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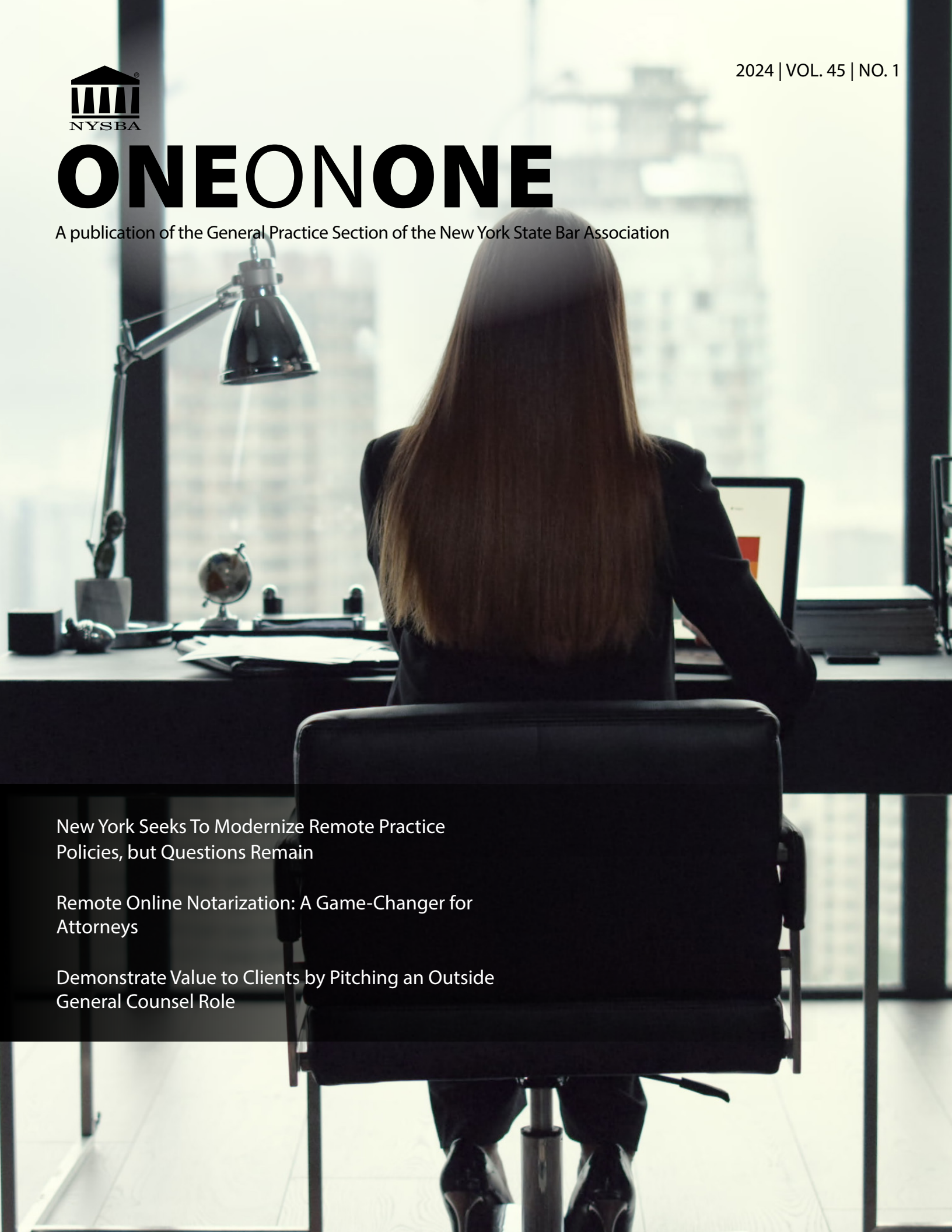
NYSBA

# ONEONONE

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



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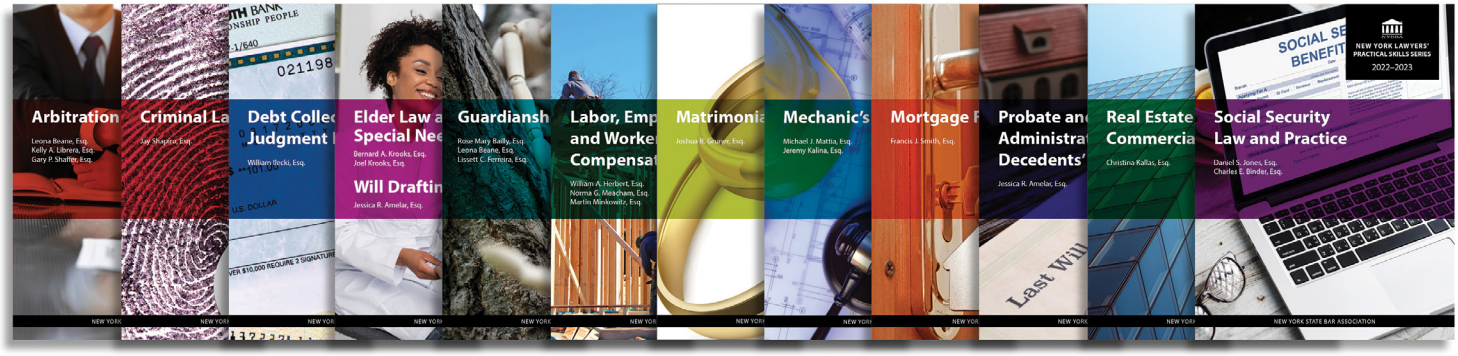


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# ONEONONE

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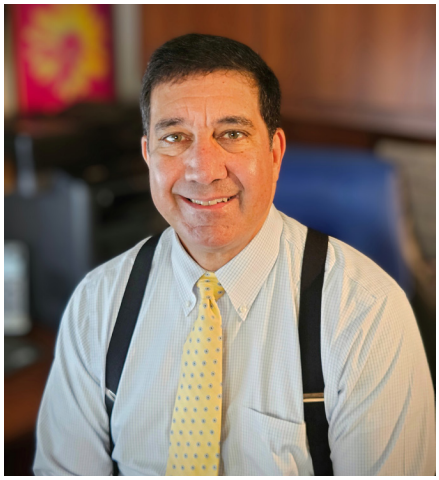
# Message From the Chair

"A jack of all trades is a master of none, but oftentimes better than a master of one." William Shakespeare should have been a member of NYSBA's General Practice Section.

A general practice lawyer, often referred to as a "generalist," offers legal services across a wide range of areas rather than specializing in one particular field. This role comes with a unique set of benefits and detriments, making it a distinctive and multifaceted career path within the legal profession.



Michael A. Markowitz

## Benefits of Being a General Practice Lawyer

**1. Diverse Casework:** One of the primary benefits of being a general practice lawyer is the diversity of cases. Generalists manage everything from family law and estate planning to criminal defense and corporate law. This variety can keep the work interesting and stimulating, preventing the monotony that might accompany specialization.

**2. Broad Skill Development:** Working across different legal areas allows general practice lawyers to develop a broad skill set. They become adept at various legal procedures, court appearances, and client interactions. This comprehensive expertise can be particularly advantageous in smaller communities where clients may need assistance with multiple legal issues.

**3. Flexibility and Adaptability:** General practice lawyers often have the flexibility to adapt to changing market demands. If one area of law becomes saturated or less lucrative, they can pivot to another. This adaptability ensures a steady stream of work and can protect against economic downturns in specific legal sectors.

**4. Client Relationships:** General practice lawyers often build strong, long-term relationships with clients. Serving as a one-stop shop for various legal needs, they become trusted advisors. This can lead to a loyal client base and consistent referrals, enhancing job stability and satisfaction.

**5. Community Impact:** Especially in smaller towns or rural areas, general practice lawyers can play a significant role in the community. By providing a wide range of services, they help address the community's diverse legal needs, often becoming pillars of the local legal landscape.

## Detriments of Being a General Practice Lawyer

**1. Jack of All Trades, Master of None:** A common criticism of general practice is that lawyers may spread themselves too thin, becoming proficient in many areas but not excelling in any one field. This can be a disadvantage when competing against specialized lawyers who have deep expertise in a particular field.

**2. Constant Learning Curve:** Staying current with the law in multiple areas requires continuous learning and adaptation. This can be both time-consuming and mentally exhausting. The constant need to update knowledge across various legal landscapes can lead to burnout.

**3. Limited Resources:** General practice lawyers, particularly those in solo or small firms, may lack the resources that specialized firms have. This includes access to specific legal databases, expert witnesses, and extensive research materials, potentially putting them at a disadvantage in complex cases.

**4. Variable Workload:** The workload of a general practice lawyer can be highly variable and unpredictable. Some areas of law may see seasonal fluctuations, leading to periods of high stress followed by lulls. Managing this inconsistency can be challenging, both financially and professionally.

**5. Perception and Credibility:** Clients may sometimes perceive general practice lawyers as less credible compared to specialists. This perception can affect their willingness to hire a generalist for complex or high-stakes legal matters, impacting the lawyer's ability to attract high-profile cases.

Our job as the General Practice Section is to accentuate the benefits while easing the detriments from our chosen field of practice. We now have a Guidance and Mentorship Program, helping a generalist speak with an expert concerning unknown areas of law. Topics involve Criminal, Real Property, Bankruptcy, and Wills, Trusts and Estates law. Participants include lawyers (young and old), judges, and mediators from Florida, Washington D.C., Europe, and of course, New York.

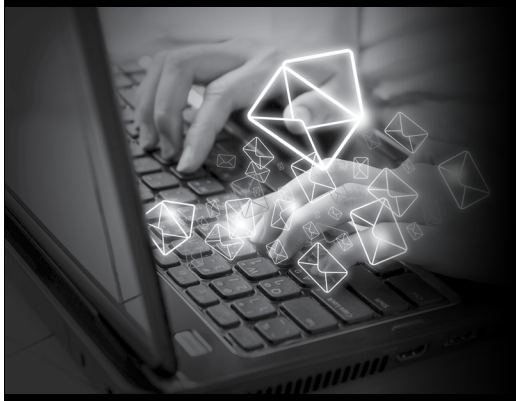
The program is not recorded to encourage questions and open dialogue.

The General Practice section is committed to providing help for the solo or small firm attorney to navigate an increasingly complex legal system. Our section presented speakers on topics such as tax reporting for transactional sales, criminal law disclosure requirements, and the use of artificial intelligence (AI) to prepare discovery demands and answers. I drafted this article with the help of AI.

Our section understands that being a general practice lawyer provides a dynamic and diverse work environment, fostering broad skill development and strong client relationships. If you have not already, I urge you to join NYSBA's General Practice Section. We understand and will help you with your wide range of legal needs.

**Michael A. Markowitz**

NEW YORK STATE BAR ASSOCIATION



If you have written an article you would like considered for publication, or have an idea for one, please contact

*Randall Tesser, Co-Editor*

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Articles should be submitted in electronic document format (PDFs are NOT acceptable), along with biographical information.

**REQUEST FOR ARTICLES**

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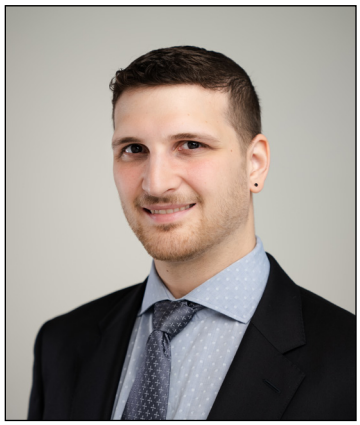
# Message From the Co-Editors

**Marty Minkowitz**



**Randall Tesser**

As summer has come into full swing, we reflected on what summer means for the practice of our valued General Practice Section members. For some, it means vacation or a decreased caseload. Even for the ever-busy practitioner, the sunshine can be a reminder to take a walk outside for a mental refresh.

With this in mind, we, the co-editors of *One on One,* selected articles that cover not only field-specific subjects of interest, but also a survey of helpful practice management topics to promote ethical and profitable legal businesses.

- "If You Want a Guarantee, Buy a Toaster": *One on One* veteran Richard A. Klass examines a case regarding the enforcement and applicability of a "Good Guy Guaranty" in a commercial leasing contract.
- "Demonstrate Value to Clients by Pitching an Outside General Counsel Role": Alex Herd provides a timely reminder that attracting new clients requires not only the skill to provide value, but also the ability to demonstrate the benefits of your representation during the consultation process.
- "New York Seeks To Modernize Remote Practice Policies, but Questions Remain": Co-Editor of *One on One* Randall Tesser reviews both enacted and contemplated policy changes in New York's regulation of attorneys and identifies gaps in the new regulatory regime.
- "Minding Your Own Business: Creating a Strong Attorney Client Relationship Through Effective Engagement Agreements": Sheila Tendy demonstrates that using engagement agreements is not just an ethical responsibility, it provides an effective tool for managing your representation and setting expectations.
- "Remote Online Notarization: A Game-Changer for Attorneys": Marcy Tiberio explores the benefits of remote online notarization, the administrative challenges it poses, and how to overcome them.
- "Filling the Void: Tracking Industry Solutions to AI Regulatory Challenges."
- "How to Comply with the New Corporate and LLC Transparency Acts."
- "You Must Read This—But You Won't Like Everything it Says!"
- "CPLR Amendments: 2023-2024 Legislative Session; 2023-24 Amendments to the Uniform Rules for Supreme and County Corts, Rules Governing Appeals and Certain Other Rules of Interest to Civil Litigators."

## Article Submission

The General Practice Section encourages its members to engage in committees and to share their expertise with others. One of the best ways to do so is 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 Randall Tesser at rtesser@tesserryan.com (212-754-9000) 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 rtesser@tesserryan.com.

**Martin Minkowitz**

**Randall Tesser**

***Co-Editors***

# New York Seeks To Modernize Remote Practice Policies, but Questions Remain

By Randall Tesser

Technology, the pandemic, and shifting social norms have transformed the business world. Studies indicate that even years after the pandemic shutdowns, as many as one in five workers is working either hybrid or fully remote.[1]

The practice of law is no exception to this trend. New York law and policymakers have supported initiatives to align the state's regulatory scheme with modern practice. Reforms to regulation of remote and interstate practice have been spurred forward by the courts, bar associations, and the state legislature. While these initiatives endeavor to align regulation with modern practice, the vestige of the prior regulatory scheme leaves some practical questions unanswered.

## Work From Home

It should not come as a surprise that only attorneys who are admitted to practice in New York may practice New York law,[2] but it is has not always been obvious how this rule should be extrapolated. This general prohibition on the unauthorized practice of law does not explain whether an attorney who practices another state's law while physically present in New York would be in violation of the rule.

Prior to the Covid-19 pandemic, the Rules of the Court of Appeals provided, "a lawyer who is not admitted to practice in [New York] shall not . . . establish an office or other systematic and continuous presence in [New York] for the practice of law [or] hold out to the public or otherwise represent that the lawyer is admitted to practice law in [New York]."[3] Conversely, lawyers who are not admitted to practice in New York are permitted to "provide legal services on a temporary basis [emphasis added]" in New York, provided they meet certain requirements,[4] including being admitted to practice in another qualifying jurisdiction,[5] being in good standing in every jurisdiction where admitted,[6] and that "the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in [New York]."[7]

These rules did not offer total clarity. First, it is not specified what degree of practice would cross the line into a "systematic and continuous presence." Also, the requirement that temporary legal services "may generally be provided by a [New York] lawyer" provided little guidance for attorneys practicing the law of other states while physically present in New York because a New York attorney who is not licensed in another jurisdiction would not be able to provide such services.

On December 7, 2022, the Court of Appeals significantly clarified these ambiguities by adopting 22 N.Y.C.R.R § 523.5 with the caption, "Working from home." The newly adopted rule affirms that a lawyer admitted in a foreign jurisdiction but not in New York may practice from a "temporary or permanent location" in New York—including their home—subject to several requirements.[8] For example, foreign lawyers must not (1) practice New York law; (2) hold themselves out as practicing New York law or maintaining a New York law office; (3) solicit or accept clients who primarily require advice pertaining to New York law; nor (4) regularly conduct in-person meetings in New York.[9] Lawyers must also make diligent efforts to correct any misunderstanding as to their jurisdictional practice.[10]

Although this rule change did much to clarify the parameters of working from home, there are still ambiguities, both in the text of the rule itself and in its application in New York's broader attorney regulatory scheme.

In particular, the requirement that that foreign lawyers "not regularly conduct in-person meetings with clients in New York" remains murky.[11] A lawyer who wishes to determine whether in-person meetings are conducted "regularly" must consider, as with the old rule, whether such meetings constitute a "systematic and continuous presence" in New York and whether such practice meets the preexisting requirements for temporary practice.[12]

Another issue arises for foreign attorneys who practice through a Professional Corporation (PC) or Professional Limited Liability Company (PLLC) from their home in New York. For a foreign corporation or PLLC to conduct business in New York it should obtain a certificate of authority to conduct such business from the New York Department of State.[13] However, the Department of State will not issue a certificate of authority to a PLLC law firm without obtaining a certificate of good standing issued by the Appellate Division for a member of the firm.[14] It is unclear whether working from home pursuant to § 523.5 of the Rules of the Court of Appeals would constitute doing business in New York and would require obtaining a certificate of authority.


