York firm to the English firm, with the inquirer and other New York attorneys remaining as shareholders?

   b. May the inquirer be employed directly by the English firm in a senior leadership role based in the United Kingdom or European Union if he continues to practice in New York? If not, would it make a difference if the inquirer ceased to practice law in New York, removed references to New York admission, and did not advise clients on matters of New York law, but continued to practice under his licenses elsewhere?

   c. May the inquirer retire from the practice of law in New York, while continuing to practice with a valid license in another jurisdiction?

OPINION

Ownership of All or Part of a New York Law Firm by Nonlawyers

3. Although we answer questions only about an inquirer's own proposed conduct, and not the conduct of other lawyers, the inquirer's first question is in effect a question on behalf of both himself and his firm. (New York is one of the only jurisdictions in the United States where a law firm as an entity is subject to discipline.) This opinion will therefore discuss the application of the New York Rules of Professional Conduct (the "Rules") to other New York lawyers in the inquirer's firm, since their conduct may affect whether the inquirer and his firm may ethically enter into the proposed transaction.

4. Rule 5.4 (Professional Independence of a Lawyer) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, prohibits a lawyer from forming a partnership with a nonlawyer if the activities of the partnership include practicing law, and prohibits a lawyer from practicing in an entity authorized to practice law for profit in which a nonlawyer owns any interest or serves as a director or officer or has the right to direct or control the professional judgment of a lawyer. Specifically, Rule 5.4 provides:

   > (a) A lawyer or law firm shall not share legal fees with a nonlawyer [except in certain circumstances not relevant here].
   >
   > (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
   >
   > * * *
   >
   > (d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:
   >
   > (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
   >
   > (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
   >
   > (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

5. Comment [1] to Rule 5.4 explains that the purpose of the Rule is to protect the independence of the lawyer's professional judgment. Similarly, Comment [2] to the Rule notes: "This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."

6. Another provision of the Rules that is relevant to multi-jurisdictional practice is Rule 8.5, the provision governing disciplinary authority and choice of law. That Rule provides:

   > (a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
   >
   > (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
   >
   > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

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

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

7. Thus, under Rule 8.5(b)(2)(ii), if a lawyer is licensed to practice in New York and another jurisdiction (as the inquirer here will be if his pending applications for admission to other bars are approved), then the New York Rules of Professional Conduct apply only in two circumstances: (a) the lawyer "principally practices" in New York and the "predominant effect" of the lawyer's conduct is in New York; or (b) the lawyer does *not* principally practice in New York but the "particular conduct" at issue "clearly has its predominant effect" in New York. (In contrast, whether the dual-licensed lawyer principally practices in New York or elsewhere, if the "predominant effect" is in the lawyer's non-New York jurisdiction, then the New York Rules will not apply.)

8. Our Committee has written a number of opinions on Rule 5.4 and Rule 8.5 as they apply to arrangements between a New York lawyer or law firm, on the one hand, and a non-New York law firm with nonlawyer owners in a jurisdiction that permits nonlawyer ownership of law firms, on the other hand. *See* N.Y. State 1166 (2019), N.Y. State 1093 (2016), N.Y. State 1041 (2014), N.Y. State 1041 (2014), N.Y. State 1038 (2014), N.Y. State 1027 (2014), N.Y. State 1023 (2014). Our opinions may be divided into two groups: (1) opinions where the lawyer proposes to principally practice law in New York, and (2) opinions where the lawyer will not principally practice in New York and the lawyer's conduct will not have its predominant effect in New York.

If the Inquiring Lawyer or Other Lawyers in the Firm Will Practice in New York

9. In N.Y. State 1038 (2014), the inquirer was a New York lawyer who was also admitted in D.C., a jurisdiction that allows a law firm to have nonlawyer partners in limited circumstances. The inquirer proposed to join the D.C. firm and to staff an office in New York to handle New York cases. The inquirer would either join the D.C. firm as a partner or be a partner in a separate wholly owned subsidiary of the D.C. firm, which the New York lawyer would independently manage. Applying Rule 8.5, the Committee determined that the lawyer's "conduct" was equivalent to "practicing in New York in a partnership with a nonlawyer partner and sharing legal fees from New York matters with a nonlawyer partner." This, we decided, was not conduct "in connection with" a particular New York proceeding in a court within the meaning of Rule 8.5(b)(1), even if the New York lawyer would be involved in New York litigation. Rather, the applicable provision was Rule 8.5(b)(2) ("any other conduct") and, since the lawyer was "licensed to practice in this state and another jurisdiction" (New York and D.C.), the questions were (a) where did the lawyer "principally practice[]" and (b) in which of these jurisdictions did the lawyer's conduct clearly have its "predominant effect"? We concluded that the conduct of practicing in New York with a partnership with a nonlawyer partner and sharing legal fees from New York matters with the nonlawyer partners would have its predominant effect in New York. Here, similarly, since the purpose of the proposed arrangement seems to be to have an office in New York staffed by New York lawyers, the "predominant effect" would clearly be in New York. Consequently, the New York Rules of Professional Conduct will apply, rather than the Rules of the non-New York jurisdiction, and the proposed firm here would likewise violate Rule 5.4.

10. Our other opinions addressing Rule 5.4 and Rule 8.5 have employed a similar analysis. *See, e.g.*, N.Y. State 1190 (2020) (a professional limited liability company with nonlawyer members may not provide legal services in New York), N.Y. State 1041 (2014) (a New York lawyer may practice in a foreign country with an entity that includes a nonlawyer supervisor or owner if the predominant effect of the lawyer's practice is not in New York), N.Y. State 911 (2012) (a New York lawyer may not establish the New York office of a U.K. law firm with nonlawyer owners, because, even if the New York lawyers also were admitted in the U.K., the predominant effect of their conduct would be in New York); N.Y. State 889 (2011) (a lawyer licensed in both New York and D.C. may practice in a D.C. firm with nonlawyer members if he principally practices in D.C. and receives a majority of his revenue from D.C. cases and matters, but if the partnership were created for the purpose of practice in New York, establishing it in D.C. would be ineffective to circumvent the New York rules on fee sharing.)

11. In N.Y. State 1038, we also addressed whether a New York firm could be a wholly-owned subsidiary of a non-New York law firm with nonlawyer owners, rather than being directly owned by nonlawyers. We did not find the answer to this ques-

tion directly in Rule 5.4, but we concluded that such indirect ownership by nonlawyers would be prohibited, because Rule 8.4(a) prohibits a lawyer from violating the Rules indirectly "through the acts of another." If a New York law firm were owned by a non-New York firm with nonlawyer owners, the New York firm would be violating Rule 5.4(d) indirectly, through the acts of non-New York lawyers who permitted their firm to have nonlawyer owners. In addition, Opinion 1038 noted that Rule 5.4(d) prohibits a lawyer (whether a partner, associate, or employee of a law firm) from practicing "with or in the form of an entity authorized to practice law for profit, if . . . *a nonlawyer owns <u>any</u> interest therein*" or "has the right to direct or control the professional judgment of a lawyer." (Emphasis added.) We interpreted the term "owns any interest therein" in Rule 5.4(d) to extend to an indirect ownership interest. Thus, the inquirer here may not escape Rule 5.4(d) by practicing in a law firm that is a wholly-owned subsidiary of a non-New York law firm with nonlawyer owners.

Would It Make a Difference if the UK Firm Owned Less Than a Majority of the New York Firm?

12. A limited number of U.S. jurisdictions have modified their versions of Rule 5.4 to allow some nonlawyer ownership of a law firm and to allow lawyers to share legal fees with nonlawyers. In 2021, for example, Arizona eliminated its version of Rule 5.4 entirely and substituted a system in which Arizona law firms with nonlawyer owners may be certified by the Arizona Supreme Court as "alternative business structures." In 2020, the Utah Supreme Court created a pilot program – a so-called legal-regulatory "sandbox" – that allows Court-approved entities to include nonlawyer owners. Decades ago, the District of Columbia modified its version of Rule 5.4 to allow firms to have nonlawyer partners if (among other restrictions) those nonlawyers provide professional services that assist the law firm in delivering legal services. *See also* Wash. R. of Prof'l Conduct 5.9 (authorizing ownership by Limited License Legal Technicians). Moreover, the American Bar Association and certain states have committed to exploring the issue of nonlawyer ownership of legal service providers, sometimes where nonlawyers own less than a majority of the firm. *See generally* ABA 499 (2021) (discussing jurisdictions that allow nonlawyer ownership of law firms and concluding that lawyers in other jurisdictions may ethically have a "passive" ownership interest in such law firms).

13. New York is not among the jurisdictions that allow nonlawyer ownership. New York Rule 5.4(d) prohibits a New York lawyer from practicing in an entity authorized to practice law for profit if a nonlawyer owns *any* interest. *Cf*. N.Y. City 2020-1 entitled "Ongoing Relationships with Alternative Legal Business Entities" (concluding that a New York lawyer may enter into a non-exclusive ongoing co-counsel relationship with a firm with nonlawyer owners as long as the New York lawyer is not employed by the firm, is not a partner or shareholder in the firm, and has no similar role with the firm).

May the Inquirer Be Employed Directly by the English Firm in a Senior Leadership Role Based in the UK/EU?

14. The inquirer's second question assumes the firm will not have a New York office but that the inquirer would be employed in the U.K. in a senior leadership position.

15. The inquirer does not describe what his duties as a senior leader would be, but we assume he would not be practicing law in New York. Not only would practicing New York law implicate the problems under Rule 5.4 discussed above, but it also would implicate Section 470 of the New York Judiciary Law. Under that statute,"[a] non-resident attorney who is admitted to practice in New York and who practices New York law must have an office in New York that meets the minimum requirements of Section 470, but we express no opinion as to what Section 470 requires." N.Y. State 1223 ¶ 14 (2021); *see also* N.Y. State 1025 (2014) (an attorney who is admitted to practice in New York and advertises his or her law practice in New York, but who does not reside in New York, must have an office that meets the minimum requirements of Judiciary Law §470, whatever those requirements may be). Section 470 would not be applicable if no lawyer in the firm were practicing law in New York.

16. If the inquirer in his capacity as a senior leader principally practices in the U.K. and his activities do not clearly have their predominant effect in New York, then we see no problem with this role.

May the Inquirer Retire From Practice in New York and Continue To Practice With a Valid License in Another Jurisdiction?

17. Finally, the inquirer asks if he may "retire" from the practice of law in New York but continue to practice in another jurisdiction in which the inquirer is licensed. As we pointed out in N.Y. State 1172 ¶ 8 (2019), there are several ways by which a lawyer might seek to "retire" from law practice in New York.

18. One way of retiring is for the lawyer to stops practicing law in New York, but to retain his or her license through ongoing registration with the Office of Court Administration and compliance with New York's mandatory continuing legal education (CLE) requirements. Such a person is still a New York lawyer and remains subject to the Rules, including Rule

5.4 and Rule 8.5. Consequently, if the inquirer used this method to retire, Rule 8.5(b)(2)(ii) would apply, requiring an analysis of where the lawyer "principally practices" and where his conduct clearly has its "predominant effect".

19. Another way of retiring from New York law practice is for a lawyer to change his or her New York registration status to "retired" under Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 N.Y.C.R.R. § 118.1(g). Lawyers who retire via this method are exempt from paying the biennial registration fee and from complying with the mandatory CLE requirement, but they may render legal services "without compensation." Those lawyers remain members of the bar and thus are subject to the Rules, including Rule 5.4 and Rule 8.5. As we said in N.Y. State 1172, this change in registration does not strip the lawyer of a license to practice law but instead places parameters on the lawyer's practice. However, under § 118.1(g) this form of retirement does not appear to be available to lawyers who confine their practice to a foreign jurisdiction. Moreover, in *Matter of Attorneys in Violation of Judiciary Law* ***§ 468-a*** *[DaCunzo]*, __ A.D.3d ___ (Nov. 4, 2021), the court held that a lawyer may not "retire" from practice in New York but continue to practice in another jurisdiction because **§ 118.1(g) provides that the practice of law includes the giving of legal advice in New York "or elsewhere."** The *DaCunzo* court therefore held that respondent's claim that she was retired was improper because she still practiced outside New York. Whether this interpretation is correct is a question of law on which we cannot opine, but the inquirer should research the law carefully before choosing this method of retirement.

20. A third method of "retiring" is for a lawyer to voluntarily and formally resign from the New York bar. The Rules for Attorney Disciplinary Matters of the Supreme Court, Appellate Division, which are contained in 22 N.Y.C.R.R. Part 1240, provide for voluntary resignation from the bar for non-disciplinary reasons as follows:

> § 1240.22 Resignation for Non-Disciplinary Reasons; Reinstatement (a) Resignation of attorney for non-disciplinary reasons. (1) An attorney may apply to the Court for permission to resign from the bar for non-disciplinary reasons by submitting an affidavit in the form in Appendix E to these Rules. … (2) When the Court determines that an attorney is eligible to resign for non disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and stating the non-disciplinary nature of the resignation.

21. If this form of resignation has been accepted by one of the Appellate Divisions, such individual is no longer a member of the New York bar and therefore is no longer subject to the New York Rules of Professional Conduct.

CONCLUSION

22. A New York lawyer may not be a partner, associate or employee of a law firm in New York or in another jurisdiction that has direct or indirect ownership by nonlawyers in accordance with the rules applicable in that jurisdiction, unless the lawyer is lawfully practicing in the other jurisdiction and principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not clearly in New York. A New York lawyer may be employed in a senior leadership position in a law firm in another jurisdiction that has nonlawyer ownership in accordance with the rules of that jurisdiction, as long as the lawyer principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not clearly in New York. Whether a New York lawyer may retire from the practice of law in New York while continuing to practice in another jurisdiction is a question of law on which we cannot opine. If a lawyer may lawfully do so, then whether the New York Rules will continue to apply to the lawyer will depend on the type of retirement the lawyer chooses.

(25-21)

Opinion 1235 (01/03/2021)

Topic: Firm name; trade names; assumed names

Digest: A law firm may operate under two different assumed names that distinguish separate practice areas of the firm, provided that no particular facts and circumstances would make it false, deceptive, or misleading to do so.

Rule: 7.5(b)

FACTS

1. The inquirer's law firm is developing a new practice area that will differ substantially from the firm's current practice area. To keep the practices separate and to enhance branding for the new practice area, the firm will operate the two practice areas under separate assumed names (also referred to as d/b/a or "doing business as" certificates). Each practice area, using its assumed name, will have its own marketing materials and website. The firm name will be disclosed wherever the assumed names are posted or published.

QUESTION

2. May a law firm operate under more than one assumed name?

OPINION

3. On June 24, 2020, the New York courts amended Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules") to permit lawyers to practice under trade names that are not false, deceptive, or misleading, We applied the amended rule to several situations in N.Y. State 1207 ¶ 5 (2020), stating: "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." In N.Y. State 1226 ¶ 9 (2021), we applied amended Rule 7.5(b) to domain names. The inquirer in Opinion 1226 wished to use a domain name for his website and email address that was different from the name he used for the law firm. We approved, saying: "Nothing in the Rules prohibits use of a domain name different from the name of the law firm." We cautioned, however, that we "could conceive of circumstances where the differing names might otherwise violate Rule 7.5(b) …."

4. The same analysis applies to the current inquiry. In our view, there is nothing inherently false, deceptive or misleading in a single law firm using two separate assumed names when holding itself out or marketing itself as a provider of legal services in two distinct practice areas, but there could well be particular facts and circumstances that would cause us to reach a different conclusion in a different case. No such particular facts or circumstances were presented to us here, especially where the firm will disclose its full name wherever the assumed names are posted or published, so we conclude that using two distinct "d/b/a" names for different practice areas within the same firm would not be false, deceptive, or misleading and thus would not violate Rule 7.5(b).

CONCLUSION

5. A law firm entity may operate under two different assumed names that distinguish separate practice areas provided that no particular facts and circumstances would make it false, deceptive, or misleading to do so.

(24-21)

Opinion 1236 (01/13/2022)

Modifies N.Y. State 613 (1990)

Topic: Divorce mediation, limited scope legal services, non-resident lawyers, ghostwriting

Digest: A New York lawyer may perform divorce mediation services for New York clients from his office in another state, provided that he makes effective disclosure of the differences in his role as mediator/neutral and lawyer and explains that he is not representing either party when he serves as a mediator. Where the mediation is successful, the lawyer may thereafter represent one of the parties to prepare a settlement agreement or other papers for the client to file pro se in the divorce proceeding, provided the lawyer obtains informed written consent from the non-represented mediation party.

A New York lawyer may also, in a pending or contemplated divorce action, enter a limited scope retainer with New York clients undertaking to provide legal advice, negotiate a settlement, or prepare legal documents for filing by the client pro se with a court in New York, provided the lawyer informs the prospective client regarding the relative risks of limited representation and benefits of full-service representation. In connection with providing these legal services, the New York lawyer cannot call himself a "legal consultant" instead of a lawyer.