Finally, these rules only apply to attorneys who are not admitted to practice in New York. New York cannot provide full guidance for New York attorneys who wish to practice New York law while living or physically present in other states. It is crucial that attorneys be thoroughly familiar with the rules of the jurisdiction in which they live or physically practice, ensuring they are not running afoul of its rules.

## Physical Office Requirement

Although New York cannot opine on whether other states would view the practice of New York law from within their borders as unauthorized practice, it does place its own restrictions on New York lawyers' ability to practice from out of state.

Judiciary Law § 470 provides:

> A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney counsellor, although he resides in an adjoining state.

At the time of its passage in 1909, the law functioned as a residency requirement—requiring that New York attorneys reside in New York or an adjoining state—and as a requirement that all practicing New York attorneys must maintain an office within the state. The residency requirement was imposed in conjunction with CPLR 9406(2), which required that an applicant for admission to practice in New York must be a resident of the state of New York but could later move to an adjoining state and continue their New York practice. In November of 1979, New York's Court of Appeals held that this residency requirement violated the privileges and immunities clause of the United States Constitution.[15] Thereafter, Judiciary Law § 470 was construed as only requiring a physical office in the state of New York for non-residents in both adjoining states and non-adjoining states.[16]

It was later argued that even the requirement for a physical office in the state was unconstitutional; however, this argument was rejected by the New York Court of Appeals after the question was certified by the Second Circuit.[17] Despite its constitutionality, this rarely enforced requirement led to increasing ambiguities in a modern world. There is little instruction on what constitutes a physical office sufficient to meet the requirements of Judiciary Law § 470. There is no authoritative guidance on whether a law firm must have a continuous presence in its New York location or if a virtual law office (VLO) is sufficient. Bar associations have abstained from deciding whether VLOs meet the requirements of Judiciary Law § 470;[18] however, the New York City Bar Association offers a VLO service to its members.[19]

Following a substantial push by the various New York bar associations for the repeal of Judiciary Law § 470,[20] a bill repealing the law passed both houses of the New York Legislature in 2023; however, the bill was ultimately not signed into law by Governor Hochul.[21] For the time being, the law is still on the books and questions remain as to its application.

## Conclusion

There is a clear appetite from various actors to reform the regulations of the practice of law in New York to align more practically with modern practice. Courts, bar associations and lawmakers will now have to contend with the questions remaining as to these new policies' scope and interpretation.

## Endnotes

1. *See* Tim Smart, *Remote Work Has Radically Changed the Economy and it's Here to Stay*, U.S. News & World Report, Jan. 25, 2024, https://www.usnews.com/news/economy/articles/2024-01-25/remote-work-has-radically-changed-the-economy-and-its-here-to-stay.
2. N.Y. Jud. Law § 478.
3. Rules of the Court of Appeals § 523.1.
4. Rules of the Court of Appeals § 523.2(a).
5. *See* Rules of the Court of Appeals § 523.2(1).
6. *See* Rules of the Court of Appeals § 523.2(2).
7. Rules of the Court of Appeals § 523.2(a)(3). The Rules additionally require that the temporary legal services: (i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or (ii) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or (iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires pro hac vice admission; or (iv) are not within paragraph (3)(ii) or (3)(iii) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice. *Id.*
8. *See* Rules of the Court of Appeals § 523.5.
9. *See* Rules of the Court of Appeals § 523.5(a-d).
10. *See* Rules of the Court of Appeals § 523.5(e).
11. *See* Rules of the Court of Appeals § 523.5(d).
12. *See supra* at n 9.
13. *See* N.Y. BCL § 1304; N.Y. LLC § 1306.

**Randall Tesser** is an associate attorney at Tesser, Ryan & Rochman LLP in White Plains, New York, where he manages the firm's professional responsibility and ethics practice and advises a wide range of professionals on matters of ethics, professionalism and disciplinary matters. Randall is the recipient of the American Bar Association's 2024 Rosner & Rosner Young Lawyer Professionalism Award. He recently joined *One on One* as co-editor.

14. *See Application for Authority (professional service) Foreign limited Liability Companies*, NYS Dep't of State, https://dos.ny.gov/application-authority-professional-service-foreign-limited-liability-companies.
15. *See Matter of Gordon*, 48 N.Y.2d 266, 267, 48 N.Y.2d 641 (1979).
16. *See White River Paper Co., Ltd. v. Ashmont Tissue, Inc.*, 110 Misc. 2d 373, 376, 441 N.Y.S.2d 960 (Civil Ct., Bronx Co. 1981).
17. *Schoenefeld v. State*, 25 N.Y.3d 22 (2015).
18. *See* NYSBA Comm. on Professional Ethics, Formal Op. 1223 (2021); NYCBA Comm. on Professional Ethics, Formal Op. 2019-2.
19. *See* Virtual Law Firm Program, NYCBA, https://www.nycbar.org/member-committee-career-services/small-law-firm-center-overview/virtual-law-firm-program-virtual-law-office/.
20. *See, e.g.*, Report of the NYSBA Working Group on Judiciary Law §470, NYSBA, Oct. 8 2018, https://nysba.org/app/uploads/2020/02/Sub-report-page-470-report-agenda-item-11.pdf.
21. *See* Rebecca Melnitsky, *New York State Bar Association Is Disappointed That Out-Of-State Lawyers Are Still Beholden to Century-Old Office Requirement*, NYSBA, Dec. 26, 2023, https://nysba.org/new-york-state-bar-association-is-disappointed-that-out-of-state-lawyers-are-still-beholden-to-century-old-office-requirement.

# Remote Online Notarization: A Game-Changer for Attorneys

By Marcy Tiberio

The legal profession has long relied on traditional, in-person notarization. In 2023, New York Executive Law 135-c was signed into law,[1] providing a legal framework for remote online notarization (RON) in New York. New York's codification of RON was a much-needed measure to reflect the reality of modern society, though it did introduce a more complex set of regulations.

Many lawyers shy away from RON because of their unfamiliarity with these requirements. It is important that lawyers understand the plethora of benefits RON offers—streamlining processes, improving client experiences, and bolstering security—and be equipped to navigate its regulatory requirements.

## The Benefits of Remote Online Notarization

### Convenience

RON transcends geographical barriers in servicing clients located all over the world. RON eliminates the need for clients out of the country to travel to an embassy or consulate as well as the need for apostilles. RON allows for home or office signings, which reduces travel time and costs for all involved. Clients who have accessibility issues such as mobility or health concerns will also be able to utilize the convenience of RON.

### Security

Safety and security are additional benefits because RON platforms allow for robust identity verification that integrates advanced measures to mitigate fraud. Digital notarization adds electronic seals and timestamps, creating tamper-proof documents that ensure authenticity and integrity. RON also provides comprehensive audit trails capturing all stages of the notarization process, improving transparency and accountability.

### Environmental

RON even has an environmental impact. Its users reduce their carbon imprint by not traveling, printing, and storing paper copies.

## The Regulatory Framework of RON and How To Navigate It

For many attorneys who previously performed notarial services themselves, the RON regulatory framework presented a daunting challenge.

"First, a currently licensed notary public must apply and obtain an electronic commission."[2]

Traditional notaries can rely on several different methods to verify a signatory's identity; RON requires the use of a third-party vendor for identity proofing and credential analysis.[3]

After the document is electronically notarized, a notarial officer may execute a "certificate of authenticity," certifying that the that the document is an accurate electronic copy upon printing.[4]

Attorneys who wish to perform RON services themselves must thoroughly acquaint themselves with these requirements.[5] Thankfully, there are various third-party providers that offer RON services to attorneys and other professionals.

## Conclusion

Inevitably RON becomes a cost saver that adds flexibility and convenience to any attorney's practice. As legal practices strive towards modernization, remote online notarization presents a compelling solution. For attorneys seeking to enhance the efficiency and effectiveness of their services, adopting RON is an essential step towards a successful digital transformation.

**Marcy Tiberio** is an entrepreneur, speaker, mentor and notary. In 2013, she launched Professional Notary Services, Inc. (PNS), a national in-person and international remote online notary signing company. In 2022, she launched the New York Notary Alliance and Notary Life to better serve the needs of Notaries. She is a regular speaker at the National Notary Association and other industry events and conferences. She was named a 2015 National Notary Association Notary of the Year Honoree and 2023 RBJ's Women of Excellence Honoree. Marcy can be reached at marcy@professionalnotaryservices.biz.

### Endnotes

1. N.Y. Executive Law § 135-c.
2. N.Y. Executive Law § 135-c(3).
3. 19 N.Y.C.R.R. § 182.2.
4. N.Y. Executive Law § 135-c(6)(d).
5. *See* Michael A. Markowitz, *The Future Is Here: New York Approves Remote Online Notarization*, NYSBA, April 11, 2023, https://nysba.org/the-future-is-here-new-york-approves-remote-online-notarization/.

# Demonstrate Value to Clients by Pitching an Outside General Counsel Role

By Alex Herd

Demonstrating value to prospective clients is vital to a business lawyer's success. Your ability to articulate your skills and efficiency will help you convert not only prospects into clients, but also one-time clients to regular clients. You can accomplish this by effectively pitching the benefits of serving as Outside General Counsel (OGC): higher quality of service at a lower cost.

Many clients may be familiar with in-house or general counsel, but they may not have heard of the concept of an OGC. You can build long-standing relationships with clients by highlighting the key benefits of an OGC:

- Services tailored to their needs
- One-stop legal resource
- Cost-effectiveness

## The Benefits of General Counsel, In-House or Outside

Businesses see their general counsel as their trusted first point of contact for any legal matter.

General counsel is relied on for a wide-ranging scope of services to meet the diverse legal needs of the client. Some key examples include:

- **Contract Review and Drafting:** OGCs can review, negotiate, and draft a variety of commercial contracts, such as vendor agreements, leases, licensing deals, and sales/purchase contracts. Their familiarity with the client's business allows them to ensure contractual terms align with the organization's long-term objectives.
- **Compliance and Regulatory Guidance:** OGCs can advise clients on complying with relevant laws, regulations, and industry standards applicable to their operations. This may include areas like employment law, data privacy, or financial reporting.
- **Corporate Governance:** OGCs can counsel clients on matters of corporate structure, board oversight, shareholder rights, and other governance best practices. This is especially important for privately held companies and non-profit organizations.
- **Litigation Support:** While OGCs do not typically handle litigation directly, they can work closely with litiga-

tion counsel to provide strategic guidance, oversee the legal process, and ensure the client's broader interests are represented.

- **Risk Assessment and Mitigation:** By deeply understanding the client's operations, OGCs can proactively identify legal risks and collaborate with the client to implement policies, contracts, and other measures to mitigate those risks.

A business that hires general counsel is able to develop the attorney-client relationship over time. This allows the attorney to learn the intricacies of the business's goals and typical legal needs and efficiently and holistically address any issues that arise for the organization.

The key is for the OGC to deeply understand the client's operations, goals, and typical legal needs. This allows the OGC to address any legal issues that arise in a way that benefits the entire organization, not just the specific matter at hand.

## Pitching Outside General Counsel as an Alternative to In-House Counsel

Clients may be skeptical that an OGC with multiple clients can deliver the same particularized attention as a dedicated in-house counsel; however, this concern can be turned into a positive. Rather than maintaining a full-time in-house counsel, the client can leverage the OGC's diverse knowledge and flexible model to address their legal requirements in a cost-effective manner.

While in-house counsel only deals with matters that arise in representing one client, OGCs have the benefit of experiences spanning multiple business sectors and legal domains, such as contracts, employment, intellectual property, compliance, and litigation. This broad expertise enables the OGC to efficiently represent the client without the high overhead of a dedicated in-house legal team.

OGCs also often benefit from a trusted network of attorneys and professionals they can consult with when legal issues cross into specialized areas. This will allow clients to avoid navigating a web of specialized attorneys. This can save them significant time, money, and energy compared to the piecemeal approach of working with multiple law firms and the need to identify a new attorney each time a different legal issue arises.

OGCs can save the client time, money, and resources by managing all of their legal needs in one place, within a budget tailored to the client's business.

## What Characteristics Should Outside General Counsel Have?

Trustworthiness is one of the most crucial qualities for an outside general counsel. Clients need to have complete confidence that they can bring any legal issue to the OGC and receive effective guidance towards a solution. Building this level of trust requires providing strong strategic advice and demonstrating a steadfast commitment to the client's best interests.

Additionally, it is critical for an OGC to recognize the areas of law where their own expertise may be limited. Having a reliable network of trusted professionals, whether within the OGC's own firm or external specialists, is essential for seeking additional guidance when needed to serve the client effectively.

Finally, the ability to address new and complex topics on a regular basis is key to succeeding as an OGC. Unlike specialized counsel who may handle similar matters repeatedly, OGCs must be prepared to tackle unique questions and challenges that their clients bring. While specialized attorneys may repeatedly draft similar contracts or motions, OGCs cannot rely on repetitive assignments. They must continuously expand their knowledge and adapt their approach to meet the diverse legal needs of their clients.

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# Minding Your Own Business: Creating a Strong Attorney-Client Relationship Through Effective Engagement Agreements

By Sheila Tendy

Lawyers strive for two key goals: providing excellent and efficient legal services while maximizing profitability. While the former is crucial for client satisfaction and professional reputation, the latter ensures sustainability and growth for law firms. One often overlooked tool in achieving both objectives is the lawyer engagement letter. The same way attorneys create strong contractual relationships for their clients' interests, attorney engagement letters with clients are the bedrock of a fruitful attorney-client relationship, setting the stage for clear communication, defined expectations, and a smooth legal process. Crafting a well-structured engagement letter that anticipates how the attorney-client relationship can be tested not only helps prevent misunderstandings but can also significantly impact an attorney's profitability.

## Understanding the Importance of Engagement Letters

An engagement letter serves as a contractual agreement between a lawyer and a client, laying out the terms and conditions of their legal representation. While not always legally required, a well-drafted engagement letter is essential for several reasons:[1]

### Clarity and Expectations

By clearly defining the scope of legal services, timelines, responsibilities, and potential outcomes, engagement letters ensure that both parties have a mutual understanding of the terms of engagement. This clarity helps manage client expectations and reduces the likelihood of misunderstandings or disputes down the line.

### Risk Management

Engagement letters can serve as a shield against malpractice claims or fee disputes. By clearly documenting the agreed-upon terms, including any limitations of the lawyer's responsibilities and liabilities, these letters provide a clear record of the client's consent and understanding of what the lawyer's role will be while mitigating potential legal risks.

### Fee Agreements

One of the most critical aspects of engagement letters is outlining the fee structure and payment terms. By clearly defining the attorney's hourly rates, flat fees, retainer fees, billing procedures, and any additional costs or expenses, lawyers can avoid ambiguity and ensure timely payment for their services.

## Strategies To Insulate Attorney Profit

The engagement agreement not only provides clarity on the terms and conditions of the engagement but can also be leveraged to insulate attorney profitability. In this section, we discuss some of the ways in which an attorney can structure the engagement agreement to insulate profitability.

1. **Detailed Scope of Services**

One of the most important tasks is to thoughtfully draft the scope of services covered by the engagement agreement. Since engagement agreements may not be protected by attorney-client privilege, an attorney must be careful not to be overly detailed in the description of the scope of services.[2] Nonetheless, tasks and deliverables included in the representation should be specified with sufficient detail so that there is no ambiguity as to what is covered. Ambiguity in the scope of services can lead to a situation where the client expects unanticipated work to be performed without corresponding compensation leading to lower attorney profitability.

Another factor to consider is whether the prospective client is expected to be a one-time client or a repeat client. For a one-time client, the scope of services should be narrow and specific. For clients who are expected to be a repeat client, an attorney may want to create a primary engagement letter, with sub-agreements for later matters. Regardless, an engagement letter should state that no legal services other than those specified in the engagement agreement will be performed without a mutual written agreement to expand the representation.

### Clear Fee Structures

The foundation of a profitable engagement letter lies in a clear and transparent fee structure. The fee structure can be a traditional hourly fee structure, a flat fee structure, a contingency fee, or some other hybrid arrangement. By offering clients options that align with their needs and budget, attorneys can attract a diverse array of clients while ensuring predictable revenue streams.

When drafting an engagement agreement, it is important to clearly identify rates, whether it is an hourly rate, contingency fee or a flat fee (or combination). For hourly fee engage-

ments, the engagement agreement should specify the hourly rate of the attorney with primary responsibility for the matter, as well as the rate of anyone else working on the matter (e.g., other attorneys or paralegals). It is important to include a clause that says that rates may change over the course of the engagement, and that the client will be notified as rates change. For flat fee engagements, only the amount of the flat fee needs to be included in the engagement agreement so it is even more critical to be clear about what services will be performed for the flat fee. For contingency fee arrangements, the method used to calculate the fee should be clearly delineated in detail, including whether disbursements are included in the contingency fee.

Regardless of the fee structure of a particular engagement, a law firm should establish standard billing practices. Most law firms bill their clients in tenths of hours (i.e., 6-minute increments), while others choose to bill in 15-minute increments. While summary invoices may be appropriate and acceptable for some clients, attorneys should always keep detailed records of time spent on each matter in case there is a future fee dispute or for cases in which attorneys' fees may be reimbursable to the client by another party. Attorneys should always discuss the type of fee with clients in addition to sending the written engagement agreement to be sure the client understands the fee structure.

### Expense Reimbursement

The engagement letter should also be explicit that the fee structures, whether flat or hourly, do not include expenses, court filing fees, expert witness fees, or travel expenses. Marking up expenses charged to clients is discouraged as it jeopardizes the attorney-client relationship and is unethical in many cases.[3] The engagement letter should also authorize the lawyer to incur such expenses on behalf of the client and establish procedures for obtaining client approval for significant expenses.

### Types of Retainers

An unfortunate reality for law firms is that all too often clients simply do not pay their legal fees, and lawyers are left either writing off significant sums or bringing an action against the non-paying client to recover the fees owed. The traditional way to prevent this is to require a retainer fee at the outset of the relationship. A retainer fee can safeguard a firm against non-payment and provide a steady cash flow. The amount of the retainer fee will vary depending on the matter.

With rising instances of clients failing to pay fees, "evergreen retainers" have become all but standard. Unlike the traditional retainer that is depleted as services are rendered, an evergreen retainer agreement requires that the client replenish the retainer to the full original amount as fees and expenses are charged against the retainer. The engagement agreement can state that failure to replenish the retainer to the original amount will result in work stoppage or withdrawal (subject to applicable ethics or professional conduct rules).[4] The engagement letter should state that any unused retainer will be returned to the client at the end of the matter.

If a retainer fee is required, the engagement agreement should be accompanied by a separate retainer invoice, which states the amount of the retainer fee and payment instructions. The engagement agreement should also state that the engagement begins only after the engagement agreement is signed and the retainer fee has been received.

### Billing and Payment Terms

Establishing explicit billing and payment terms is crucial for protecting attorney profit. The engagement agreement should specify when invoices will be issued (e.g., monthly), when payment is expected (e.g., immediately or within 30 days) and any late fees or interest charged for overdue payments. Consider implementing automated reminder invoice systems to streamline the invoicing process and reduce administrative overhead.

### Indemnification Clause

In order to protect the firm from third-party liability, many lawyers include in their standard engagement agreement an indemnification clause which states that the client agrees to indemnify or compensate the firm for losses incurred due to damages or liabilities resulting from the client's actions or failures to act. Of course, a client cannot be required to indemnify the law firm in the event that there is an allegation of malpractice or misconduct by the attorney.

### Termination and Withdrawal

Sometimes, it becomes necessary for the engagement to be terminated before the matter is concluded. A client is free to terminate the engagement at any time. However, the engagement letter should clearly state that the client is responsible for the payment of all fees and expenses incurred to the date of termination.

The engagement letter should also include the circumstances under which the attorney may terminate the representation, including non-payment of fees and expenses. In litigation cases, an attorney may not be able to withdraw from a case without court approval. Rather than engaging in motion practice in order to withdraw from a case in the event of non-payment, it would be prudent for the engagement agreement to state that the client agrees to promptly execute a Notice of Substitution of Counsel with the court if the attorney needs to withdraw for non-payment of fees.

## Dispute Resolution

Despite best efforts to avoid litigation, fee disputes sometimes end up in litigation. In New York, Part 137 of the Rules of the Chief Administrator of the Courts (22 N.Y.C.R.R.) provides for the mechanism for arbitrating fee disputes.[5]

In the event that the client chooses not to participate in a Part 137 arbitration, or if the dispute is not eligible for arbitration under Part 137, it is a good idea to include terms regarding the dispute resolution process, forum and venue clauses. Many law firms include an arbitration clause and choose either JAMS or AAA as the forum, but fee dispute cases can also be brought in court.

## Conclusion

Effective lawyer engagement agreements are more than just contractual formalities, they are powerful tools for protecting attorney profit while fostering positive client relationships. By clearly defining the scope of legal services, establishing transparent fee arrangements, and setting clear expectations for communication and billing, lawyers can streamline their practice operations, minimize legal risks, and enhance profitability. Investing time and resources in crafting comprehensive and client-friendly engagement letters is a strategic imperative for law firms seeking sustainable growth and success in today's competitive legal landscape.

**Sheila Tendy** is the owner of Tendy Law Office LLC, which serves as outside general counsel to corporations and not-for-profits. More information can be found on their website at www.tendylaw.com.

### Endnotes

1. The rules for when written letters of engagement are generally required—or not required—are found in Part 1215 of the Joint Order of the Appellate Divisions (22 N.Y.C.R.R.). Special rules regarding engagement letters apply to certain types of matters, such as domestic relations matters. *See, e.g.*, Part 1400 of the Joint Rules of the Appellate Divisions (22 N.Y.C.R.R.).
2. *See, e.g.*, *HK Capital LLC v. Rise Development Partners LLC*, 74 Misc. 3d 1201(A), at *2 (Supreme Ct., Kings Co. 2022).
3. Whether a marked-up fee is ethically permissible depends on whether the fee is for legal or non-legal services and the reasonableness of markup. *See* American Bar Association Formal Opinion 08-451 (2008).
4. *See* Rule 1.16(c) of the New York Rules of Professional Conduct (22 N.Y.C.R.R. Part 1200).
5. The full text of Part 137 is available at http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/NyclaRules.pdf.

# If You Want a Guarantee, Buy a Toaster

By Richard Klass


It is very common in commercial leasing that the landlord will insist that the owner of the tenant's business provide a "Good Guy Guaranty." This limited guaranty promises the landlord that, in exchange for releasing the owner of the business from liability for future rent obligations, the tenant promises to provide sufficient notice to the landlord as to when the tenant will be leaving the premises and will leave it in the same condition as it was given with all rent paid up through the surrender date.

## Office Tenant Moved Out Owing Rent Arrears

An office tenant of a construction business in a Manhattan office building decided to move out during the COVID-19 pandemic. Upon renting the office, tenant's principal had signed a good guy guaranty which allowed her to terminate her liability upon surrender of the premises according to its specific terms.[1] The landlord's attorney retained Richard A. Klass, Your Court Street Lawyer, to sue the former tenant and guarantor for breach of contract for rent arrears and other charges due and owing.

## Guarantor's Motion To Dismiss Complaint

The individual guarantor filed a motion to dismiss the landlord's complaint. In opposing the motion, it was urged by the landlord that, based upon the documentary evidence (namely: the lease agreement and the personal guaranty) and relevant statutory and case law, the landlord asserted valid causes of action against the defendants and the motion should be denied.

As stated in *Sokol v. Leader*, 74 A.D.3d 1180, 1180-81, 904 N.Y.S.2d 153 (2d Dep't 2010): When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.[2] In considering such a motion, the court must "'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'"[3] "Whether a plaintiff can ultimately establish its allegations is not part of the calculus."[4]

## Provisions of Good Guy Guaranty Must Be Strictly Followed

The guarantor claimed that she provided proper notice under the terms of the limited personal guaranty; however, the landlord argued that the notice was ineffective given as of the "surrender date," there remained a substantial amount of rent arrears due and owing. Thus, the guarantor did not satisfy the conditions set forth in the guaranty itself to revoke her personal guaranty.[5] "A guaranty is not effectively terminated where the guarantor fails to comply with the termination provisions of the guaranty. Thus, if the guaranty provides that it is to continue until revoked by notice in a specified manner, it may be revoked only by a notice which complies with the contract provision."[6]

The guarantor further argued that NYC Administrative Code § 22-1005[7] (which allowed those individuals who provided personal guarantees of commercial leases to restaurants

and similar retail businesses to cancel them) permitted her to cancel her liability. In response, it was argued that the defendants had the onus to prove that defense somehow applied, given the nature of its business being an office tenant in the construction industry on the 14th floor of the building.

## Documentary Evidence Contradicts the Motion

Based upon the arguments put forth in opposition, the judge denied the motion. Specifically, she determined that the documentary evidence put forth contradicted the motion to dismiss. Accordingly, the defendants were directed to file their answer to the complaint.

Once the defendants were directed to file their answer, the lawsuit settled, given the written lease agreement and limited guaranty. The liability under the limited guaranty was fairly straightforward.[8] "[A]ll that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty."[9] The Second Department held that, "the plaintiff bank made a prima facie showing of entitlement to judgment as a matter of law against the defendants, . . . by submitting proof of the underlying credit agreement, Laniado's personal guaranty of the company's obligations under that agreement, and the company's failure to make payment in accordance with the terms of the credit agreement."[10]

**Richard A. Klass** maintains a law firm engaged in civil litigation at 16 Court Street, 28th Floor, Brooklyn, New York. He may be reached at (718) COURT-ST or RichKlass@courtstreetlaw.com with any questions.

### Endnotes

1. The limited guaranty provided as follows: "The "Surrender Date" means the date on which the Tenant has given Landlord possession of the demised premises broom clean and free of all liens, claims, damages, trash, occupants and personal property and otherwise in the condition required under the Lease required as if it was the date of expiration of the term of the Lease and Tenant has paid all Annual Base Rent and additional rent for any and all other charges then accrued under the Lease through the last day of the month in which the Surrender Date shall occur and an effective instrument of surrender of the demised premises has been signed and delivered by Tenant to Landlord (without prejudice to Landlord's right to recover from Tenant the Annual Base Rent and any and all additional rent for the unexpired balance of the term of the Lease as provided in the Lease) in form reasonably satisfactory to Landlord on at least seventy-five (75) days prior notice."
2. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977); *Foley v. D'Agostino*, 21 A.D.2d 60, 64–65, 248 N.Y.S.2d 121 (1st Dep't 1964).
3. *See Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, (2007), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972 (1994).
4. *See EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170 832 N.E.2d 26.
5. *See* 63 N.Y. Jur. 2d Guaranty and Suretyship § 154.
6. *Id.*
7. *See* § 22-1005, Personal liability provisions in commercial leases:

   > A provision in a commercial lease or other rental agreement involving real property located within the city, or relating to such a lease or other rental agreement, that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other event, wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement, shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:
   >
   > 1. The tenant satisfies the conditions of subparagraph (a), (b) or (c):
   >
   > (a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;
   >
   > (b) The tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or
   >
   > (c) The tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.
   >
   > 2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and June 30, 2021, inclusive.
8. *See City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71, 681 N.Y.S.2d 251 (1st Dep't 1998).
9. *Id.*
10. *Id. HSBC Bank USA, Nat. Ass'n v. Laniado*, 72 A.D.3d 645, 897 N.Y.S.2d 514 (2d Dep't 2010).

# Filling the Void: Tracking Industry Solutions to AI Regulatory Challenges

By Matthew Lowe

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Truly a tale as old as tech is that of bleeding-edge technological advancement, regulators seeking to keep pace and the gray area that exists in the middle of these two points. Once again, that is where lawyers find themselves on the topic of artificial intelligence.

AI has posed several challenges, many of which are playing out in our courts. Last year, a group of artists filed suit against an AI company for the illegal use of their work. Recently, The New York Times filed a lawsuit against Microsoft and OpenAI for copyright infringement. Copyright is one of most complex issues in the Wild West of AI, and it's one without any simple answers or solutions.

AI is also disrupting our campuses, requiring educational institutions to come up with ways to combat a steep increase in plagiarism. Further, AI is blamed for bias in the use of facial recognition technology, with potentially harmful repercussions for people already at a disadvantage. But just as people and technology have played a role in creating some of our current challenges, it is also within our collective capability, using the same ingenuity and tools, to forge effective solutions.

## Copyright Complexities and Industry Response

One of the biggest legal practice areas challenged with the increased use of these models is copyright. This is because, in some instances, there are questions as to where the ingested data that powers them comes from.[1] For example, some models scrape the internet and absorb massive amounts of data, possibly including copyrighted material, which can inadvertently infringe on content contributors' rights depending on how they impact models' outputs.[2]

In December 2023, The New York Times joined a growing number of litigants in filing suit against OpenAI alleging copyright infringement.[3] Specifically, The New York Times alleged that OpenAI, creator of ChatGPT, uses its published works to train its AI model and that there have been instances of "blatant regurgitation" of their articles in ChatGPT's outputs as opposed to outputs that are truly transformative and thus more compelling representations of "fair use," in support of OpenAI's arguments.[4]

Though this case is freshly filed, the implications it can have for AI copyright regulations may be significant. It could set precedent and expectations around what constitutes acceptable use of copyrighted materials in generative AI products, what level of documentation and transparency regarding training should be readily available and what rights content contributors may have in this context. This is significant for those who do not have the resources and headline-making capability of The New York Times.

In February of 2024, one of the first attempts to reconcile some of these issues came when Google signed a deal to train its AI model on Reddit users' posts for $60 million.[5] This may indicate a future trend in how businesses seek to avoid, or at least limit liability, when building their models leveraging large-scale data ingestion through third-party platforms' content.

### *Andersen v. Stability AI Ltd.*

One area that raises more questions is social media platforms such as Instagram and X, formerly known as Twitter, which serve as tools for up-and-coming artists to build their brands and gain larger followings by posting their works publicly. Users' expectations for how those posts will be utilized are important to note. Artists may not consent to having their pieces ingested into machine-learning models but have limited recourse available when they are used.

Many artists pride themselves on having a unique style. The potential of AI to replicate that style and borrow from their techniques can result in negative impacts for an artist's bottom line and brand sustainability. To combat this, in January 2023, three artists joined forces to file suit in *Anderson v. Stability AI Ltd.* in federal court against popular generative AI platforms for these precise reasons.[6,7] Unfortunately for the artists, copyright claims cannot be taken up in the federal courts if a copyright is not properly filed and registered with the U.S. Copyright Office, which happened to be the case for many of the works cited in the suit.[8]

Because of that and other defects outlined in U.S. Senior District Judge William H. Orrick's order, the case was largely dismissed, marking a critical victory for the AI companies named in the complaint.[9] Still, it was not a total loss, as the artists were granted some latitude by Judge Orrick, who granted them an opportunity to amend their complaints to remove the defects and narrow their scope accordingly.[10] The plaintiffs refiled their complaint in November 2023.[11] One important reminder here for attorneys is to urge artist clients

to register copyrights federally for works they seek to protect through the U.S. Copyright Office.

The Copyright Office also had an open comment period between August and October 2023 for industry stakeholders to weigh in on some of the questions AI has raised about copyright. Some of the questions they posed for comments included:[12]

• "What are your views on the potential benefits and risks of this technology?"

• "Does the increasing use of distribution of AI-generated material raise unique issues for your sector or industry?"

• "Are there any statutory or regulatory approaches that have been adopted or are under consideration in other countries that relate to copyright and AI that should be considered or avoided in the United States?"

• "Is new legislation warranted to address copyright or related issues with generative AI?"[13]

## Safeguards and Solutions

As this space continues to develop and we await the dust to settle, the question is: what, if anything, can serve as technical safeguards for content creators in the interim?

As it turns out, academics and various AI developers are making efforts to help solve some of these issues. For starters, while content contributors can opt out from allowing certain developers to use their work, the efficacy of this mechanism has resulted in challenges from some. Since a prerequisite to opt out and removal is often providing proof that a model is using your content, exercising this option can prove difficult.

One currently available solution being developed by the University of Chicago is Project Nightshade.[14] This project adopts an aggressive approach regarding current AI training practices. The developers point to existing opt-out mechanisms, stating that they "have been disregarded by model trainers in the past" and "can be easily ignored with zero consequences" because they are "unverifiable and unenforceable."[15] The team, including lead developers Ben Zhao and Shawn Shan, describe the functionality of this tool in the following way:

> [I]t is designed as an offense tool to distort feature representations inside generative AI image models. . . . Nightshade is computed as a multi-objective optimization that minimizes visible changes to the original image. While human eyes see a shaded image that is largely unchanged from the original, the AI model sees a dramatically different composition in the image. For example, human eyes might see a shaded image of a cow in a green field largely unchanged, but an AI model might see a large leather purse lying in the grass. Trained on a sufficient number of shaded images that include a cow, a model will become increasingly convinced cows have nice brown leathery handles and smooth side pockets with a zipper, and perhaps a lovely brand logo.[16]

The distortion effect of the kind presented here offers some hope for content creators to protect their works. It may be encouraging for them to see these types of tools becoming avail-

able, but what can be more assuring is if developers themselves take proactive steps toward addressing these problems. In fact, this can be mutually beneficial as regulations and rules are starting to form around this technology because they will help protect both developers and artists.