A New York lawyer who resides in Florida but represents New York divorce clients over the internet from his law office in Florida must comply with the physical office requirement of New York Judiciary Law § 470.

Rules: 1.2(c), 1.12(b), 2.4, 8.4(b)-(c)

FACTS

1. The inquirer is a matrimonial attorney admitted in New York and Florida. He is closing his New York office and moving to Florida. He plans to open a Florida office to provide divorce mediation services for New York clients over the internet, and to serve as what he refers to as a "legal consultant" on issues of New York divorce law. His services as a legal consultant would include negotiating divorce settlements and drafting legal papers to be filed *pro se* by New York clients in New York courts.

2. The inquirer proposes to advise any New York client that wishes to retain him as a "legal consultant" of the risks associated with not having a full-service attorney representing the client, to make clear that he would not appear on the client's behalf in court, and to disclose that he would not be maintaining a physical law office in New York.

QUESTIONS

3. The facts provided by the inquirer raise five related questions:

   a. If a mediation is successful, may the lawyer-mediator represent one of the parties in preparing a settlement agreement (or other papers) for the client to file *pro se* in the divorce proceeding?

   b. May a New York lawyer, in connection with a pending or contemplated divorce action, enter a limited scope retainer with a New York client undertaking to provide legal advice, negotiate a settlement, and/or prepare legal documents for the client to file *pro se* with a New York court?

   c. May a lawyer prepare legal papers on behalf of a *pro se* client for submission to court without disclosing his role in preparing those papers?

   d. May a New York lawyer providing limited legal services market himself as a "legal consultant" instead of a lawyer?

   e. Must a New York lawyer who resides outside New York but provides legal services to New York clients via the internet maintain a physical office in New York?

OPINION

May a lawyer who has successfully handled a divorce mediation subsequently prepare papers for one of the mediation parties to file in a New York court to obtain a judgment of divorce?

4. The inquirer plans to offer mediation services over the internet to divorcing couples. If the parties to the mediation process reach a settlement agreement, the inquirer hopes to be retained by one of the mediation parties to prepare a marital settlement agreement and the other requisite pleadings and documents to be filed in a New York court to obtain a judgment of divorce.

5. When serving as a neutral, a lawyer is governed Rule 2.4 of the New York Rules of Professional Conduct (the "Rules"). Rule 2.4(a) provides that a lawyer serves as a "third-party neutral" when the lawyer "assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." In N.Y. State 1178 (2019), we concluded that "lawyer-mediators are not engaged in the representation of a client and are not providing legal services to the parties to the mediation." As a result, while Rule 2.4 expressly applies to lawyers acting as mediators, the Rules governing the representation of clients do not. See N.Y. State 1178.

6. However, when serving as a mediator, a lawyer-mediator must make certain disclosures. Rule 2.4(b) requires a lawyer-mediator to "inform unrepresented parties that the lawyer is not representing them." Rule 2.4(b) continues: "When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." The effort should be made even where the legal issues in the matrimonial mediation are subtle or complex, or the parties are unequal in their sophistication and bargaining power. See N.Y. State 1178 ¶ 8.

7. Rule 2.4 addresses a lawyer's duties during a mediation, but not after. For a lawyer's duties after a mediation, we must examine Rule 1.12(b), which addresses specific conflicts of interest of mediators or other third-party neutrals. Rule 1.12(b)(1) says that in most circumstances, "unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as … (1) an arbitrator, mediator or other third-party neutral …." (Emphasis added.) In other words, Rule 1.12(b)(1) expressly permits a lawyer-mediator at the conclusion of the mediation to represent one of the parties to the mediation with the "informed consent" of all parties to the mediation.

8. What must the lawyer mediator disclose to obtain "informed consent" to representing one of the parties against the other after the mediation? We believe the lawyer mediator must make clear that (i) he is representing only one of the parties, and (ii) the unrepresented spouse should consult independent counsel. Thus, if the lawyer mediator makes such disclosure and obtains consent from all parties to the mediation, the lawyer mediator may draft a post-mediation settlement agreement or other legal document relevant to the divorce proceeding for only one of the parties. In so doing, as the lawyer has clearly crossed the line from providing mediation services to providing legal services, he becomes subject to the full panoply of legal and ethical rules applicable to the provision of those legal services. See N.Y. State 1178 (2019), citing N.Y. State 1026 (2014) (concluding that a lawyer performs legal services when the lawyer drafts and files divorce papers on behalf of the parties).

May a lawyer enter into a limited scope retainer agreement regarding a pending or potential New York divorce proceeding which provides that the lawyer is being retained to perform discrete out-of-court legal tasks?

9. Separate and apart from his mediation practice, the inquirer also proposes to perform a host of legal services for New York divorce clients pursuant to

a limited scope retainer. The scope of his representation would be limited to providing legal advice, negotiating divorce settlements, and drafting legal papers pertinent to the divorce. The inquirer would not file court papers or appear in court.

10. Rule 1.2(c) expressly permits limited scope representation subject to certain conditions. It provides that a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is given to the tribunal and/or opposing counsel." See N.Y. State 856 (2011) (limited scope representations are permissible if the client gives informed consent, the scope of the representation is reasonable, and the limitation is not prejudicial to the administration of justice). Comments [6] – [8] to Rule 1.2 provide helpful guidance on limited scope representation.

11. In particular, Comment [6A] to Rule 1.2 provides that in obtaining consent from the client "the lawyer must adequately disclose the limitations on the scope of the engagement" as well as the "reasonably foreseeable consequences of the limitation." Comment [6A] also explains that such consequences could include "delay, additional expense and complications" if the lawyer or client later determines that additional services outside the limited scope specified "are necessary or advisable" to adequately represent the client. In that case, "the client may need to retain separate counsel."

12. Further, Comment [8] to Rule 1.2 provides that in a limited scope representation, as in all agreements concerning a lawyer's representation, a lawyer must act in accord with the Rules of Professional Conduct and other law. Thus, to the extent the inquirer seeks to continue to provide legal services for a fee for New York clients despite the closure of his New York office, he may only do so if he complies with "other law." We do not opine on questions of law, so we offer no opinion on which particular "other law" applies to a lawyer who has closed his New York office but continues to practice in another jurisdiction where he is licensed, but the inquirer should consider the applicability of 22 NYCRR § 118.1(g) (governing retired lawyers), which may mandate continuing his biennial attorney registration, filing the required forms, paying the required fee, and completing the mandatory continuing legal education requirements. See N.Y. State 1172 ¶ 8 (2019). If the inquirer is closing his New York office but continuing to practice in New York remotely, then he should also consider the implications of New York Judiciary Law § 470 (discussed below).

13. We believe such limited scope can be reasonable provided the client understands the risks associated with not having a full-service legal representation at every stage of the proceeding inside and outside of the courtroom, the client gives informed consent, confirmed in writing, and the inquirer complies with other applicable ethics rules and law. In fact, such limited scope representation may be the only viable alternative for clients who cannot afford more extensive representation and, for both clients and the courts, is normally preferable to no legal representation at all. See N.Y. County 742 (2010) (noting that "limited scope legal arrangements with pro se litigants can provide equal access to justice for pro se litigants who do not qualify for or are without access to free legal services but who are nonetheless unable to afford prevailing legal fees,"). Nor does a limitation on the scope of the inquirer's services appear to be prejudicial to the administration of justice, because counsel's assistance can avoid delay and needless motion practice often caused by a pro se litigant's lack of familiarity with legal and procedural issues. Id.

May a lawyer prepare legal papers on behalf of a pro se client for submission to court without disclosing his role in preparing those papers?

14. The inquirer here does not intend to appear as counsel of record on any matter in which he has provided limited scope legal services. Rather, whether preparing an uncontested application for a divorce judgment following a successful mediation or preparing papers in a contested matter, the inquirer intends the clients to submit papers to the court pro se. Must the inquirer disclose his behind-the-scenes role as a "ghostwriter" of these applications? Rule 1.2(c) addresses this issue but does not answer it, stating: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and *where necessary notice is provided to the tribunal and/or opposing counsel*." (Emphasis added.)