As AI developers are being frequently summoned before Congress and expected to address general concerns surrounding the safe use and deployment of AI, genuine demonstrations of good faith toward ethical practices can go a long way toward easing those concerns. Whether it's recognizing artists for their works or identifying deep fakes more effectively, concepts like data provenance, i.e., information about where data came from and how it may have been modified, are vital, and AI content credentials are a great step toward achieving that. Content credentials are embedded metadata used for verification purposes. While digital watermarks have been used in the past as an attempt to preserve the integrity of content, it is now easy to have them removed; in contrast, content credentials are cryptographic and unalterable.[17]

Attempts to surface solutions like content credentials into the mainstream are being spearheaded by companies like Adobe, a member of the Content Authenticity Initiative and co-founder of the Coalition for Content Provenance and Authenticity, which comprises members that include Intel and Microsoft.[18] Both are focused on creating standards around the sharing of digital content across platforms and websites.[19] The mobile phone industry is undergoing a similar transformation as brands including Samsung and Motorola will have newer devices roll out with content credential capability.[20] These kinds of tools are important to look out for to preserve integrity and transparency. Attorneys can work with their clients to seek out appropriate tools.

Pioneers in deploying technical defensive safeguards can play a major role in influencing future regulations of controls that the industry may be expected to follow. Even if not explicitly prescribed in a regulation, such safeguards can become industry standard, similar to how encryption and multifactor authentication are commonly available to users today.

## AI and Plagiarism

OpenAI's launch of ChatGPT threw the long-existing AI discussion into hyperdrive when it acquired 100 million monthly active users only two months after it went public in November 2022, making it the fastest growing consumer application in history.[21] Unfortunately, as users began to experiment with its capabilities, misuse and unintended outcomes accompanied that exploration. Namely, students became aware that they could have AI write unique outputs/responses to unique inputs/prompts, i.e., they did not have to read books to do book reports or really do much of anything to produce a multi-page essay, or science problem, or recall a historically significant moment – and teachers began to catch on. Education is an industry that is dependent on self-governance, which tends to come in the form of academic handbooks, etc. Like the legal environment, these handbooks most likely have not addressed AI directly. Also like the legal environment, schools could technically point to existing, broad rules, and administrators could likely defer to customary practice, which prohibits plagiarism and any other action that goes against the spirit of academic honesty and integrity and could reasonably be deemed cheating.

Still, the issue is not in clarifying the wrongness of using AI in these circumstances; the issue is detecting it. Just as the law can be difficult to apply to significant advances in technology, academia's self-governance model, through the use of now-outdated plagiarism trackers, can present similar challenges. Enter Edward Tian, who, while completing his senior year at Princeton University, launched GPTZero at around the same time that ChatGPT was breaking user acquisition records in January 2023.[22] With this new technology, the fight against advanced plagiarism was now purportedly balanced, as GPTZero's purpose is to detect AI-generated content, although it has been criticized for producing false positives. Regardless, in October 2023, the American Federation of Teachers signed a deal with GPTZero to assist teachers in identifying possible plagiarism.[23]

## Facial Recognition Technology

The Black Lives Matter movement has highlighted important discussions about the use of facial recognition technology. Concerns have been raised about potential biases and the need for responsible use, as well as law enforcement tracking of protesters at rallies.[24] These discussions are vital as they guide us toward more equitable and transparent applications of AI technologies. In a report published by the National Institute of Standards and Technology, studies demonstrated that algorithms falsely identified Black and Asian faces 10 to 100 times more than white faces.[25]

Several facial recognition technology developers have since ceased development and distribution of this innovation.[26] While different algorithms may produce distinctive results, and technical enhancements are rapid in this space, struggles with the technology persist to this day. In December 2023, the Federal Trade Commission announced that popular national drugstore chain Rite Aid would be prohibited from using facial recognition technology for surveillance purposes for five years, citing Rite Aid's "reckless use" of the technology that "left its customers facing humiliation and other harms."[27] Among the transgressions listed in the FTC complaint, Rite Aid failed to

- Consider and mitigate potential risks to consumers from misidentifying them, including heightened risks to cer-

tain consumers because of their race or gender;•
Test, assess, measure, document or inquire about the accuracy of its facial recognition technology before deploying it;

- Prevent the use of low-quality images in connection with its facial recognition technology, increasing the likelihood of false-positive match alerts;
- Regularly monitor or test the accuracy of the technology after it was deployed; and
- Adequately train employees tasked with operating facial recognition technology in its stores and flag that the technology could generate false positives.[28]

It did not help that Rite Aid had also violated a 2010 FTC order by failing to adequately implement a comprehensive information security program.[29] In light of these circumstances, there has been a boom over the years in anti-FRT fashion and arts, including masks, LED visors and even knit sweaters designed to confuse the recognition software.[30] While it may not be feasible to suggest that clients and developers invest in the use of these fashion accessories, the FTC's Rite Aid order does outline helpful guidelines and protocols for proper and safer use of facial recognition technology.

## General Best Practices

A simplified overview of where we find ourselves today is that AI is a fast-developing technology yielding a strikingly steep adoption curve for users, which can present new risks. To help address those risks, we are witnessing the emergence of new tools and markets. As regulations surrounding AI continue to evolve, those involved can be guided by some basic principles, regardless of what final shape they may take, which can serve to both insulate companies from potential liability and protect content creators.

First, blind trust in autonomous technologies without any human oversight is imprudent. When some lawyers attempted to rely fully on AI, they found out the hard way, via sanctions or even job termination, that some AI tools can "hallucinate" (i.e., produce an incorrect output based on unintended patterns it recognizes) when it comes to generating case law.[31] GPTZero has experienced issues with false-positives; in one example, it claimed that our own U.S. Constitution was drafted with the help of AI.[32] Therefore, if you or your client are seeing areas of your business where there is full automation without any oversight, especially when sensitive data is involved, be aware of the risks.

Secondly, honest approaches to AI self-governance in lieu of fully fleshed out regulations should lean on existing principles of ethical data stewardship. Organizations collecting and processing potentially sensitive (or otherwise regulated) data should implement meaningful forms of transparency, consent and security so the emergence of AI should not present any surprises there.

This is critical for both developers of the technology, as well as for those seeking to procure it. Developers should clarify how their models operate, what data they ingest and how they ingest it and ensure that any potentially sensitive data is secure through adherence to appropriate encryption protocols.

One way tech companies like IBM, Meta, and Microsoft have already begun to proactively address ethical AI is by pledging to voluntary commitments outlined by the White House.[33] In addition to this gesture of good faith, which involves committing to practices that touch upon safety, security, trust, and five other pillars,[34] a number of these companies bolster those commitments through resources they publish outlining best practices for responsible AI self-governance.[35] Attorneys may want to note these commitments and advise that their AI developer clients consider making similar guarantees to their customers (and have the internal processes to make good on them). At a minimum, attorneys should ensure that, regardless of whether representing content creators or AI developers, the platforms' terms of use are continually updated and speak to whether or not works may be used for the purpose of model training. Being mindful of the FTC's position on this process is also critical, as the commission recently published a blog making it clear to AI developers that "quietly changing your terms of service could be unfair or deceptive," which could result in possible enforcement actions.[36] Thus, merely making passive changes to policies without clear and explicit notice to users can result in liability.

As a last note, grace goes a long way. It is easy to vilify developers for making mistakes as they innovate and grow, but there is a learning curve for stakeholders industrywide. Not every outcome is foreseeable, but if we continue to take steps toward embracing this technology and employing ethical practices, the future for AI offers some exciting possibilities.

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# How To Comply With the New Corporate and LLC Transparency Acts

By Julie Hung

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Corporations and limited liability companies have historically been used as "shell entities" for both legitimate and illegitimate purposes.[1] In response to the illicit use of shell entities, legislation has been passed on both the federal and state level requiring business entities to disclose beneficial owner information (BOI) to the government.[2]

The federal Corporate Transparency Act (CTA), effective January 1, 2024, mandates business entities to report the BOI of beneficial owners and company applicants to the Financial Crimes Enforcement Network (FinCEN) of the United States Department of Treasury ("U.S. Treasury").[3] Following the passage of the CTA, New York State passed its own LLC Transparency Act ("NYS Act"), effective January 1, 2026.[4] The NYS Act is modeled after the CTA, but focuses more narrowly on the regulation of limited liability companies (LLCs) formed or authorized to do business in New York State.[5]

In response to the enactment of the CTA, a non-profit corporation, the National Small Business Association (NSBA), challenged the CTA for exceeding Congress' authority under Article I of the Constitution.[6] On March 1, 2024, a federal district court in Alabama permanently enjoined the U.S. Treasury from enforcing the CTA against NSBA and its members.[7] In a press release issued soon thereafter, FinCEN interpreted the district court's decision to mean that all other entities are still required to comply with the CTA pending the government's appeal in the NSBA case.[8] A similar lawsuit before a federal district court in Ohio seeks a more widely applicable nationwide injunction against the enforcement of the CTA.[9] Additional litigation may lead to significant changes to the CTA later this year. This article addresses the disclosure requirements of the CTA and the NYS Act as of March 14, 2024.

## The Federal Corporate Transparency Act

### Background of the CTA

The CTA is encompassed within the National Defense Authorization Act for Fiscal Year 2021 (NDAA) under Division F, the Anti-Money Laundering Act of 2020. As national defense legislation, the CTA is intended to "prevent and combat money laundering, terrorist financing, corruption, [and] tax fraud."[10] Prior to the CTA, an entity's BOI was available to law enforcement only if the entity opened an account with a financial institution pursuant to the Customer Due Diligence (CDD) Rule. Several government studies, including the 2016 Financial Action Task Force (FATF) report identifying the lack of BOI reporting requirements, highlighted the need for increased transparency of legal entities. In the summer of 2017, the CTA was introduced to Congress, and following a series of hearings, the CTA was passed in 2020. On September 30, 2022, after a notice-and-comment rulemaking,

FinCEN issued the final Beneficial Ownership Information Reporting Rule ("Final Rule") implementing the CTA.[11]

## Requirements of the BOI Reporting Rule

The CTA requires domestic and foreign entities, statutorily defined as "reporting companies," to file BOI reports identifying its beneficial owners and company applicants to FinCEN.[12] FinCEN is authorized to share the BOI reports with government agencies, financial institutions, and financial regulators under certain circumstances. The BOI reports are maintained by FinCEN on the Beneficial Ownership Secure System (BOSS) database. When a reporting company is terminated, FinCEN will retain the BOI reports for a minimum of five years from the date of termination.[13]

For individuals who provide fraudulent information related to the BOI report, who willingly fail to complete the BOI report, or who, without authorization, knowingly disclose information related to the BOI report, the CTA imposes a penalty of $500 a day for each day the violation continues, and a possible fine up to $10,000 and possible imprisonment up to two years.[14]

### Definitions of Reporting Companies, Company Applicants, and Beneficial Owners

Reporting companies may be U.S. or non-U.S. entities.[15] Domestic reporting companies include corporations, LLCs, and entities created by filing a document with the secretary of state or similar office under state or Indian tribe laws. Foreign reporting companies include corporations, LLCs, entities formed under the law of a foreign country, and entities that are registered to do business in any state or Tribal jurisdiction by filing a document with the secretary of state or similar office under state or Indian tribe laws.[16] There are 23 categories of entities exempt from the CTA's reporting requirements, including banks, securities entities, insurance companies, accounting firms, and large operating companies with a physical office in the U.S., more than 20 full-time employees, and more than $5,000,000 in annual gross sales.[17]

In this article, unless otherwise specified, "newly created entities" refer to entities that were created or registered on or after January 1, 2024, the effective date of the regulation, but before January 1, 2025. "Existing entities" refer to entities created or registered before January 1, 2024. When applicable, all entities regardless of creation date will be referred to collectively as "reporting companies."[18]

Only newly created entities are required to submit specific information regarding the company applicant. A company applicant is defined as the primary individual who is "responsible for directing or controlling" the filing that creates the entity. For U.S. entities, the company applicant is the individual who files the document that creates the entity; and for non-U.S. entities, the company applicant is the individual who files the document that first registers the entity.[19]

All reporting companies are required to submit reports on beneficial owners. The CTA defines a beneficial owner as an individual who, directly or indirectly, exercises substantial control over the reporting company; or who owns or controls at least 25% of the ownership interests of the reporting company. Substantial control is exercised if the individual serves as a senior officer of the reporting company, has appointment or removal authority of any senior officer or board of directors, or has a substantial influence over important decisions made by the reporting company. Beneficial owners do not include minor children, agents or custodians on behalf of another individual, employees, individuals with inheritance interests, or creditors. Ownership interests refer to economic-related instruments, including but not limited to, equity, stock, investment, instrument convertible, option, privilege, contract, or arrangement in the entity. Ownership or control of ownership interests refers to an individual's relationship with the reporting company, including but not limited to, joint ownership, agency, trustee, recipient of income, and through ownership of intermediary entities that own or control ownership interests of the reporting company. FinCEN's regulations further provide guidance on the calculation of total ownership interests based on capital, profit, and stock.[20]

### Initial Report Requirements: Content and Time To File

Reporting companies must fill out the BOI form, which generally requires the same information regardless of the entity type. A red asterisk on the BOI form indicates required information. Reporting companies may complete a PDF version of the form, input the information directly on FinCEN's website, or contact FinCEN for an automated method to file the report via a system-to-system Application Programming Interface.[21]

The BOI form first requires the reporting company to disclose: (1) its full legal name, (2) current address of its principal place of business in the U.S. or the primary location it conducts business in the U.S., (3) the state, Tribal, or non-U.S. jurisdiction of its formation, and (4) a tax identification number (TIN), satisfied by either an Employer Identification Number (EIN), Social Security Number (SSN), or Individual Taxpayer Identification Number (ITIN). A non-U.S. reporting company must include all of the aforementioned information, as well as the state or Tribal jurisdiction where it first registered and, if it has not been issued a TIN by the Internal Revenue Service (IRS), a tax identification number issued by a non-U.S. jurisdiction.[22]

In addition, reporting companies must provide the following information for every individual who is a beneficial owner and every individual who is a company applicant to

the reporting company: (1) full legal name, (2) date of birth, (3) complete current address of the company applicant who forms or registers an entity in the course of business or the individual's residential street address, (4) a unique identifying number and issuing jurisdiction of a non-expired U.S. passport, a non-expired identification document issued by a state, local government, or Indian tribe, a non-expired drivers' license issued by a state, or a non-expired non-U.S. government passport, and (5) an image of the document with the unique identifying number. Existing entities are subjected to the aforementioned disclosure requirements only as to the individual beneficial owners, and not to company applicants.[23]

There are special content rules for reporting companies owned by exempt entities, information related to minor children, and reporting companies considered non-U.S. pooled investment vehicles consistent with 31 C.F.R. § 1010.380(c)(2)(xviii).[24] The CTA sets different requirements for the filing of reports for newly created entities, entities created on or after January 1, 2025, and existing entities.[25] The timing of reports differ depending on whether the filing is an initial, updated, or corrected report.

### Time To File Initial Reports for Newly Created Entities

For newly created entities, initial reports must be filed within 90 calendar days of the entities' creation. The period of the initial report is triggered by the earliest date of notice that the entity's creation is effective, either by public notice from the secretary of state, or by the entity's actual notice of its creation.[26] Domestic and foreign entities created on or after January 1, 2025 must file initial reports within 30 calendar days of public or actual notice of the entities' creation.[27]

### Time To File Initial Reports for Existing Entities

Existing entities are required to submit initial reports by January 1, 2025, one year of the effective date of the final regulations. Although the CTA states that initial reports must be in filed "in a timely manner, but not later than two years after the effective date of the final regulations," FinCEN's interpretation of the statutory language grants it the discretion to adopt a shorter deadline than two years.[28]

### Time To File Updated and Corrected Reports for All Entities

Reporting companies are subject to the timing requirements under 31 C.F.R. § 1010.380(a)(2)–(3) for updated and corrected reports.

For updated reports, the filing period is triggered by the date of the change. If there is a change to required information previously submitted regarding the beneficial owner(s), the reporting company must submit an updated report pursuant to § 1010.380(b)(3) within 30 calendar days after the date of the change. If a beneficial owner dies, the reporting company must submit an updated report identifying any new beneficial owners. If there is inaccurate information in the initial BOI report, the reporting company is required to file a corrected report pursuant to § 1010.380(b)(3)(iii) within 30 calendar days of its knowledge of the inaccuracy.[29]

## The NYS LLC Transparency Act

### Legislative History of the NYS Act

On December 22, 2023, Governor Hochul signed Senate Bill No. 995-B, enacting the NYS Act, on the condition that the state legislature pass amendments to limit public access to the BOI database. Similar to the CTA, the NYS Act intends to prevent illicit activity by individuals using LLCs as "shield[s]" against law enforcement.[30] On March 1, 2024, the NYS Act was amended by the approval of Senate Bill No. 8059, with a new effective date of January 1, 2026.[31]

The NYS Act applies only to LLCs formed or authorized to do business in the state of New York. It amends the New York Limited Liability Company Law ("LLC Law") by adding three new sections, and by either amending or repealing subsections in the LLC Law and the New York Executive Law ("Exec. Law").[32]

### Requirements of the NYS Act

The NYS Act models the CTA, and largely follows the CTA's definitions of reporting company, beneficial owner, applicant, and exempt company.[33] However, there are several key differences between the NYS Act and the CTA, including annual filings, access to BOI information, and timing.