15. Based on the plain language of Rule 1.2(c), N.Y. County 742 (2010) concluded that disclosure of the fact that a pro se litigant's court submission was prepared by counsel is required only "where necessary," not in every case. Specifically, N.Y. County 742 said that disclosure was "necessary" where mandated by a procedural rule, a court rule, particular judge's rule, a judge's order in a particular case, or whenever the failure to disclose an attorney's assistance in ghostwriting would constitute a "misrepresentation." We relied on N.Y. County 742 in N.Y. State 856 ¶ 10 (2011) ("we think notice of the limited representation is 'necessary' under Rule 1.2(c) only if a court rule requires such notice, and we lack jurisdiction to interpret court rules"), and we still agree with N.Y. County 742 that disclosure of ghostwriting is not required unless any of those circumstances apply. To the extent we held in

N.Y. State 613 (1990) that disclosure of the identity of the lawyer to the court and the opposing party is required whenever a lawyer ghostwrites pleadings for a *pro se* party, we overrule that opinion, because it was issued before New York adopted Rule 1.2(c).

May the lawyer call himself a "legal consultant" and not a lawyer with respect to his intended limited scope of services?

16. The inquirer intends to use the term "legal consultant" in his retainers and in dealing with adverse counsel in negotiating divorce settlements. We do not approve, as the inquirer's use of the term "legal consultant" would have the potential to confuse or mislead clients or adverse counsel.

17. Although the Rules do not define the term "legal consultant," the "Rules of the Court of Appeals for the Licensing of Legal Consultants" (22 NYCRR Part 521) make clear that the term refers to a member in good standing of a recognized legal profession in a foreign country who intends to practice as a legal consultant in New York and maintain an office New York for that purpose. See 22 NYCRR § 521.1(a)(1) and (5). The inquirer does not qualify as a "legal consultant" under Part 521.

18. Apart from the problem of Part 521, the phrase "legal consultant" has no fixed meaning but seems to suggest that the person is something more than an ordinary layman but less than a lawyer. It thus seems as if the inquirer desires to use the term "legal consultant" in the hope that it will relieve him of some of the duties and obligations that are imposed upon lawyers. It does not. When the inquirer represents or advises clients or otherwise acts as a lawyer, he remains subject to all legal and ethical rules applicable to the provision of legal services. *See* N.Y. State 1178 (2019).

19. Thus, the use of the term "legal consultant" has the potential to mislead clients and others in violation of Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Must an attorney residing in Florida and practicing law in New York over the internet maintain a physical office in New York?

20. The inquiry raises a final question: may the inquirer practice law in New York via the internet if he resides in Florida and does not maintain a physical office in New York? While this Committee does not opine upon questions of law, we note that New York Judiciary Law § 470 provides that a non-resident attorney admitted in New York may practice law in New York only if that attorney maintains an office for the practice of law in New York, and this requirement has been upheld by the New York Court of Appeals and the Second Circuit Court of Appeals. *See Schoenefeld v. State of New York*, 25 N.Y. 3d 22 (2015) (holding that a New York attorney who resides outside New York must maintain a physical office in New York); *Schoenefeld v. State of New York*, 821 F.3d 273 (2d Cir. 2015) (rejecting a constitutional challenge to § 470's physical office requirement). As we noted in N.Y. State 1025 ¶ 21 (2014), a lawyer is "required to comply with applicable law," and a violation of Judiciary Law § 470 "may adversely reflect on the lawyer's honesty, trustworthiness or fitness," which would violate Rule 8.4(b). Therefore, to be entitled to practice law in New York, a non-resident member of the New York bar "must have an office that meets minimum requirements of Judiciary Law § 470 …." N.Y. State 1025 ¶ 22. But as in Opinion 1025, since this Committee does not decide issues of law, we offer no opinion as to what type of "physical office" Judiciary Law § 470 requires.

CONCLUSION

21. A New York lawyer may perform divorce mediation services for New York clients from his office in another state, provided that he makes effective disclosure of the differences in his role as mediator/neutral and lawyer and explains that he is not representing either party when he serves as a mediator. Where the mediation is successful, the lawyer may thereafter represent one of the parties to prepare a settlement agreement or other papers for the client to file *pro se* in the divorce proceeding, provided the lawyer obtains informed written consent from the non-represented mediation party.

22. A New York lawyer may also, in a pending or contemplated divorce action, enter a limited scope retainer with New York clients undertaking to provide legal advice, negotiate a settlement, or prepare legal documents for filing by the client *pro se* with a court in New York, provided the lawyer informs the prospective client regarding the relative risks of limited representation and benefits of full-service representation. In connection with providing these legal services, the New York lawyer cannot call himself a "legal consultant" instead of a lawyer.

23. A New York lawyer who resides in Florida but represents New York divorce clients over the internet from his law office in Florida must comply with the physical office requirement of New York Judiciary Law § 470.

(15-21)

Opinion 1237 (02/01/2022)

Topic: Conflict of interest and referral fees; serving as lawyer on a real estate transaction referred by real estate broker associated with lawyer's real estate agency

Digest: A lawyer may not accept the referral of real estate closings from a real estate agent who is associated with a real estate company owned by the lawyer where the real estate agent and the real estate company will split the brokerage commission earned on the real estate transaction, regardless of whether the attorney agrees to waive in favor of the real estate clients the portion of the real estate commission due to his real estate agency.

Rules: 1.7(a)(2); 1.7(b); 7.2(a)

FACTS

1. The inquirer, an attorney and real estate broker, is an owner and principal of a real estate company, separate from his law practice, that offers real estate brokerage services. At this time, the only other brokers associated with the real estate company are his mother and a friend. Historically, the real estate company has performed real estate brokerage services primarily for family and friends. The attorney has not performed legal services on matters for which he has earned a brokerage commission. Where the attorney has performed legal services in relation to a sale on which he was also a broker, he has waived any brokerage commission in favor of the client.

2. Another real estate agent is considering leaving that agent's current real estate brokerage agency to join the attorney's real estate company. This real estate agent is more active than the brokers currently associated with the lawyer's real estate company. The real estate agent and the real estate company will split the commissions earned as a result of brokering real estate transactions in accordance with a preagreed percentage breakdown.

3. At his current agency, the real estate agent refers some of his real estate clients to the attorney, by including the attorney's name alongside the names of other attorneys. After associating with the attorney's brokerage firm, the real estate agent would like to continue referring potential clients to the attorney to perform legal services.

QUESTIONS

4. May a lawyer accept the referral of real estate closings from a real estate agent who is associated with a real estate company owned by the lawyer where the real estate agent and the real estate company owned by the attorney will split the brokerage commissions earned on the real estate transaction?

5. If not, may the lawyer accept the referral if his real estate company were to waive in favor of the real estate clients the portion of the real estate commission due to his real estate company, while allowing the associated real estate broker to keep his agreed share of such commissions?

OPINION

6. The general provisions addressing conflicts of interest relating to current clients are set forth in Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). A lawyer with a conflict of interest as defined by Rule 1.7(a) may not represent a client unless the conflict is both waivable and properly waived by the client under Rule 1.7(b).

7. Rule 1.7(a)(2) defines a "personal interest" conflict as arising when 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."

8. Our opinions have consistently concluded that a conflict arises when a lawyer acts as a lawyer and a broker in the same real estate transaction. They have also concluded that such conflicts are per se non-waivable. N.Y. State 1043 (2015) ("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"); N.Y. State 1177 (2017) ("A lawyer who receives a broker's commission in a real estate transaction may not also serve as the lawyer for the buyers [without charging for the service], even if the buyers are long-time clients and friends and have requested both kinds of services."). We have reasoned that, where a lawyer acts as both broker and lawyer in the same 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) . . . ." That is because "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." N.Y. State 916 (2012); see also N.Y. State 933 ¶7 (2012) ("the personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer's responsibility to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client"); N.Y. State 1015 (2014) (quoting N.Y. State 753 and citing later opinions).

9. As owner of the real estate company offering real estate brokerage services, the inquirer has a financial interest in the brokerage commissions that associated brokers generate and split with that real estate company. Our prior opinions make clear that the lawyer cannot also provide legal services with respect to real estate transactions that generate a commission for the real estate company. The arrangement would convey upon the lawyer a financial interest in the real estate transactions that would interfere with the lawyer's ability to be fully independent in giving legal advice to the clients. It would therefore constitute a per se non-waivable conflict as in our prior opinions noted above.

10. Citing N.Y. State 1208 (2020), the inquirer asks whether the same result would adhere if his real estate company were to waive in favor of the real estate clients the portion of the real estate commission due to his real estate company, while allowing the associated real estate broker to keep his agreed share of such brokerage commissions.