The NYS Act departs from the CTA by requiring entities to submit an annual statement to the New York Department of State (NYDOS). The annual statement must confirm or update either the entity's BOI information or statement of exemption, and the street address of its principal executive office. NYDOS will retain the BOI information on a secured database, but the information may be accessible under certain circumstances, including: (1) at the written request of beneficial owners; (2) by court order; (3) by any federal, state, or local government agency if required by statute or program; and (4) for any law enforcement purpose, including investigations by the New York State attorney general.[34]

#### Initial BOI Disclosure: Timing and Content

One major difference between the CTA and the NYS Act is the time period for filing a reporting company's initial BOI disclosure. Under the NYS Act, a reporting company formed or qualified to do business in New York is required to file its initial BOI disclosure or submit an attestation of exemption with the NYDOS within 30 days of the initial filing of its articles of organization or of authorization to do business in the state. All existing entities created or authorized to do busi-

ness in New York before January 1, 2026, the effective date of the NYS Act, are required to submit either an initial BOI disclosure or an attestation of exemption on or before January 1, 2027.[35]

If a reporting company believes it is exempt from the BOI disclosure based on the exempted entities enumerated in the federal CTA, the entity must submit an attestation of exemption, in a format to be determined by the NYDOS, explaining the specific exemption claimed and the facts that the exemption is based upon. Each year after its initial exemption statement, the entity is required to submit an annual statement confirming its status as an exempt entity.[36]

For both new and existing reporting companies, the BOI disclosure must contain the following information of each beneficial owner and applicant of the reporting company: (1) full legal name; (2) date of birth; (3) current home or business street address; and (4) unique identifying number from either (i) an unexpired passport, (ii) an unexpired state driver's license, or (iii) an unexpired identification card or document issued by a state or local government agency or Tribal authority.[37] Each year, reporting companies must submit an annual statement confirming or updating the BOI disclosures.

### Penalties Imposed by New York State

Any entity that fails to file a BOI disclosure or attestation of exemption will be deemed "suspended" and therefore prohibited to conduct business in New York State, with certain broad exceptions, until the entity files its BOI disclosure or attestation of exemption. An entity that fails to file a BOI disclosure, attestation of exemption, or annual statement after 30 days will have its NYDOS records noted as "past due" and the entity will be subjected to a fine up to $500 for each day past due. After two years of failure to file a BOI disclosure, attestation of exemption, or annual statement, the entity's NYDOS records will be noted as "delinquent" and the entity will be subjected to a fine up to $500 for each day delinquent. A delinquent entity may be subjected to an action by the New York State attorney general to dissolve or cancel the entity for failure to comply with the NYS Act. Like the CTA, the NYS Act makes it unlawful for any individual to knowingly provide, or attempt to provide, false and fraudulent information in the BOI disclosure.[38]

## Conclusion

As of March 2024, most corporations and LLCs are required to submit BOI disclosures to the federal government. Due to pending litigation challenging the constitutionality of the CTA, there may be major changes to the federal disclosure requirements later this year. Currently, the federal government has laid the technological foundation to collect and preserve BOI reports; however, there still remains uncertainty about the government's financial ability to maintain the database.[39]

Most existing LLCs formed or authorized to do business in New York State will be required to submit separate, state-specific BOI disclosures to the New York State government by January 1, 2027.[40] Following the effective date of the NYS Act, all LLCs, whether reporting companies or exempted companies, will be required to submit annual statements confirming or updating the BOI disclosures or attestations of exemption. The state government has neither revealed a detailed collection plan of BOI reports nor identified the costs required to maintain its database.

Business entities should continue to monitor the federal courts' interpretation of the CTA and any implementing regulations issued by the state of New York.

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31. Compare 2024 N.Y. Laws ch. 102 with 2023 N.Y. Laws ch. 772.
32. 2024 N.Y. Laws ch. 102, § 1 (adding §§ 1106, 1107, and 1108 to the LLC Law); §§ 2-8 (amending or repealing several sections of the LLC Law); § 9 (repealing § 100-b of the Exec Law); and § 10 (amending effective date).
33. *Id.* § 1; 31 U.S.C. § 5336(a)(11) (CTA's definition of "reporting company"); 31 U.S.C. § 5336(a)(3) (CTA's definition of "beneficial owner"); 31 U.S.C. § 5336(a)(2) (CTA's definition of "applicant"); 31 U.S.C. § 5336(a)(11)(B) (CTA's definition of exempted entities).
34. *Id.* § 1 (adding §§ 1107(f)–(g) to the LLC Law).
35. 2024 N.Y. Laws ch. 102, § 1 (adding §§ 1107(d)–(e) to the LLC Law).
36. *Id.* § 1 (adding §§ 1107(b), 1106(c), 1107(g)(4) to the LLC Law).
37. *Id.* § 1 (adding § 1107(a) to the LLC Law).
38. *Id.* § 1 (adding §§ 1108(g), 1108(a)(1)–(2), 1108(b)(1)–(2), and 1108(e)(1) to the LLC Law).
39. *See generally* Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59562 (discussing the costs to the public, reporting companies, FinCEN, and other government agencies).
40. The New York State Legislature repealed § 215(a) of the LLC Law, which permitted a reporting company to submit a copy of its federal BOI report pursuant to the CTA in lieu of submitting a New York State-specific disclosure. *See* 2024 N.Y. Laws ch. 102, § 5.

# You Must Read This—but You Won't Like Everything It Says!

## *Professional Judgment for Lawyers* by Randall Kiser

Book Review by Laura A. Kaster

**REPRINT**
Originally published in *NY Dispute Resolution Lawyer* (2024, v. 17, no. 1).

For over fifteen years, Randall Kiser has been challenging lawyer decision-making and risk assessment. His seminal work studying settlement rejections demonstrated an unexpectedly high rate of "decision error" which resulted far too often in either plaintiffs' recoveries at trial lower than the settlement offered or significantly greater payouts by defendants at trial after they rejected settlement.

Kiser's book, *Beyond Right and Wrong* (Springer 2010), showed us more granular examples of those who have developed techniques for better prediction. Now, in *Professional Judgment for Lawyers* (Edward Elgar Publishing, 2023), Kiser challenges our assumptions about legal training itself. He asks, why do we believe we are trained in analysis and judgment when we fail to ground our thinking in known science or in scientific method, or even evaluation of decisions previously made? Why has legal training remained fundamentally unexamined since Langdell introduced the case method in the nineteenth century? How can we continue to ignore not just decision science but psychology and brain science? Why have we no real training in risk assessment? Despite our obligation to provide our best judgment to our clients, why have we not developed techniques for improving that judgment or advancing to wisdom?

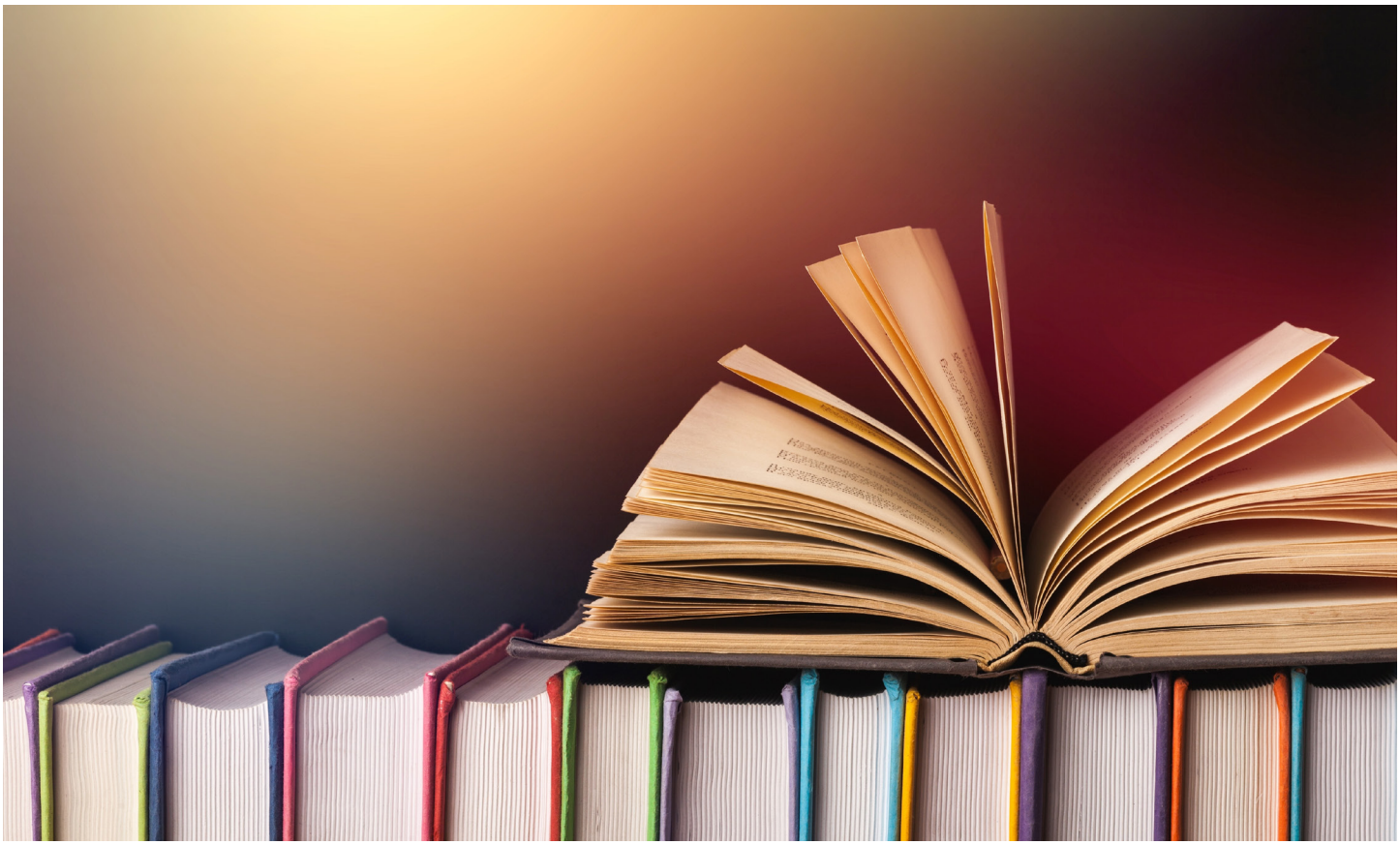
> For a profession that reveres and promotes procedures, it is peculiar that law has neither established nor followed specific procedures for analyzing facts, selecting arguments, or validating conclusions. Legal analysis and reasoning remain largely idiosyncratic, extemporaneous, and opaque processes more dependent on the unique challenges of specific disputes and transactions than overarching principles that advance decision-making quality.

This book is a must for arbitrators, mediators, and advocates and educators in ADR where risk assessment (a kind of forecasting) is a key element of the project. Kiser not only explains the underlying gaps in legal training and self-development and the pernicious influences of a variety of cognitive biases that taint lawyer and judicial decisions but also gives specific guidance for self- assessment and improvement. Chapter 8 on "Insight, Hindsight, and Foresight" is invaluable in helping to explain the project of forecasting. Although most attorneys may class prediction as a dark science outside their professional purview, in fact it is key to counseling clients in negotiations and settlements, including during mediation. Limited ability to see the weight of evidence that supports an opponent or to counter the attorney and client rosy view of their own case inhibits the constant iterative process needed to improve prediction. As Kiser states:

> Effective forecasting is a process of synthesizing multiple sources of information, developing forecasts, and then testing and trying to disprove your own forecasts with new data. This process is stymied when we are strongly attached to our own opinions and view our opinions as extensions of ourselves.

One of Kiser's many recommendations is that we abandon vague verbiage, such as success is "probable," and assign numerical values to our predictions, values that we constantly update on the basis of new information. The truth is that to the client a 60% chance of success may be much closer to 50/50 than the lawyer perceives and is likely to lead to quite a different discussion regarding settlement. In any case, assigning probabilistic words reduces misunderstandings and employing ranges rather than a single number (a range that decreases with improved information) improves focus on what information is needed to improve insight. In this regard, the use of AI may become significant, and the lawyer needs to understand how and why in order to be a proficient counselor. Most of all, Kiser recommends that we consider the opposite. Put yourself in your opponent's shoes or as Daniel Kahneman recommends, do a premortem, imagine you have lost and assess the reasons for that loss.

The book is well-organized with a summary of points made at the end of each chapter followed by a rich listing of resources. There is a separate section on arbitrator decision making and one on mediator decision making. According to studies cited by Kiser, arbitrators do not perform better than judges and lawyers and suffer equally from unconscious bias. Mediators' control over information and communication presents special problems for Kiser. But his primary concern is that the lack of diversity in the ADR field undermines ADR's role as a substitute for judicial process; he notes statistically significant differences in the median awards given by male and female arbitrators in employment cases, and the



much lower participation and selection of female arbitrators in those disputes.

The project of becoming a true professional is arduous. It begins with a commitment to achieving expertise and for dispute resolvers and counselors, it demands self-development in assessing risk and predicting outcomes. Kiser's book is a tremendous contribution to us all.

**Laura A. Kaster**, FCIArb, is a fellow in the College of Commercial Arbitrators and a master mediator for the AAA. She is former chair of the NYSBA Dispute Resolution Section and is a co-editor in chief of *NY Dispute Resolution Lawyer*, where this article first appeared (2024; vol. 17, no. 1). For more information please visit NYSBA.ORG/DRS.

**Endnotes**

1. Randall L. Kiser, Martin A. Asher, Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, Journal of Empirical Studies (2008).
2. Randall L. Kiser, Beyond Right and Wrong (Springer 2010).
3. Randall Kiser, Professional Judgment for Lawyers (Edward Elgar Publishing 2023).
4. Professional Judgment for Lawyers at 71.
5. Professional Judgment for Lawyers at 277.

# CPLR Amendments: 2024 Legislative Session

(2024 N.Y. Laws ch. 1-59, 61-118)

| CPLR | Chapter (Part) (Subpart, Item, §) | Change | Eff. Date |
|---|---|---|---|
| 213-c(b) | 23(39) | Adds additional crimes to 20-year statute of limitations | 1/30/24 |
| 215(8)(b) | 23(40) | Adds a crime formerly defined in Penal Law § 130.50 | 1/30/24 |
| 506(b)(5) | 91(1) | Adds venue provisions for proceedings challenging apportionment by the legislature | 2/28/24 |
| 3102(e) | 101(4) | Adds a definition of gender-affirming care | 6/25/23 [sic] |
| 3119(g)(1) | 89(2) | Adds an exception where express consent is not feasible because of patient's injury or death | 6/25/23 [sic] |
| 3119(h) | 101(3) | Adds a definition of gender-affirming care | 6/25/23 [sic] |
| 4551 | 56(LL)(3) | Adds new New York voting and elections database | 4/1/26 [sic] |

# Proposed Rules of Interest to Civil Litigators (2023-2024)

(http://ww2.nycourts.gov/rules/comments/index.shtml)
*Note: The comment periods for the following proposed rules have expired, except as noted. Comments must be submitted to rulecomments@nycourts.gov.*

**April 17, 2024: Request for Public Comment on a proposal to add a preamble before Commercial Division Rules 25-33**
request-for-public-comment-commercial-division-preamble-041724.pdf (nycourts.gov)

**April 12, 2024: Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements**
LitigationFinancingAgreements.pdf (nycourts.gov)

**February 13, 2024: Request for Public Comment on a proposed amendment to 22 NYCRR § 202.72 authorizing the Chief Administrative Judge to grant exemptions from the current mandate that all Child Victim Act (CVA) cases be assigned to specific CVA parts**

ChildVictimActCaseAssignments.pdf (nycourts.gov)

**October 18, 2023: Request for Public Comment Regarding Standardized Notice of Petition Forms Outside New York City**
NoticeOfPetitionFormsOutsideNYC-101823.pdf (nycourts.gov)

*CPLR Amendments, Proposed Rules of Interest, and the 2024 Amendments (next page) appear in the current issue of the* Commercial and Federal Litigation Section Newsletter *(2024, vol. 30, no 2). For more information, please vist NYSBA.ORG/COMFED.*

# 2024 Amendments to the Uniform Rules for Supreme and County Courts, Rules Governing Appeals, and Certain Other Rules of Interest to Civil Litigators

(West's 2024 N.Y. Orders 1-14; Adopted Rules on OCA website, at http://ww2.nycourts.gov/rules/comments/index.shtml; amended rules on appellate court websites)

| 22 NYCRR § | Court | Subject (Change)<br>Link to Order | Eff. Date |
|---|---|---|---|
| Part 52 | All | Establishes procedure for ex parte requests for judicial accommodation by persons with a disability<br>https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/Part52-AO.pdf | 2/16/24 |
| Part 53 | Sup. | Adds a rule on coordination of related actions pending in more than one judicial district<br>https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO.02.24.pdf | 4/18/24 |
| 202.12 | Sup. | Substantially revised the rule governing preliminary conferences<br>https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-166-24.pdf | 5/20/24 |
| 202.16-c | Sup. | Adds a new rule governing the electronic filing of matrimonial actions in supreme court<br>https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO152-24.pdf | 4/23/24 |
| 202.69 | Sup. | Repeals rule<br>https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-168-24.pdf | 5/14/24 |
| 202.70(b)(1) | Sup. | Adds to list of Commercial Division cases technology transactions and/or commercial disputes involving or arising out of technology<br>https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO77-Commercial-Division.pdf | 2/14/24 |
| 202.70(g), Rule 9-b | Sup. | Adds a provision on appointment of referees pursuant to CPLR 4301 and 4317(a)<br>https://www.nycourts.gov/LegacyPDFS/rules/comments/orders/AO77-Commercial-Division.pdf | 2/14/24 |
| 500.11(j) | Ct. App. | Extends AG's deadline for filing an amicus curiae submission without leave of court<br>https://www.nycourts.gov/ctapps/news/nottobar/nottobar-Amicus-042324.pdf | 5/8/24 |
| 500.12(e) | Ct. App. | Extends AG's deadline for filing an amicus curiae submission without leave of court<br>https://www.nycourts.gov/ctapps/news/nottobar/nottobar-Amicus-042324.pdf | 5/8/24 |
| 500.23 | Ct. App. | Adds provision that amicus curiae relief will be denied where acceptance may cause recusal or disqualification of a judge and changes deadlines for amicus curiae motions<br>https://www.nycourts.gov/ctapps/news/nottobar/nottobar-Amicus-042324.pdf | 5/8/24 |

# 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 1255 (05/26/2023)

**Topic:** Romantic relationship between criminal defense attorney and county deputy sheriff

**Digest**: Where a criminal defense attorney is in a romantic relationship with a county deputy sheriff, the attorney must determine if a reasonable lawyer would conclude there is a significant risk that the attorney's independent professional judgment on behalf of the client will be adversely affected. If such a significant risk exists but the attorney reasonably believes he or she can provide competent and diligent representation, the attorney may request client consent to the conflict. If the attorney's belief would be unreasonable, the conflict would be nonconsentable. If the attorney has a nonconsentable conflict, then the conflict is imputed to the attorney's firm, but the imputation may be waived with client consent, even if the inquirer's conflict is nonconsentable as to the individual lawyer, so as to allow other lawyers in the firm to accept or continue the representation. If the attorney has a consentable conflict but fails to obtain consent, then the conflict is imputed to the attorney's entire firm.

**Rules:** 1.0(j), 1.7(a) and (b), 1.10(a), (d) and (h)

Partially modifies N.Y. State 660

### FACTS

1. The inquirer is a criminal defense attorney who is in a romantic relationship with a county deputy sheriff. She states that the deputy sheriff was a "secondary or supporting officer" in two prior cases against her clients, both of which ended in negotiated non-criminal dispositions. The inquirer is currently representing a client accused of a double homicide in a prosecution in which the deputy sheriff is again a "supporting officer."

### QUESTIONS

2. Where a criminal defense attorney is in a romantic relationship with a county deputy sheriff, may the attorney represent clients in cases in which the deputy sheriff was involved?

3. If the attorney is disqualified from the representation, will the other lawyers in the inquirer's firm also be disqualified by imputation?

### OPINION

#### A Romantic Relationship Presents a Rule 1.7(a)(2) Personal Interest Conflict

4. We have previously opined on the rules governing disqualification based on personal interest under Rule 1.7(a)(2) of the New York Rules of Professional Conduct ("Rules"). *See* N.Y. State 1119 (2017) (former work colleagues). Here, the romantic relationship between the inquirer and the deputy sheriff is clearly such a personal interest and we revisit Rule 1.7(a)(2) in that context.

5. Rule 1.7 (a)(2) provides that a lawyer may not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own . . . personal interests" unless the conflict is consentable under Rule 1.7(b) and the conflicted lawyer obtains the client's informed consent, confirmed in writing.

6. Here, whether such a significant risk exists will depend, among other factors, upon (i) the closeness of the relationship between the inquirer and the deputy sheriff, (ii) whether the deputy sheriff played a significant role in investigating the matter, (iii) whether the actions of the sheriff's department are an issue in the case, and (iv) whether the deputy sheriff will be a trial witness subject to cross-examination by the inquirer.

7. Concern would arise if the deputy sheriff played a significant role in investigating the matter, or if the deputy sheriff would be subject to cross-examination, because the inquirer might be tempted to "pull her punches" in defending her client. The inquirer might also be inclined to accept a negotiated plea of guilty to resolve the matter without exposing deficiencies in the investigation or implausible testimony given by the deputy sheriff or others in the sheriff's office.

8. Concern would also arise that the inquirer might reveal client confidential information to the deputy sheriff. Rule 1.7, Comment [11] addresses matters where related lawyers are involved on opposite sides of a case, but we believe it is also relevant here:

> [11] When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j).

But *see* N.Y. State 409 (1975) (citing ABA 340 to the effect that it should not be assumed that a lawyer whose husband or wife is a lawyer will not obey all disciplinary rules, and thus it should not be assumed that one spouse will disclose confidences or secrets of the client to his or her spouse in violation of the ethical proscription).

**A Personal Interest Conflict Arising from a Romantic Relationship May Be Consentable**

9. As Comment [11] to Rule 1.7 suggests, if a reasonable lawyer would conclude that there is a significant risk that the attorney's professional judgment on behalf of the client would be adversely affected, then the attorney may still represent the client as long as the waiver and consent provisions of Rule 1.7(b) are met. These require that:

> (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.

10. Rule 1.0(j) in the terminology section of the Rules) defines informed consent as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

11. Accordingly, the lawyer must explain both the risks that his or her professional judgment could be adversely affected and the reasonably available alternatives (including representation by other lawyers in the firm, or in other firms).

12. Under Rule 1.7(b), a conflict of interest is sometimes nonconsentable:

> Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. ***" Rule 1.7, Comment [15].

13. Determining whether a conflict is nonconsentable depends on the facts and circumstances. Here, for example, we believe the conflict would be nonconsentable if the deputy sheriff was significantly involved in the investigation of the matter and is expected to be called as a prosecution witness at trial. In that circumstance (and there may well be others), client consent would not be effective because the inquirer could not reasonably conclude that she could provide competent and diligent representation to her client to defend against the murder charges.

14. Our conclusion that the inquirer, based on particular facts and circumstances, might ethically continue her representation – either because there is not a "significant risk" under Rule 1.7(a)(2) or because the conflict is consentable and the lawyer has obtained informed consent pursuant to the requirements of Rule 1.7(b) – is dependent on the fact that the inquirer and the deputy sheriff are not opposing attorneys in the matter. The conflict would be nonconsentable if the romantic relationship were between the prosecutor and the defense attorney, not the defense attorney and the deputy sheriff.

15. Thus, in N.Y. State 660 (1994), decided under the former New York Code of Professional Responsibility, an

associate in a law firm with a significant criminal defense practice was dating an assistant district attorney in the county in which the associate's firm was located. They dated frequently and had a close personal relationship. The Committee concluded that "[u]nder the circumstances, it would not be unreasonable to assume that they each had a personal interest in one another's reputation, success and welfare" that "ordinarily would operate to disqualify the lawyers from undertaking an adverse representation without the consent of their respective clients."

16. Noting that a "scintilla of partiality, which might be waivable by private parties in other contexts, is intolerably suspect and prejudicial to the public's regard for the criminal justice system," we stated:

> Irrespective of the subjective intent of the prosecutor and defense counsel, and regardless of howsoever scrupulous they may be in the conduct of their professional obligations, the appearance of partiality in the administration of justice is so strong that a couple who date frequently should not be permitted to appear opposite one another in criminal cases.
>
> We leave for another day the issue of how to determine when friendship and warm regard become so fraught with emotion as to provide a basis for disqualification under DR 5-101(A). Whatever hereafter may be said of friendships in varying degrees, we believe that a frequent dating relationship is clearly over the line that separates ethically cognizable conflicting interests from those which are not. A dating relationship between adversaries is inconsistent with the degree of professional judgment required by DR 5-101(A).
>
> N.Y. State 660 (emphasis added).

**Personal Conflicts of Interest Are Imputed to Other Lawyers in the Firm**

17. If the inquirer's personal conflict is nonconsentable under Rule 1.7(b), or if the client declines consent, may another lawyer in the inquirer's firm handle the representation with the consent of the client? Rule 1.10(a) is the basic rule on imputation of conflicts of interest. With exceptions not here relevant, Rule 1.10(a) provides:

> (a) 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, 1.8 or 1.9 ….

18. Because the disqualification here would be under Rule 1.7, and no exceptions apply, there would be imputed disqualification of the inquirer's entire firm under Rule 1.10(a).

19. Notably, the Rules of Professional Conduct in New York differ from the Model Rules of the American Bar Association (the ABA) on whether personal interest conflicts are imputed within a law firm. Rule 1.10 of the ABA Model Rules specifically provides that personal conflicts of interest of one lawyer in a firm are not imputed to other lawyers in the firm unless the conflict presents a significant risk of materially limiting representation by the other lawyers in the firm. Comment [11] to Section 1.7 of the ABA Model Rules contains a sentence not included in the same Comment to Rule 1.7 of the New York Rules, namely: "The disqualification arising from a close family relationship is personal and not imputed to members of firms with whom the lawyers are associated." In New York, however, the conflict here would be imputed to all lawyers in the firm under Rule 1.10(a).

20. In N.Y. State 660, decided under the former New York Code of Professional Responsibility, we noted the paradox that conflicts with non-spouses would be imputed while conflicts with spouses, which are now covered by Rule 1.10(h) would not be imputed. We said:

> The issue as to whether defense counsel's firm would be disqualified raises what appears as something of an anomaly in applying the provisions of DR 5-105(D) [the predecessor to Rule 1.10(a)]. Because disqualification of the associate is based on DR 5-101(A) [the predecessor to Rule 1.7(a)], a literal reading of DR 5-105(D), as amended effective September 1, 1990, would automatically impute the associate's disqualification to the entire firm. See N.Y. State 632 (1992). DR 9-101(D) [now Rule 1.10(h)] expressly prohibits spouses from undertaking adverse representation [without client consent]. The only operative difference between the general rule of DR 5-101(A) and the more specific prohibition of DR 9-101(D) is that the latter does not trigger automatic imputed disqualification under DR 5-105(D), for reasons bearing more on sociology and economics than traditional notions of conflicting interests.

> It should be evident that a spousal relationship is significantly closer than that of a dating couple. Among other things, a dating relationship is usually devoid of the community of financial interests present in the spousal relationship. Consequently, and most anomalously, if the Code were to be applied literally, the closer relationship of spouses would not require automatic disqualification of the entire firm, while the more casual relationship of a dating couple would seem to impute firm-wide disqualification. This result would be as illogical as it is manifestly inconsistent. Notwithstanding that the dating relationship invokes the proscriptions of DR 5-101(A), for purposes of applying standards of imputed disqualification, we believe that it should not be subject to greater constraint than the relationship of spouses addressed by DR 9-101(D). Thus, whether other lawyers in the firm will be disqualified depends on the facts and circumstances. See N.Y. State 638, at 8-11 (1992); N.Y. State 632, at 2-3 (1992); see also N.Y. State 654, at 5 (1993) (discussion of appropriate factors to be considered). If the lawyer concludes that another lawyer in the firm may undertake or continue the representation of a defendant prosecuted by the assistant district attorney in question, the associate must be effectively screened from any participation in the matter and must be apportioned no part of the fee therefrom.

21. In the nearly 30 years since N.Y. State 660 was issued, New York has amended its ethics rules many times – yet no amendments have been made to the provisions imputing personal interest conflicts. Indeed, in 2008 when the New York State Bar Association recommended replacing the Code of Professional Responsibility with a version of the Model Rules, the Bar Association recommended amending Rule 1.10 to eliminate imputed disqualification for personal conflicts of interest absent special circumstances. The New York Administrative Board of the Courts declined to adopt this recommendation in favor of the language quoted above. In 2020, the State Bar again recommended an amendment to Rule 1.10 that would eliminate imputation of personal conflicts of interest, but that proposal is still pending before the Administrative Board. In light of the failure to adopt this proposal by the Administrative Board in 2008 and its failure to act on the most recent proposal, we must conclude that Rule 1.10(h) and Comment [11] to Rule l.7 mean what they say, no matter how inconsistent. We therefore partially modify N.Y. State 660, to the extent that it concludes that whether other lawyers in the firm will be automatically disqualified depends on the facts and circumstances. The imputation of the personal conflict to the inquirer's entire firm is automatic and would not be dependent on facts and circumstances.

### A Nonconsentable Rule 1.7(a)(2) Personal Conflict of Interest May Be Waived

22. Despite the imputation of the nonconsentable conflict to other lawyers in the inquirer's firm, Rule 1.10(d) allows the client to waive the imputed disqualification and consent to the representation by other lawyers in the firm. Rule 1.10(d) provides:

> A disqualification prescribed in this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

23. Thus, if another lawyer in the inquirer's firm reasonably believes he or she will be able to provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing, then that other lawyer may undertake the representation. In other words, the client may waive the conflict imputed to other lawyers in the inquirer's firm even if the inquirer's own conflict would be nonconsentable. *See* N.Y. State 994 (2013), N.Y. State 975 (2013), N.Y. State 973 (2013), N.Y. State 968 (2013) (only the underlying conflict, and not the nonconsentability of that conflict, is imputed).

## CONCLUSION

24. Where a criminal defense attorney is in a romantic relationship with a county deputy sheriff, the attorney must determine if a reasonable lawyer would conclude there is a significant risk the attorney's independent professional judgment on behalf of the client will be adversely affected. If such a significant risk exists but the attorney reasonably believes he or she can provide competent and diligent representation, the attorney may request client consent to the conflict. If such a belief would be unreasonable, the conflict would be nonconsentable. If the lawyer is disqualified, the disqualification is imputed to the lawyer's firm, but the imputed conflict may be waived with client consent, even if the inquirer's conflict is nonconsentable as to the inquirer, so as to allow other lawyers in the firm to accept or continue the representation.

(07-23)

## Opinion 1256 (05/26/2023)

**Topic:** Lawyer purchasing claims from clients of his law firm through a company he owns and then prosecuting those claims by retaining the law firm, or by retaining another law firm with which the lawyer has no affiliation.

**Digest:** A lawyer may not purchase claims through a company he owns from clients of a law firm where the lawyer is employed and then prosecute those claims by retaining the law firm. Whether a lawyer can purchase claims through a company he owns from clients of a law firm where the lawyer is employed, and then prosecute those claims by retaining another law firm with which the lawyer has no affiliation is not expressly governed by the New York Rules of Professional Conduct. Assuming such conduct is not illegal under Judiciary Law section 488, it is subject to the provisions of Rule 1.8(a), which govern business transactions with clients.

**Rules:** 1.8(a), 1.8(i), 8.4(a).

### FACTS

1. The inquirer is employed by a law firm in which he has no ownership interest. The firm's practice includes litigation against insurance companies that have denied or disclaimed insurance coverage. Rather than engage the firm to pursue such coverage claims on behalf of the insureds, some clients would prefer to sell and assign their claims outright to the law firm for an agreed price.

### QUESTIONS

2. The inquirer asks if a company he owns can purchase denied insurance claims from clients of the law firm where he is employed and then retain that law firm to litigate those claims?

3. If not, may a company that the inquirer owns purchase the denied insurance claims and retain another law firm with which the inquirer has no employment affiliation to litigate on behalf of the company?

### OPINION

4. Rule 1.8(i) of the New York Rules of Professional Conduct provides that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client." That provision prevents the inquirer from purchasing, on behalf of a corporation he owns, the denied insurance claims of clients of the law firm where he works, and then retaining that law firm to litigate those claims. See also Restatement Third, The Law Governing Lawyers § 36 ("Forbidden Client–Lawyer Financial Arrangements")(discussing the prohibition in Rule 1.8(i)).

5. While it is a question of law beyond the scope of our jurisdiction, the inquirer should also consider whether the proposed conduct violates the prohibitions in Judiciary Law section 488, entitled "Buying demands on which to bring an action." See Judiciary Law § 488(1) ("An attorney or counselor shall not . . .[d]irectly or indirectly, buy, take an assignment of or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.").

6. The inquirer's second question is whether a company he owns can purchase the denied insurance claims and retain another law firm with which the inquirer has no employment affiliation to litigate the claims on behalf of the company. While this conduct is not expressly governed by Rule 1.8(i), we note that "[a] lawyer or law firm shall not . . . violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another." Rule 8.4(a).