11. The issue in Opinion 1208 was whether an attorney could accept referrals for real estate closings from her paralegal who was also a real estate broker. Because the attorney had no financial interest in the paralegal-broker's commission, we concluded that the referrals "did not trigger the per se non-waivable conflict that was present in N.Y. State. 916 and N.Y. State 1043." Accordingly, the appropriate inquiry was whether or not, under the particular facts and circumstances, a referral by the paralegal-broker created a "significant risk that the lawyer's interest would be adversely affected by the lawyer's own financial, business, property or other personal interests." If a significant risk did not exist, then no Rule 1.7(a)(2) conflict arose. If a substantial risk did exist, then the attorney could accept the referral only upon satisfying the exceptions set forth in Rule 1.7(b), including informed written client consent.

12. In Opinion 1208, the real estate clients would owe the same amount in commission regardless of whether the inquiring attorney, or some other attorney, provided legal services in connection with the closing. By contrast, under the fact pattern described here, any clients of the real estate broker who choose to avail themselves of the inquirer's legal services in connection with a referred real estate transaction will receive a discount to the real estate commission they owe with respect to the referred real estate transaction.

13. The inquirer's proposal to waive the real estate company's portion of the commission owed by the real estate clients implicates Rule 7.2(a), relating to "Payment for Referrals." With certain exceptions not implicated here, Rule 7.2(a) provides that "[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." In exchange for the real estate broker's referrals, the inquirer proposes to provide the real estate broker with the ability to charge the clients who hire the inquirer a lower commission without a corresponding reduction in the amount the broker will earn as a commission. Because this ability to charge a lower commission constitutes "something of value" that is given in exchange for a referral, the arrangement would violate Rule 7.2(a).

14. In N.Y. State 845 part C (2010), the question was whether a broker may share part of her brokerage commission with a referring lawyer who represents a buyer or seller in the transaction if the referring lawyer obtains informed client consent and remits or credits the referral fee to the client. In considering the question, we acknowledged that "the attorney will . . . have an incentive to refer real estate clients to a broker who pays a referral fee (i.e., shares her commission)" even where the lawyer remits or credits the referral fee to the client "because the referral fee (in effect a reduced real estate broker commission) will enable the attorney to offer potential clients a reduced brokerage fee (or an equivalent cash payment or credit) for utilizing the attorney's services, thus attracting more business to the attorney." We nevertheless approved the payment of part of the brokerage commission in exchange for recommending the broker – where accompanied by informed client consent and a remittance of the commission to the client – because, "although a referral fee gives the lawyer a financial incentive to refer a client to that particular broker even if the fee is passed on to the client, clients are generally aware that they have many real estate brokers to choose from, and clients are generally capable of evaluating different brokers." ¶ 18.

15. In N.Y. State 845 part C (2010), the attorney was able to offer a reduced fee as a result of referring business to a real estate broker. By contrast, the inquirer here posits a circumstance where the attorney is enabling the real estate broker to enjoy the possibility of enhanced business prospects resulting from a reduced brokerage commission in connection with referrals to the attorney. Our opinions have indicated that the former is acceptable, at least under certain circumstances. See N.Y. State 845 part C. Rule 7.2(a) makes clear that the latter is not.

CONCLUSION

16. A lawyer may not accept the referral of real estate closings from a real estate agent who is associated with a real estate company owned by the lawyer where the real estate agent and the real estate company will split the brokerage commission earned on

the real estate transaction, regardless of whether the attorney agrees to waive in favor of the real estate clients the portion of the real estate commission due to his real estate agency.

(01-22)

Opinion 1238 (03/14/2022)

Topic: Conflict of interest; full-time attorney in county attorney's office with part-time outside practice

Digest: A full-time lawyer in a county attorney's office who represents the county in civil litigation in state and federal courts may represent private clients in family court, or accept appointments as assigned counsel to represent indigent persons in family court, provided neither the county nor any of its agencies is a party to the proceeding and either no conflict of interest exists under Rule 1.7(a) or, if there is a waivable conflict, both the county and the family court client give informed consent to the conflict, confirmed in writing, pursuant to Rule 1.7(b)(4).

Rules: 1.0(h), 1.7 (a)-(b), 1.10(a), 1.11(f)

FACTS

1. The inquirer is a permanent, full-time attorney in the county attorney's office, assigned to defend the county in civil litigation in state and federal courts. Neither the inquirer nor any other lawyer in the county attorney's office appears in family court as a member of the county attorney's office, but the county is represented in family court by counsel in the Family Law Division of the county's Department of Social Services.

2. Assignments to represent indigent clients in criminal cases and family court matters are made pursuant to the 18-B program, which is governed by a contract between the county and the county bar association. The inquirer did not draft or negotiate that contract, and inquirer plays no role in approving assigned counsel appointments or claims for compensation.

3. With the permission of the county attorney, the inquirer has embarked upon the private practice of law while retaining his position in the county attorney's office. In his private practice, the inquirer declines representation in any family court matter in which the county is a party.

QUESTION

4. May a full-time assistant county attorney represent clients in family court matters in which the county is not a party, including assigned counsel matters pursuant to the 18-B program?

OPINION

5. This committee has established and repeatedly affirmed a per se rule that prohibits a part-time prosecutor from representing a defendant in a criminal proceeding anywhere in New York state. *See e.g.*, N.Y. State 788 (2005); N.Y. State 657 (1993); N.Y. State 184 (1971); N.Y. State 171 (1970).

6. In N.Y. State 800 (2006), however, when faced with a part-time prosecutor who proposed to represent indigent persons in family court proceedings in an adjacent county, we declined to extend the per se prohibition. Instead, we identified three types of family court proceedings in which the part-time prosecutor would be barred from representation: (a) matters in which the prosecutor was then working or had previously worked with the law enforcement officials involved, (b) juvenile delinquency proceedings and (c) cases involving Persons in Need of Supervision (PINS). Id. ¶ 5.

7. Outside these strictures, we opined that whether the part-time prosecutor could accept a family court assignment depended "on all the relevant facts and circumstances." *Id*. ¶ 4. We said:

> The attorney must avoid all conflicts of interest, ensuring that neither the attorney's own interests, nor the attorney's simultaneous work as a prosecutor preclude the attorney from exercising independent judgment on behalf of his or her clients. In many cases, a conflict might not be apparent at the outset of the case. For this reason, the attorney must be careful to avoid cases where a conflict is likely to occur. N.Y. State 800 ¶ 4 (footnotes omitted).

8. In N.Y. State 1074 (2015) we applied the same facts-and-circumstances test to a part-time Department of Social Services attorney who wanted to accept assignments to represent indigent persons in criminal and family court matters, noting that the attorney had made a "well advised" decision not to accept child abuse and neglect cases from the assigned counsel program, two additional types of family court proceedings which we deemed "off limits" under the rationale of N.Y. State 800. Id. ¶ 6. In importing the part-time prosecutor facts-and-circumstances test to the Department of Social Services attorney we concluded:

> We cannot say that the Rules invariably forbid a lawyer to accept the representation of an indigent defendant in a traffic violation merely by virtue of the lawyer's role as a part-time lawyer handling Medicaid, paternity, or child support issues for the Department of Social Services. Likewise, we cannot say that the Rules in-

variably forbid a lawyer to accept a representation in a family court proceeding between, say, two private individuals in which the Department of Social Services has no involvement. N.Y. State 1074 ¶5.

9. Here, a full-time assistant county attorney wants to represent clients in family court proceedings to which the county is not a party, including assigned counsel 18-B matters. Neither he nor any other attorney in the county attorney's office represents the county in juvenile delinquency, PINS, or child abuse or neglect cases. In our view, provided that law enforcement officers with whom the attorney is working or with whom he has previously worked as assistant county are not involved in the family court proceeding, there is no basis in the Rules or in our prior opinions that would give rise to a per se prohibition. As in N.Y. State 800 and N.Y. State 1074, the ethical propriety of each intended family court representation would be governed by the same facts-and-circumstances test.

10. Our conclusion is consistent with our most recent opinion in this area, N.Y. State 1219 ¶ 7 (2021), where we opined that the inquirer, a part-time assistant county attorney, was not subject to a "per se bar" on representing convicted defendants in state parole violation hearings where "(1) the inquirer's practice as a part-time county attorney is entirely civil, as is all of the work of the county attorney's office; (2) the inquirer would not appear before any county judges or officials in the contemplated parole work; and (3) a violation or construction of county law is not typically at issue in parole violation hearings or appeals." Rather, we noted "[t]here may be . . . particular cases in which the inquirer would have a conflict. For example, if the conduct of County employees is involved in the parole violation, or the parole violation defendant is a party to a civil case brought by the County Attorney's Office, the inquirer might have a conflict." *Id*. ¶ 8 (citing N.Y. State 1074 ¶ 8 (2015) and N.Y. State 800 ¶¶ 5-6 (2006)).

11. In applying the facts-and-circumstances test here, two important factors regarding the inquirer's practice are the full-time character of the inquirer's public practice, and the particular sensitivity of family law matters. Especially in this context, the inquirer's family court representation could give rise to situations where a reasonable lawyer would conclude there is a significant risk that the attorney's professional judgment would be adversely affected by his personal interests, including his status in the county attorney's office, under Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules"). Specifically, Rule 1.7 (a)(2) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
>
> (1) ***; or
>
> (2) 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.

12. For example, county policies that concern child protective services, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, foster care, or other county policies and procedures affecting children and families may be implicated in a family court case. *See* N.Y. State 800. An assistant county attorney representing a private or an assigned counsel client in such a case may feel constrained in advancing the most advantageous or persuasive legal arguments, or in pursuing the most promising factual inquiries, if those actions might embarrass county officials or conflict with county policy and risk antagonizing the county attorney.

13. If the inquirer determines that a conflict of interest exists in a particular matter under Rule 1.7(a)(2), the lawyer's representation may nonetheless be permitted under Rule 1.7(b) which provides:

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

14. We have previously opined that government may waive a conflict pursuant to Rule 1.7(b), provided the conflict is waivable under the Rules and "(i) the lawyer was reasonably certain both that the entity was legally authorized to waive the conflict of interest and that all legal prerequisites to the consent had been satisfied and (ii) the lawyer reasonably believed that the process by which the consent was

granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." N.Y. State 1130 ¶15 (2017).

15. Even if there is no conflict or if there is a waivable conflict and informed consent to the representation is properly sought and secured from both the county and the Family Court client, three caveats are in order.

16. First, this committee's jurisdiction is limited to the Rules and we do not opine on questions of law. Therefore, the inquirer should be mindful that, independent of any ethical concerns, his proposed conduct may violate a statute, local law, or municipal ethics code concerning outside private employment by an assistant county attorney.

17. Second, Rule 1.11(f)(2) cautions that a lawyer who holds public office shall not "use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client." *See also* N.Y. State 1065 ¶ 11 (2015) ("even assuming there is no conflict under Rule 1.7(a), the inquirer is prohibited from using any influence he may have as a public official to influence or attempt to influence, any tribunal to act in favor of the [inquirer's] proposed client.").

18. Third, our conclusion might be different if the attorneys in the Family Law Division of the Department of Social Services were considered to be part of the same "law firm" as the county attorney's office. See Rule 1.0(h) (definition of "firm" and "law firm" includes a "government law office." That is because our analysis relies heavily on the fact that the county attorney's office, and the inquirer, are engaged exclusively in civil practice and the attorneys in the Family Law Division represent the Department of Social Services in all family court matters.

19. We have opined that the defense function in juvenile delinquency proceedings "although not categorized as 'criminal' is indistinguishable from defense in an adult criminal proceeding" and that "PINS proceedings are functionally indistinguishable from juvenile delinquency proceedings" (N.Y. State 800 ¶¶ 7, 8). Citing N.Y. State 657 (1993) and N.Y. State 788 (2009), we have also opined:

> The role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the D.A.'s office in criminal prosecutions. In both, the attorney represents the interests of the state in matters with grave consequences (incarceration in one, custody and parentage in the other). Like the D.A. in criminal prosecutions, the Social Services prosecutor has a special role that is "inherently incompatible" with the role of defense counsel. N.Y. State 859 ¶ 13 (2011).

20. Accordingly, following the broadening of the per se rule that prohibits a part-time prosecutor from representing a defendant in a criminal proceeding anywhere in New York State to include Department of Social Service and assistant county attorneys who prosecute these quasi-criminal matters in family court, if the attorneys in the Family Law Division here prosecute juvenile delinquency, PINS or child abuse and neglect proceedings, which appears likely, its lawyers would not be permitted to accept private clients or 18-B counsel assignments to defend such matters in the family court. That per se prohibition would apply to the inquirer if the two offices are, in effect, the same law firm for imputation purposes under Rules 1.10(a) which provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 . . . except as otherwise provided therein."

21. Whether the lawyers in the county attorney's office and the Family Law Division of the Department of Social Services are in the same "firm" as defined by Rule 1.0(h) is a "fact-intensive inquiry" that focuses, among other things, on (1) whether the county attorney's office, on the one hand, and the Family Law Division or the Department of Social Services, on the other hand, present themselves to the public in a way that suggests they are a single firm; (2) whether the lawyers in each office have mutual access to the same information concerning the clients that they each serve; and (3) whether the lawyers in each office are independent from the direction and control of supervising attorneys in the other office. *See* N.Y. State 1219 ¶ 9 (2021); N.Y. State 1210 ¶¶ 6-8 (2020).

CONCLUSION

22. A full-time lawyer in a county attorney's office who represents the county in civil litigation in state and federal courts may represent private clients in family court, or accept appointments as assigned counsel to represent indigent persons in family court, provided neither the county nor any of its agencies is a party to the proceeding and either no conflict of interest exists under Rule 1.7(a) or, if there is a waivable conflict, both the county and the family court client give informed consent to the conflict, confirmed in writing, pursuant to Rule 1.7(b)(4).

(32-21)

Opinion 1239 (03/22/2022)

Topic: An attorney's ethical obligation when a court orders forensic analysis of hard drive containing client confidential information

Digest: An attorney in receipt of a court order directing production of his hard drive containing the confidential information of clients who have not waived privilege or consented to disclosure, has the obligation to advise non-waiving clients of the existence of the court order. Absent the clients' informed consent to waiver of the attorney-client privilege and consent to disclosure, an attorney must consult with the non-waiving clients about the reasonable steps necessary to avoid or limit production of confidential information and undertake those steps before complying with the court order.

Rules: 1.0(j), 1.4 (a)(1), 1.4(a)(3), 1.6(a), 1.6(b)(6)

FACTS

1. The inquirer is an attorney who provided transactional services to a client who is now in litigation over the transaction. The attorney has received a trial court order directing him to turn over for a forensic analysis a hard drive in a computer that contains data of the client (who has waived the attorney-client privilege) but also contains the data of non-party clients who have not waived the attorney-client privilege or consented to the disclosure of their confidential information.

QUESTIONS

2. When confronted with a discovery order requiring production of data stored on a lawyer's hard drive, what steps must the lawyer take to protect the confidential information of other clients stored on that hard drive who are not parties to the litigation and who have not waived the attorney-client privilege or consented to the disclosure of the client's confidential information?

OPINION

3. Rule 1.6(a) of the Rules of Professional Conduct (the "Rules") provides "A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless the client gives informed consent, as defined in Rule 1.0(j). . ." As noted in Comment [2] to Rule 1.6, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source."

4. An exception to this Rule may be found in Rule 1.6(b)(6) providing a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary…when permitted or required under these Rules or to comply with other law or court order." Although nothing in Rule 1.6(b) mandates disclosure by the attorney, *per se*, other law may require that a lawyer disclose confidential information. Whether such other law supersedes the protections of Rule 1.6 is generally a question of law beyond the scope of this committee. When it appears that disclosure is required by law or court order – as here, for example, as a result of a trial court discovery ruling – the lawyer must consult with the client before making the disclosure. If the lawyer concludes that Rule 1.6 is superseded, Rule 1.6(b)(6) provides a safe harbor allowing the lawyer to make the disclosure as necessary to comply with the law or court order. *See* Comment [12] to Rule 1.6.

5. We have addressed the lawyer's duty of reasonable care to avoid the disclosure of a client's confidential information in a number of different contexts. *See, e.g.*, N.Y. State 1020 (2014) (cloud storage); N.Y. State 940 (2012) (off-site backup tapes); N.Y. State 939 (2012) (office sharing); N.Y. State. 842 (2010) (online data storage). What is reasonable in the specific context of an already issued court order directing the production of confidential information has been addressed in the Comments to Rule 1.6:

> A tribunal or government entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by applicable privilege or other law, or the law is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b) (6) permits the lawyer to comply with the order. Comment [13] to Rule 1.6.