7. Assuming that the purchase of a client's denied insurance claim, with the intent to prosecute that claim through another law firm, is not illegal under the provisions of the Judiciary Law and other substantive law, it would be subject to Rule 1.8(a), which governs business transactions with clients. *See* N.Y. State 1231 (2021) (an estate-planning lawyer who has an interest in a nonlegal financial management company that the lawyer hopes to recommend to estate-planning clients must comply with Rule 1.8(a)). Rule 1.8(a)(1) requires that the terms of the transaction be "fair and reasonable to the client." Furthermore, "the terms of the transaction [must be] fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client." Rule 1.8(a)(1). Rule 1.8(a)(2) requires that the client be advised in writing of the desirability of seeking the advice of independent legal counsel on the transaction and be provided with a reasonable opportunity to seek independent counsel. See Rule 1.8(a), Comment [2] ("When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable."). Finally, Rule 1.8(a)(3) requires that the client give an "informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

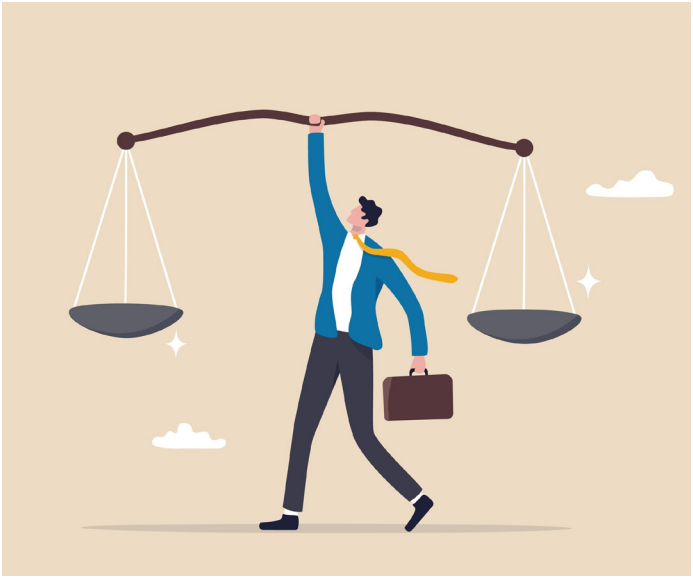
8. While a client need not be independently represented when consummating a business transaction with her lawyer, certain requirements in Rule 1.8(a) are deemed satisfied if independent representation exists. As Comment [4] to Rule 1.8 states:

If the client is independently represented in the transaction, paragraph (a)(2) is inapplicable, and the requirement of full disclosure in paragraph (a)(1) is satisfied by a written disclosure by either the lawyer involved in the transaction or the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client, as paragraph (a)(1) further requires.

## CONCLUSION

9. A lawyer may not purchase claims through a company he owns from clients of a law firm where the lawyer is employed and then prosecute those claims by retaining the law firm. The question of whether a lawyer can purchase claims through a company he owns from clients of a law firm where the lawyer is employed, and then prosecute those claims by retaining another law firm with whom the lawyer has no affiliation, is not expressly governed by the New York Rules of Professional Conduct. Assuming such conduct is not illegal under Judiciary Law Section 488, it is subject to the provisions in Rule 1.8(a), which govern business transactions with clients.

(06-23)



## Opinion 1257 (05/26/2023)

**Topic**: Conflicts of interest; former district attorney in public defender's office

**Digest**: A former district attorney may be employed by a public defender's office in the same county. The former district attorney shall not personally represent a public defender client in a matter in which he was personally and substantially involved as district attorney or in which he is conflicted because he acquired "confidential government information" within the meaning of Rule 1.11(c). Where a conflict exits, it is not imputed to all lawyers in the public defender's office, and the public defender can assign another attorney in the office to represent the affected client, if appropriate measures are taken to effectively screen the former district attorney from the matter in accordance with Rule 1.11(b).

**Rules:** 1.0(*l*), 1.9(c), 1.11(a)-(c)

## FACTS

1. An attorney from a county public defender's office has asked if the office can hire the former district attorney of the same county as a full-time assistant public defender. The public defender is authorized to have three full-time attorneys who defend criminal cases, as well as a full-time and a part-time attorney who handle matters in Family Court. The former district attorney would work solely in Family Court, with an office in a building separate from that of the public defender and the assistant public defenders who handle criminal cases outside of Family Court.

## QUESTIONS

2. May a county public defender's office hire a former district attorney to serve as an assistant public defender in the same county?

3. If so, how should the public defender's office identify and address potential conflicts of interest?

## OPINION

### Rule 1.11 Establishes a Special Conflicts Rule Regarding Former Government Attorneys

4. Conflicts regarding former government lawyers are governed by Rule 1.11 of the New York Rules of Professional Conduct (the "Rules"), which is entitled "Special Conflicts of Interest for Former and Current Government Officers and Employees." As its title indicates, Rule 1.11 is a special rule for government lawyers that establishes special standards for (a) determining whether a former client conflict of interest exist; (b) enumerating notice and screening requirements that obviate the imputed disqualification of attorneys associated in the same firm with the former

government lawyer, and (c) protecting confidential information acquired during government service.

**The Standard for Disqualification Under Rule 1.11(a)**

5. We begin with Rule 1.11(a). which imposes two distinct restrictions on former government lawyers and provides, in pertinent part:

> (a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) shall comply with Rule 1.9(c); and
>
> (2) shall not represent a client in connection with a matter in which the lawyer *participated personally and substantially* as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. ***
>
> (Emphasis added)

6. Subparagraph (a)(1) incorporates the general provision set forth in Rule 1.9(c), including its exceptions, which governs whether a lawyer may use or reveal protected confidential information of a former client. Rule 1.9(c) pertains to all lawyers, not just former government lawyers. Subparagraph (a)(2), in contrast, is unique to former government lawyers and provides in pertinent part that a former government attorney:

> shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

7. "Matter" is defined in Rule 1.0(l) to include any "representation involving a specific party or parties." All criminal cases and family court cases meet this definition.

8. Accordingly, under Rule 1.11(a)(2), unless the district attorney's office and the client give their informed consent, confirmed in writing, the former district attorney would be precluded in his capacity as an assistant public defender from participating in a particular Family Court matter in which he "participated substantially and personally" when he was the district attorney. See N.Y. State 776 (2004) (a former prosecutor may not defend an accused if the lawyer participated personally and substantially in prosecuting the defendant on the same charges while serving as a prosecutor).

9. As we said in N.Y. State 748 (2001), which construed DR 9-101 (the predecessor to Rule 1.11):

> The fact that a former government lawyer was counsel for the government in unrelated matters at the same time that the defendant's case was investigated or prosecuted is not enough to demonstrate personal and substantial participation under DR 9-101 or to require disqualification under that rule. See N.Y. State 638 (1992). At the same time, a former prosecutor must still carefully assess the circumstances of his or her service in the prosecutor's office to determine whether he or she may be deemed to have participated "personally and substantially" in the investigation or prosecution of a criminal defendant. Relevant facts include, but are not limited to, (1) the extent to which the former prosecutor served in a more than nominal supervisory role; (2) the extent to which the former prosecutor had knowledge of government confidences and secrets relevant to the proposed representation of the same defendants; (3) the extent to which the former prosecutor provided coverage for other ADAs; (4) the extent to which the former prosecutor was kept apprised of cases in the office; and (5) the extent of the former prosecutor's access to the case files and other information regarding cases in the prosecutor's office.

10. We believe that the "relevant facts" (or factors) under former DR 9-101 remain relevant to an analysis under Rule 1.11(a), which uses the same standard ("participated personally and substantially") that appeared in DR. 9-101.

11. Here, because the inquiry concerns the former district attorney himself and not an assistant district attorney in that office, the former government lawyer's name appeared on all charging instruments and other papers filed against defendants in the county. This does not, however, in and of itself establish that the former district attorney "participated personally and substantially" within the meaning of Rule 1.11(a)(2)). Rather, the emphasis is on whether and to what extent the former district attorney's general supervisory role regarding all prosecutions brought in his name within his jurisdiction could tip the balance in favor of disqualification in a particular matter on behalf of a client of the public defender office. The tipping point is the personal and substantial participation standard, measured by the relevant factors set forth in N.Y. State 748 (quoted above). The former district attorney will need to examine

these factors with respect to each matter in which he is asked to represent a client in the public defender's office.

**Subject to Enumerated Conditions, Rule 1.11(b) Allows Other Lawyers in the Public Defender's Office To Accept Representations From Which the Former District Attorney Is Disqualified**

12. Rule 1.11(b) sets forth an exception to Rule 1.11(a). If Rule 1.11(a) disqualifies a former government lawyer from a matter, then Rule 1.11(b) allows other lawyers in a firm with which the disqualified former government lawyer is "associated" to "undertake or continue representation in such a matter" if "the firm acts reasonably and promptly" to take certain specified actions specified in subparagraph (b)(1) and "there are no other circumstances in the particular representation that create an appearance of impropriety" within the meaning of subparagraph (b)(2)). The actions specified in subparagraph (b)(1) are to:

> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
>
> (iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule;

13. Here, provided the public defender and the other assistant public defenders employed in that office operate in conformance with the conditions specified in subparagraph (b)(1) and the "circumstances in the particular representation" do not "create an appearance of impropriety" under subparagraph (b)(2), then the former district attorney may represent the county or individual clients of the public defender office in Family Court matters from which the former government attorney himself is ethically barred under Rule 1.11(a).

**Under Rule 1.11(C), Other Attorneys in the Firm Who Accept the Representation of a Client Whom the Former Government Attorney Is Disqualified From Representing Must Be Screened From Acquiring Confidential Government Information**

14. Paragraph (c) of Rule1.11 restricts the use of "confidential government information" that a former government attorney "acquired when the lawyer was a public officer or employee." "Confidential government information" is defined in Rule 1.11(c) as "information that has been obtained under government authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public." The former government attorney "may not represent a private client whose interests are adverse to that person in a matter in which the [confidential government] information could be used to the material disadvantage of that person."

15. However, even where a former government lawyer is personally disqualified from representation under Rule 1.11(c), other lawyers in the same firm with which the former government lawyer is associated may undertake or continue that representation "if the disqualified lawyer is timely and effectively screened from any participation in the matter" in accordance with the same four conditions established in paragraph (b) of Rule 1.11.

**CONCLUSION**

16. A former district attorney may be employed by a public defender's office in the same county. The former district attorney shall not personally represent a public defender client in a matter in which he was personally and substantially involved as district attorney or in which he is conflicted because he acquired "confidential government information" within the meaning of Rule 1.11(c). Where a conflict exits, it is not imputed to all lawyers in the public defender's office, and the public defender can assign another attorney in the office to represent the affected client, if appropriate measures are taken to effectively screen the former district attorney from the matter in accordance with Rule 1.11(b).

(23-22)

## Opinion 1258 (06/05/2023)

**Topic**: Credit card fees as an "expense"

**Digest**: A lawyer may pass on a merchant processing fee to clients who pay for legal services by credit card provided that both the amount of the legal fee and the amount of the processing fee are reasonable, and provided that the lawyer has explained to the client and obtained client consent to the additional charge in advance.

**Rules**: 1.5(a)-(b)

### FACTS

1. The inquirer accepts credit card payments for payment of legal services. Credit card companies charge the inquirer between 3.5% and 3.75% of the invoiced amount as a merchant processing fee.

### QUESTION

2. May a lawyer pass on the merchant processing fee to the client as an expense?

### OPINION

3. New York lawyers may allow their clients to pay for legal services by credit card provided: "(i) the amount of the legal fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv) the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137." N.Y. State 1050 ¶5 (2015).

4. Rule 1.5(a) of the New York Rules of Professional Conduct ("Rules") prohibits charging a client "an excessive fee or expense" (emphasis added) and sets forth a non-exclusive list of factors to consider in determining whether a fee is excessive. A merchant processing fees that a lawyer wishes to charge back to a client who pays for legal services by credit card is an "expense" within the meaning of Rule 1.5(a). Rule 1.5(b) requires a lawyer to advise the client in writing "fee and expenses for which the client will be responsible."

5. Provided the attorney complies with Rule 1.5, nothing prohibits a lawyer from increasing the invoiced amount for legal services by an amount equal to the merchant processing fee incurred when accepting credit card payments. Thus, in N.Y. State 1050 (2015), in addition to allowing the inquiring lawyer to pass on to a client the credit card company's processing fee for payment of the firm's advance payment retainer by credit card, we allowed the lawyer to charge an additional nominal amount to compensate for the additional merchant processing fee incurred on that processing fee up-charge. We stated:

> A lawyer may, as an administrative convenience, charge a client a nominal amount over the actual processing fees imposed on the lawyer by a credit card company in connection with the client's payment by credit card of the lawyer's advance payment retainer, as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged (including the up-charge) are reasonable under the circumstances.

6. N.Y. State 1050, ¶18. The same principles apply here with respect to merchant processing fees assessed on legal fees that a client pays by credit card after the advance retainer.

7. Ethics opinions issued by bar associations in other states have reached similar conclusions on this issue. *See, e.g.,* Illinois Op. 14-01 (2014); D.C. Op. 348 (2009).

### CONCLUSION

8. A lawyer may pass on a merchant processing fee to clients who pay for legal services by credit card provided that both the amount of the legal fee and the amount of the processing fee are reasonable, and provided that the lawyer has explained to the client and obtained client consent to the additional charge in advance.

(09-23)

## Opinion 1259 (06/06/2023)

**Topic:** Collaboration between lawyer and paralegal

**Digest:** Subject to various Rules regarding fee sharing, referral fees, solicitation, aiding the unauthorized practice of law, and supervision of nonlawyers, a lawyer may enter into a non-exclusive agreement with a paralegal who refers clients to the lawyer and completes forms for submission to judicial and non-judicial bodies.

**Rules:** 5.3, 5.4(a), 5.5(b), 5.8, 7.2(a)

### FACTS

1. The inquirer is an attorney who primarily practices immigration law. The inquirer has been approached by an individual who operates a document-preparation business and who is characterized by the inquirer as a "paralegal." The paralegal proposes to enter into a "collaboration agreement" that "implies both referring clients to my firm and completing forms that would later on be submitted to the immigration authorities (court and non-court cases)."

### QUESTIONS

2. What ethical rules govern an agreement between a lawyer and an independently employed paralegal who wishes to refer clients to the lawyer and prepare documents for the lawyer's use in his or her legal practice?

3. On what basis, if any, could the lawyer ethically compensate the paralegal?

### OPINION

4. This Committee does not give general advice on structuring business arrangements, nor does it critique proposed business plans. Rather, our jurisdiction is limited to addressing attorney inquiries regarding specific acts of proposed future conduct. Accordingly, our response to the current inquiry is to call attention to some of the important ethical principles which, under the New York Rules of Professional Conduct ("Rules"), would pertain to any relationship or business plan that the inquirer may pursue with the independently employed paralegal.

5. In accepting the inquirer's characterization of the nonlawyer with whom she is contemplating a business relationship as a "paralegal," the Committee does not opine on whether that characterization is appropriate when such person is, as here, independently employed. Although more than 50 years ago this Committee described a "paralegal" in N.Y. State 255 (1972) as a "lay person employed by a lawyer to perform certain law office functions for which legal training and bar admission are not necessary," we note that the generally accepted meaning of the term has likely evolved. *See also* N.Y. State 1079 (2015) ("it is not deceptive for a lawyer to use the title 'paralegal' to describe a layperson who . . . who is not a graduate of a paralegal program or certified by any certifying body.")

6. Turning to the principles that shape the answer to this inquiry, the Committee begins with the rule, firstly, that a lawyer must not share legal fees with the paralegal. Rule 5.4 (a). *See also* N.Y. State 1068 (2015) (no fee-splitting with a nonlawyer). The paralegal may, of course, be appropriately compensated for the value of the paralegal services on an hourly or per document basis.

7. Second, the inquirer may accept referrals from the paralegal but must not pay the paralegal a fee for referrals. Rule 7.2(a). *See also* N.Y. State 942 (2012) (it would violate Rule 7.2(a) to give something of value to a non-lawyer firm in exchange for referrals); N.Y. State 1132 (2017) (although lawyers may ethically pay nonlawyers for advertising and marketing services, they must not pay for a "recommendation").

8. Third, the inquirer should be mindful not to aid the paralegal in the unauthorized practice of law, a violation of Rule 5.5(b), although the question of whether certain collaborative actions taken by the inquirer might constitute the unauthorized practice of law presents issues of law on which this Committee does not opine.

9 Fourth, the inquirer must appropriately supervise the work of the paralegal with respect to the inquirer's clients. Rule 5.3. The duty to provide appropriate supervision of "nonlawyers" extends to all nonlawyers "employed by or retained or associated with the law firm, including nonlawyers outside the firm working on firm matters." Rule 5.3, Cmt [2] (emphasis supplied). The lawyer must ensure that the paralegal is "given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information." *Id*. When a lawyer uses a nonlawyer outside the firm to assist the lawyer in rendering legal services to the client, the lawyer "must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligation of the lawyer and law firm." Rule 5.3, Cmt [3]. As such, the inquirer "should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Id.

10. Fifth, the inquirer must not "allow, assist, or induce" the paralegal "to engage in conduct that the lawyer could not engage in directly," in particular, the in-person solicitation of business for the inquirer. *See* N.Y. State 1068 ¶ 11 (2015); *see also* N.Y. State 705 (1997).