6. To be sure, the facts before us are complicated by the client's waiver of the client-lawyer privilege and consent to the disclosure of confidential information as it pertains to that client's communications. That waiver, however, does not impact the lawyer's obligation to take reasonable steps to safeguard the

duty of confidentiality owed to the non-party clients whose interests were not represented when the court issued its order or to notify the non-party clients of the existence of the court order.

7. The involvement of the confidential information of non-waiving clients imposes upon the lawyer an obligation to notify the affected clients of what has occurred. In the event of an adverse ruling on the disclosure of confidential communication—as is the case here—Comment [13] to Rule 1.6 requires the attorney to "consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge…." Given the general communication obligations under Rule 1.4, the attorney must notify the affected clients of the extent to which their confidential information may be subject to unauthorized review. In addition to requiring an attorney to keep the client reasonably informed about the status of the matter (*see* Rule 1.4(a)(3)), Rule 1.4 also requires an attorney to promptly inform the client of any circumstance with respect to which the client's informed consent is required and any material developments in the matter. *See* Rule 1.4(a)(1)(i) and (iii).

8. In N.Y. City 2017-5, the New York City Bar Association applied Rule 1.4 to explain an attorney's obligation to advise a client when an electronic device containing confidential information is reviewed or seized upon a border crossing. Comparing the unauthorized access (even if sanctioned by law) to an attorney's obligation to divulge the loss of a client's file (N.Y. City 2015-6) and the obligation to advise a client of a significant error or omission by the attorney in the rendition of legal services (N.Y. State 1992 (2016)), that committee held:

> Disclosure will provide the client an opportunity to determine whether to file a legal challenge, assuming one is available, or to undertake any other available responses.

9. The facts present by the inquiring attorney are not materially different. The non-waiving clients must be consulted about the reasonable efforts the attorney will undertake to preserve the confidentiality of their confidential information stored on the lawyer's hard drive.

10. If a non-waiving non-party client is provided sufficient information so as to meet the Rule 1.0(j) definition of informed consent, then that client may waive the intrusion upon his or her confidential information. If not, the attorney must take reasonable steps to preserve the non-waiving non-party clients' confidential information. Depending upon the facts presented, the legitimate interests of the waiving party client and the counterparty in the litigation may be satisfied by less intrusive means than mirroring the entire hard drive containing the confidential information of the non-waiving non-party clients.

11. Reasonable steps that the inquirer may take in furtherance of his mandatory obligation to minimize or eliminate any impact on non-party non-waiving clients' confidential information include (a) seeking to establish agreed search terms or other protocols that a mutually acceptable ESI vendor could implement; (b) in the event the waiving client's electronic file has been stored in a fashion that allows for segregated duplication, securing an agreement to produce only that portion of the file that concerns the waiving client; (c) negotiating a confidentiality order limiting production for "attorney eyes only"; (d) seeking the appointment of a special master to review the privilege issues; (e) seeking *in camera* review of the confidential information by the court (*see* N.Y. State 1057 (2015)); (f) in the absence of agreement, moving to reargue the motion leading to the court's decision outlining less intrusive means by which the legitimate goals of the litigation may be advanced; (g) in the absence of a court order revisiting the terms of the order, moving to stay enforcement pending appeal; and (h) appealing.

12. In N.Y. State 1198 (2020), this committee addressed the obligations of a former government attorney receiving a subpoena or court order and reached essentially the same conclusions we reach here regarding consultation with the client, reasonable efforts, and the safe harbor of Rule 1.6(b)(6). Reviewing a prior American Bar Association opinion, we stated:

> In 2016, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 473, which detailed a lawyer's obligation upon receiving a subpoena relating to the lawyer's representation of a client. The ABA Committee opined that "a lawyer must obey a court order, subject to any right to move the court to withdraw or modify the order or to appeal the order. But a lawyer facing a court order requiring the disclosure of client confidential information still is faced with complex, critical and fact-intensive questions on how to respond – e.g., what challenges should be considered, what specific information should be disclosed, and what protective measures should be sought. In making these judgments the lawyer must balance obligations inherent in the lawyer's dual role as an advocate for the client and an officer of the court." Initially, if the client is

available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other demand on any reasonable ground. ABA Formal Opinion 473 (2016). We agree. N.Y. State 1198 ¶12.

13. Accordingly, pursuant to the safe harbor provision of Rule 1.6(b)(6), after consulting with the non-waiving non-party clients and taking reasonable, albeit unsuccessful, steps to protect their confidential information, the inquirer here is not ethically required to be held in contempt of court to protect confidential information stored on his hard drive and may comply with the court directing the production of his hard drive for forensic analysis.

14. Although N.Y. State 528 (1981) suggested that where the order is "subject to a good faith challenge, the lawyer should be free to postpone" compliance with the court order directing production of confidential information "pending timely exhaustion of available further review," we believe the better course would be to seek a stay of enforcement from the trial or appellate court. We also observe that the expense associated with opposing disclosure of the non-waiving non-party client's confidential information in these circumstances appears to fall on the attorney. As Comment [8a] to Rule 1.16 states "... lawyers are ordinarily better suited than clients to foresee and provide for the burdens of representation."

CONCLUSION

15. An attorney has the obligation to advise non-waiving clients of a court order directing duplication and production of their confidential information. Absent the clients' informed consent to waiver of the attorney-client privilege and consent to disclosure, an attorney must consult with the clients about the reasonable steps necessary to avoid or limit production of confidential information and undertake those steps before complying with the court order.

(31-21)

Opinion 1240 (04/08/2022)

Topic: Duty to protect client information stored on a lawyer's smartphone.

Digest: If "contacts" on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent.

Rules: 1.6

FACTS

1. When the inquiring lawyer downloads or accesses an app on his smartphone, the lawyer is sometimes asked whether the lawyer gives consent for that app to access the lawyer's "contacts" on the smartphone. The lawyer's contacts include clients in criminal representations.

QUESTION

2. May a lawyer consent for an app to access contacts on the lawyer's smartphone that include the lawyer's current, former or prospective clients?

OPINION

3. Rule 1.6(c) of the New York Rules of Professional Conduct (the "Rules") requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to" the confidential information of current, former and prospective clients. Rule 1.6(a), in turn, provides that confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

4. Rule 1.6(c) has been interpreted to require a lawyer to take reasonable care to protect clients' confidential information when carrying electronic devices containing such information across the border (see N.Y. City 2017-5 (2017)), when using an online storage provider to store clients' confidential information (see N.Y. State 842 (2010)), and when sending emails containing confidential information (see N.Y. State 709 (1998)).

5. In N.Y. State 820 (2008), we applied this general principle to a lawyer's use of an e-mail service provider that scans e-mails for keywords and sends or displays targeted computer-generated advertise-

ments to the lawyer using the service based on the words in the e-mail communications. We concluded that using such a service is permissible if "[u]nder the particular e-mail provider's published privacy policies, no individuals other than e-mail senders and recipients read the e-mail messages, are otherwise privy to their content or receive targeted advertisements from the service provider." We reasoned: "Merely scanning the content of e-mails by computer to generate computer advertising . . . does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the emails' content." In contrast, we stated it would not be permissible to use the service "if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order)." Accordingly, we opined that a "lawyer must exercise due care in selecting an e-mail service provider to ensure that its policies and stated practices protect client confidentiality" in conformance with these governing principles.

6. In N.Y. State 1088 (2016), we addressed whether an attorney could disclose to a potential client the names of actual clients the attorney had represented in the same practice area. To answer that inquiry, we needed to determine, as a threshold matter, whether and under what circumstances the names of current or past clients could be "confidential information," as defined in Rule 1.6(a). We stated, first, that clients' names will be confidential information if the clients have requested keeping their names confidential. *See* N.Y. State 1088 ¶ 6 (2016). We then opined:

> If the client has not requested that the lawyer keep the client's name confidential, then the lawyer must determine whether the fact of representation is generally known and, if not, whether disclosing the identity of the client and the fact of representation is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation. N.Y. State 1088 ¶ 7.

7. We discussed in Opinion 1088 what it meant to be "generally known" within the meaning of Rule 1.6(a) (¶ 8) and stated, "The client is more likely to find that disclosure of the fact of a current or prior representation by a lawyer is embarrassing or detrimental where the representation involves or involved criminal law, bankruptcy, debt collection or family law." *Id.* ¶ 9. Finally, we noted there might be other factors, other than the subject matter of the representation, that are relevant to determine whether the client would object to being identified as the lawyer's client. *Id.* ¶ 10.

8. Contacts stored on a smartphone typically include one or more email addresses, work or residence addresses, and phone numbers (collectively sometimes called "directory information"), but contacts often also include additional non-directory information (such as birth date or the lawyer's relationship to the contact). Social media apps may seek access to this information to solicit more users to the platform or to establish links between users and enhance the user experience. Apps which sell products or services may seek such access to promote additional sales. Apps that espouse political or social beliefs may seek such access to disseminate their views. These are but three examples of how an attorney's contacts might be exploited by an app, but there are more, and likely many more to come.

7. Insofar as clients' names constitute confidential information, a lawyer must make reasonable efforts to prevent the unauthorized access of others to those names, whether stored as a paper copy in a filing cabinet, on a smartphone, or in any other electronic or paper form. To that end, before an attorney grants access to the attorney's contacts, the attorney must determine whether any contact—even one—is confidential within the meaning of Rule 1.6(a). A contact could be confidential because it reflects the existence of a client-attorney relationship which the client requested not be disclosed or which, based upon particular facts and circumstances, would be likely to be embarrassing or detrimental to the client if disclosed. N.Y. State 1088 (2016).

8. Some relevant factors a lawyer should consider in determining whether any contacts are confidential are: (i) whether the contact information identifies the smartphone owner as an attorney, or more specifically identifies the attorney's area of practice (such as criminal law, bankruptcy law, debt collection law, or family law); (ii) whether people included in the contacts are identified as clients, as friends, as something else, or as nothing at all; and (iii) whether the contact information also includes email addresses, residence addresses, telephone numbers, names of family members or business associates, financial data, or other personal or non-public information that is not generally known.

9. If a lawyer determines that the contacts stored on his smartphone include the confidential information of any current or former client, the lawyer must not consent to give access to his contacts to an app, unless the attorney, after reasonable due diligence, including a review of the app's policies and stated practices to protect user information and user privacy, concludes that such confidential contact information will be handled in such a manner and for

such limited purposes that it will not, absent the client's consent, be disclosed to additional third party persons,systems or entities. *See* N.Y. State 820 (2008).

CONCLUSION

10. If "contacts" on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent.

(34-21)

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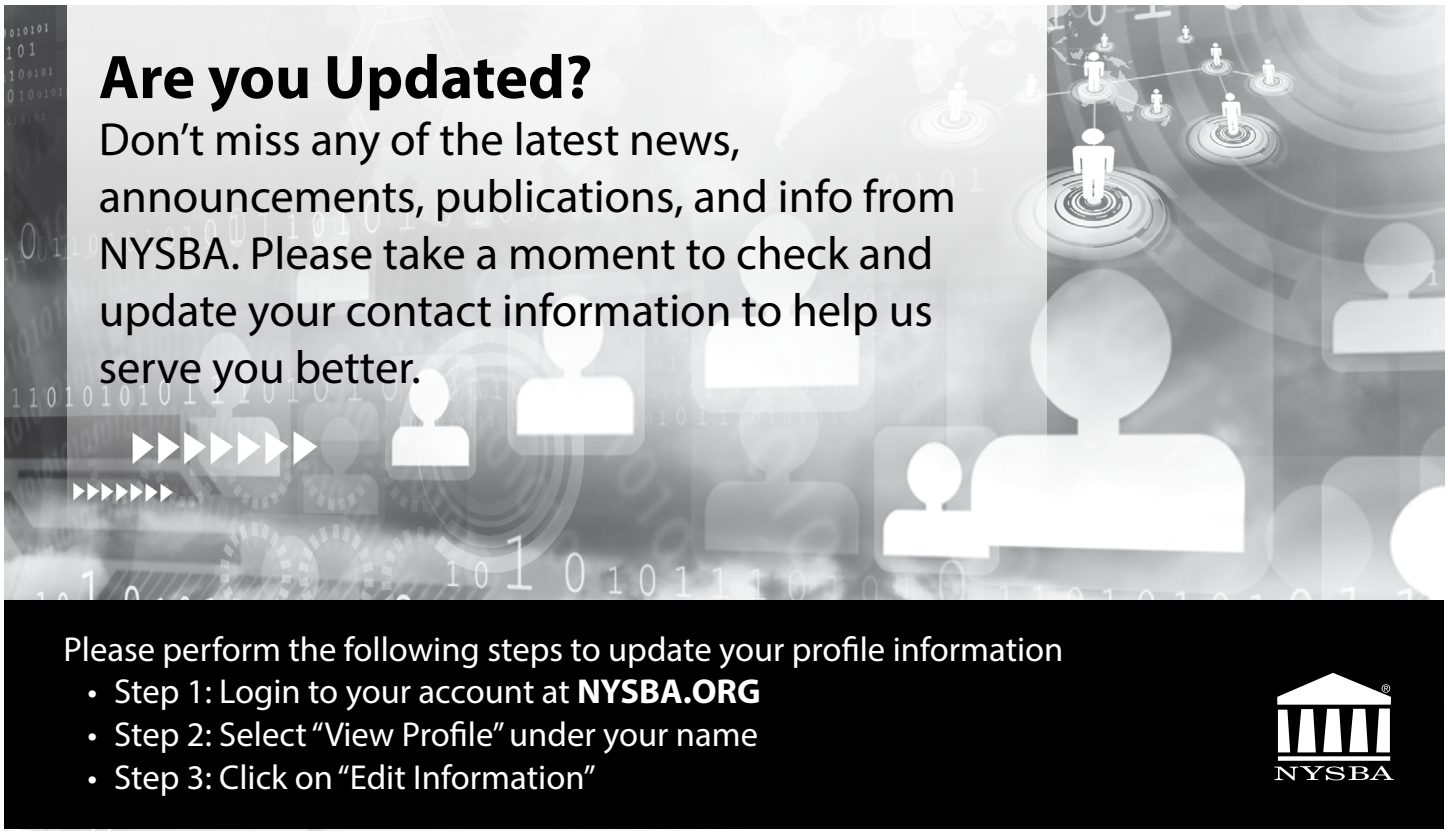

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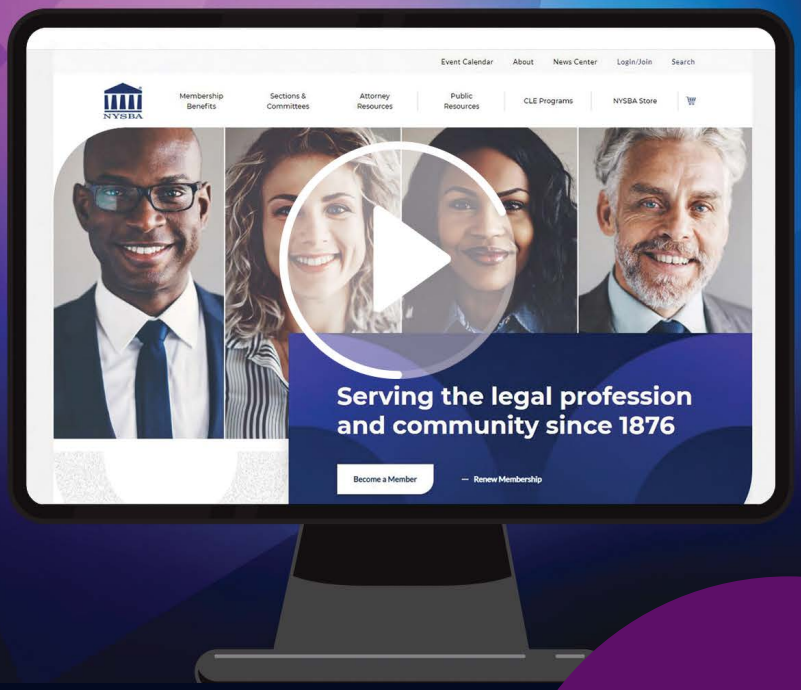

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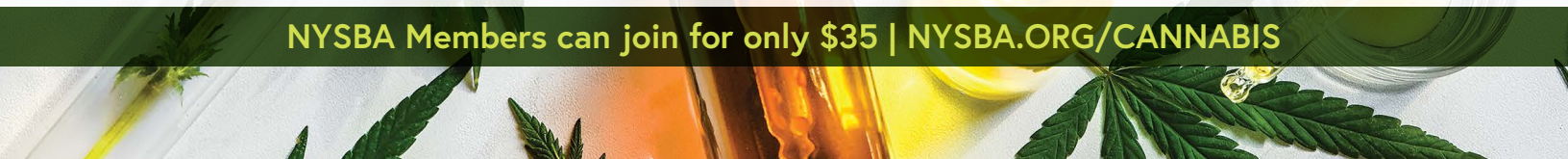

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