11. Finally, Rule 5.8 is also relevant to this inquiry. Paragraphs (a) and (b) of that Rule permit lawyers to contract with nonlegal professionals included in a list of professions jointly established and maintained by the Appellate Divisions to provide, on a systematic and continuing basis, both legal and nonlegal services. Although paralegals are not included in that list, and although it is not even certain that paralegals would be considered professionals within the meaning of Rule 5.8 (*see* N.Y. State 255 (1972) ("paralegal" is a "lay person employed by a lawyer to perform certain law office functions for which legal training and bar admission are not necessary"), paragraph (c) of Rule 5.8 expressly allows "relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm." As we said in N.Y. State 765, "It is important to emphasize that . . . any [such] reciprocal referral understanding, agreement or contract . . . must be nonexclusive. That is, a lawyer can never agree to refer all clients, or a specified quota . . . because the lawyer must continue to exercise professional judgment on behalf of the client." And as stated in Comment [4] to Rule 7.2, "R]eciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services."

**CONCLUSION**

12. Subject to various Rules regarding fee sharing, referral fees, solicitation, aiding the unauthorized practice of law, and supervision of nonlawyers, a lawyer may enter into a non-exclusive agreement with a paralegal who refers clients to the lawyer and completes forms for submission to judicial and non-judicial bodies.

(03-23)

## Opinion 1260 (07/10/2023)

**Topic**: Responsibilities of a lawyer in a non-legal position

**Digest**: A lawyer employed as a lawyer's assistant to provide both legal services and nonlegal services to the supervising lawyer's client is subject to the Rules set forth in the New York Rules of Professional Conduct. Because the services provided by the legal assistant are part of a package of legal services provided by the supervising lawyer to the client, the assistant's nonlegal services are not "distinct" from the legal services being provided to the client, so the exception in Rule 5.7(a)(4) that contemplates that the Rules of Professional Conduct might not apply to nonlegal services provided by a lawyer to a client if they are distinct from legal services provided to that client is not available.

**Rules**: 5.1(b)(2), 5.2(a), 5.3(a), 5.7

**FACTS**

1. The inquiring attorney is employed as "confidential assistant" to a school attorney, a full-time civil service position that the inquirer characterizes as primarily secretarial and administrative, and which does not require a law degree or admission to the bar (though the inquiring attorney has both). The stated responsibilities for the position include the preparation of documents for signature by the school attorney and the revision of drafts of legal documents and reports. The position requires the incumbent to have "good knowledge" of the organization, functions, laws, policies, and regulations both of the office of the school attorney and of the school district.

**QUESTION**

2. In performing his duties as a confidential assistant to the school attorney, is the inquirer governed by the New York Rules of Professional Conduct ("Rules")?

**OPINION**

3. When a lawyer exercises professional legal judgment in providing services that a nonlawyer would be lawfully permitted to provide, the lawyer is engaged in the practice of law and is governed by the Rules. *See* N.Y. State 709 (1998) (citing N.Y. State 636 (1992)) ("[E]ven though trademark searches and application filings may be performed by non-lawyers, to the extent that the attorney invokes his or her professional legal judgment in conducting searches or filing applications, the business becomes the practice of law"). Accordingly, the inquirer here is bound by the Rules with respect to the various duties he performs in the supporting role of confidential assistant to the school attorney to the extent that the inquirer applies his professional legal judgment in the performance of those duties.

4. What then about the purely clerical or administrative duties that the inquirer also undertakes for the school attorney? Do the Rules govern those actions as well?

5. To answer that question, we first turn to Rule 5.7, entitled "Responsibilities Regarding Nonlegal Services." Rule 5.7 distinguishes between "legal services" and "nonlegal services" provided by lawyers and defines nonlegal services to mean "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." Rule 5.7(c). Where the legal services provided are "not distinct" from the nonlegal services, a lawyer "is subject to these Rules with respect to the provision of both legal and nonlegal services." Rule 5.7(a)(1) (emphasis added).

6. Where the legal services provided "are distinct" from the nonlegal services, the lawyer "is subject to [the] Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship." Rule 5.7(a)(2) (emphasis added).

7. Under Rule 5.7(a)(4), there is a rebuttable presumption that the person receiving nonlegal services that are distinct from legal services nonetheless believes that the nonlegal services are the subject of client-lawyer relationship, and thereby governed by the Rules, "unless the lawyer has advised the person receiving the services in writing that the services are not legal services and that the protection of the client-lawyer relationship does not exist with respect to the nonlegal services . . ."

8. The application of Rule 5.7 to the inquirer's situation, however, is shaped by the fact that the inquirer's client is not the school attorney to whom the inquirer reports. Rather, the client is the school district. The school attorney, assisted by the inquirer as a subordinate school district employee, is providing legal services to that client (the school district), not unlike a nonlawyer secretary or nonlawyer administrative assistant employed in a private law office.

9. Accordingly, a Rule 5.7(a)(4) notice to the client (the school district) cannot rebut the presumption that the inquirer's clerical or administrative nonlegal services are subject to a client-lawyer relationship (i.e., school district-inquirer). Because the legal services rendered by the school attorney are "not distinct" from the supporting nonlegal services rendered by the inquirer, the Rule 5.7(a)(4) escape hatch is not available here. Whether the inquirer's services are legal services or nonlegal services, those services are provided as part of a package of legal services rendered by the school attorney to the school district. As such, the inquirer's nonlegal clerical and administrative services cannot be "distinct" from the legal services being provided to the client by the school attorney to whom the confidential assistant (the inquirer) reports and for whom he works. Accordingly, we conclude that all duties performed by the inquirer to assist the school attorney in providing legal services to the School District are governed by the Rules of Professional Conduct.

10. Our conclusion that all duties performed by the inquirer to assist the school attorney in providing legal services to the school district are governed by the Rules is in harmony with Rule 5.1, entitled "Responsibilities of Law Firms, Partner, Managers and Supervisory Lawyers, and Rule 5.3, entitled "Lawyer's Responsibility for Conduct of Nonlawyers." Both Rules 5.1 and 5.3 would require the school attorney to take appropriate action to assure that the inquirer, as confidential assistant, whether acting as a lawyer or nonlawyer, conduct himself in accordance with the Rules. See Rule 5.1(b)(2) ("A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that other lawyers in the firm conform to these Rules"); Rule 5.3(a) ("A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate."); and Comment [2] to Rule 5.3 ("With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm, including nonlawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and firm").

**CONCLUSION**

11. A lawyer employed as a lawyer's assistant to provide both legal services and nonlegal services to the supervising lawyer's client is subject to the Rules set forth in the New York Rules of Professional Conduct. Because the services provided by the legal assistant are part of a package of legal services provided by the supervising lawyer to the client, the assistant's nonlegal services are not "distinct" from the legal services being provided to the client, so the exception in Rule 5.7(a)(4) that contemplates that the Rules of Professional Conduct might not apply to nonlegal services provided by a lawyer to a client if they are distinct from legal services provided to that client is not available.

(04-23)

## Opinion 1261 (07/27/2023)

**Topic**: Conflicts of interest

**Digest**: An attorney may not represent a current criminal defense client in connection with providing testimony before a grand jury against a former criminal defense client unless the former client gives informed consent in writing and the disclosure of such representation will not be prejudicial or detrimental to the interests of the current client. Inasmuch as such disclosure and consent of the former client would not be required if the attorney withdrew from the current client's representation and was succeeded by counsel untainted by the prior representation, the conflicted attorney should give serious consideration to, and discuss with the current client, whether such withdrawal would be in the current client's best interests.

**Rules:** 1.0(e), 1.0(j), 1.2(a), 1.4(a)(b),1.6, 1.9, 4.2

**FACTS**

1. The inquirer was assigned as counsel to represent two defendants in unrelated criminal matters. In one of the

matters the inquirer was subsequently relieved as counsel for the defendant (now "Former Client"), but he continues as counsel in the other matter for the remaining defendant ("Current Client"). Although the inquirer is unaware of any information the Current Client possesses about the Former Client, he has been advised by the district attorney that the Current Client will be called to testify before the grand jury concerning the Former Client. The Former Client and the Current Client never mentioned each other in their respective confidential client-attorney conversations with the inquirer, and the inquirer believes that the subject matter of the Current Client's anticipated grand jury testimony has no evidentiary relevance to the Current Client's case.

**QUESTIONS**

2. May the inquirer continue to represent the Current Client?

3. May or must the inquirer inform the Former Client that the Current Client may testify as a witness against the Former Client before the grand jury?

**OPINION**

**Is There a Conflict of Interest Between the Former Client and the Current Client if the Inquirer Represents the Current Client in Connection With His Testimony Against the Former Client?**

4. Rule 1.9 of the New York Rules of Professional Conduct ("Rules") governs the duties owed to former clients. Paragraph (a) of Rule 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

5. Accordingly, absent Former Client consent, the inquirer would be precluded from representing the Current Client if the matter in which the Current Client will testify is "substantially related" to the matter in which the inquirer previously represented the Former Client and the interests of the Current Client and Former Client in that substantially related matter are "adverse."

6. Comment [3] to Rule 1.9 provides guidance for determining whether matters are "substantially related" and states in pertinent part: "Matters are related for purposes of the Rule if they involve the same transaction or legal dispute . . ." Here, the Current Client will be giving testimony in the matter pending against the Former Client, which is the very same matter in which the inquirer previously represented the Former Client. Accordingly, because the two matters are in fact the same matter, the "substantial relationship" component has been established, and we turn to the question of whether the interests of the Current Client and Former Client are "adverse" to each other in that singular matter.

7. As with any criminal defendant, the interest of the Former Client is to defeat the criminal charges pending against him or to secure the most favorable negotiated plea disposition. Whether and to what extent the Former Client succeeds in achieving these objectives depends in large part on the quality and quantity of admissible incriminating evidence in the possession and control of the district attorney. Although we are unaware of the particular criminal charges lodged against the Former Client, or the specific relevance to those charges of the Current Client's grand jury testimony, that testimony is sought by the district attorney to support the prosecution case in some important respect. Whether the evidence to be presented by the Current Client is only marginally useful to the district attorney in prosecuting the Former Client, or whether it provides proof of a key element required for criminal liability, it is certainly adverse to the Former Client's interests for the Current Client to testify against him.

8. Conversely, the Current Client shares the same objectives as the Former Client in his own unrelated criminal case—namely, to defeat the charges or to obtain the most favorable negotiated plea disposition. The prospect of cooperating with the district attorney and providing testimonial evidence against a defendant in another case, who happens here to be the Former Client, may provide the Current Client with substantial leverage for plea negotiations in the Current Client's own case. To the extent that the Current Client's testimony fills a gap in the proof required to sustain a conviction against the Former Client, corroborates a key element of the charges against the Former Client, or refutes a defense interposed by the Former Client, that leverage may be substantial. Accordingly, from the perspective also of the Current Client, the interest of the Current Client in securing a more favorable disposition of charges against him also puts the Current Client in a position of material adversity to the Former Client.

**May the Former Client Waive the Rule 1.9 Conflict of Interest?**

9. Even though the inquirer has a conflict of interest with the Former Client under Rule 1.9(a) based on substantial relationship and material adversity, Rule 1.9(a) expressly provides that an attorney may represent a current client notwithstanding a conflict of interest with a former client

if the former client "gives informed consent, confirmed in writing." Rule 1.0(j) defines "informed consent" as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

10. The process by which the inquirer in this case would seek to obtain informed consent from the Former Client, however, implicates other ethical rules and concerns.

11. First, we believe that the testimony of a grand jury witness is (at least initially) cloaked by statute in secrecy, and we do not know whether and when (if ever) the grand jury testimony of the Current Client will be disclosed to the Former Client. The parameters and timing of any such disclosure are matters of law on which this Committee does not opine. Nonetheless, to the extent that the Current Client's grand jury testimony against the Former Client remains secret, it is not likely to be in the Current Client's interest for the Former Client to know that the Current Client is providing evidence against him. Such knowledge might invite witness tampering, intimidation, physical violence, or other actions by the Former Client or the Former Client's friends and allies that are prejudicial or damaging to the Current Client. Proceeding down a path which could foreseeably result in harm to the Current Client raises issues of competence under Rule 1.1(c)(2) ("A lawyer shall not intentionally … prejudice or damage the client during the course of the representation . . .").

12. Second, the situation raises issues of communication under Rule 1.4, which requires the inquirer to promptly inform the Current Client of "material developments" and to keep the client "reasonably informed about the status of the matter." See Rules 1.4(a)(1)(iii) and (3). See also Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); and Rule 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.")

13. Third, issues regarding the duty of confidentiality arise under Rule 1.6. Both the substance of the Current Client's grand jury testimony and the naked fact that the Current Client is to provide secret grand jury testimony against the Former Client may well be "confidential information" within the meaning of Rule 1.6, which provides that a "lawyer shall not reveal confidential information. . . . or use such information to the disadvantage of a client" unless certain requirements are met, including that the client gives informed consent. "Confidential information" consists of information gained during or relating to a 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." Accordingly, the same concern for the Current Client's safety that arises under Rule 1.1(c)(2) may be relevant here. It is likely to be "detrimental" to the Current Client for the Former Client to know that the Current Client is to be a witness against him, especially if a likely consequence of that knowledge would be witness tampering, intimidation, physical violence against the Current Client, or even adverse social consequences.

14. Fourth, issues concerning withdrawal under Rule 1.16 must be considered. Rule 1.16(c)(1) allows an attorney (subject to the court's approval) to withdraw from representing a client where such withdrawal "can be accomplished without material adverse effect on the interests of the client." Here, the inquirer should consider whether the duty of confidentiality to the Current Client will prohibit the inquirer from obtaining the informed consent of the Former Client because the inquirer may simply be unable to reconcile the Current Client's interest in leveraging his cooperation in providing testimony adverse to the Former Client in order to secure a more favorable plea disposition with the interest of the Current Client in avoiding the risk of harm occasioned by the Former Client's knowledge of that cooperation. It may well be that both of these important interests of the Current Client can be protected only if the Current Client is represented by an attorney who is not ethically obligated to seek informed consent from the Former Client regarding the Current Client's anticipated grand jury testimony, because only in that event can the secrecy of the Current Client's testimony before the grand jury be protected from disclosure to the Former Client. If the Former Client is not informed of the Current Client's grand jury testimony, the risk of physical or other harm to the Current Client will be substantially reduced or eliminated entirely.

15. Finally, even if (i) the inquirer determines that the Current Client will not be prejudiced by the Former Client learning that the Current Client will be providing grand jury testimony against him, (ii) the inquirer fully explains to the Current Client the benefits to be gained by cooperating with the district attorney and the risks of disclosing the Current Client's cooperation to the Former

Client, and (iii) the inquirer obtains the Current Client's consent to disclose confidential information to the Former Client in order to seek the Former Client's consent to the inquirer's continued representation of the Current Client, the inquirer must still be mindful that, absent consent, Rule 4.2 requires the inquirer to communicate through the Former Client's current counsel in the Former Client's criminal case, not directly with the Former Client. Rule 4.2(a) provides:

> In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

16. In sum, without knowing the particulars of the charges or the evidence against the Former Client, and without knowing the details of the testimony the Current Client can offer the district attorney, we cannot say that the path for obtaining the consent of the Former Client to the continued representation of the Current Client by the inquirer is impassable. We can, however, say that there are many obstacles that must be surmounted along that road, all of which would be avoided by permissive withdrawal pursuant to Rule 1.16.

#### May or Must the Inquirer Inform the Former Client of the Current Client's Testimony?

17. Nothing in the Rules requires the inquirer to inform the Former Client about the Current Client's testimony either before or after it is given. Moreover, Rule 1.1(c)(2) may prohibit the inquirer from informing the Former Client about the Current Client's grand jury testimony because doing so may prejudice or harm the Current Client. Laws governing grand jury secrecy (on which we do not opine) may also prohibit the inquirer from informing the Former Client about the Current Client's grand jury testimony. Even if the inquirer can navigate around Rule 1.1(c)(2) and grand jury secrecy laws, the inquirer would still have to obtain the Current Client's informed consent without transgressing Rules 1.2, 1.4 and 1.6. That is a tall order.

### CONCLUSION

18. An attorney may not represent a current criminal defense client in connection with providing testimony before a grand jury against a former criminal defense client unless the former client gives informed consent in writing and the disclosure of such representation will not be prejudicial or detrimental to the interests of the current client. Inasmuch as such disclosure and consent of the former client would not be required if the attorney withdrew from the current client's representation and was succeeded by counsel untainted by the prior representation, the conflicted attorney should give serious consideration to, and discuss with the current client, whether such withdrawal would be in the current client's best interests.

(08-23)

## Opinion 1262 (12/14/2023)

**Topic**: Recognition of lawyer on not-for-profit organization's website

**Digest**: A lawyer may pay for an advertisement on the website of a not-for-profit organization that provides online medical information for victims of toxic chemicals. Separately, the lawyer may make a financial contribution to the not-for-profit organization in exchange for the organization's agreement to list the lawyer as a "sponsor" on the organization's website. But the lawyer may not make a financial contribution to the organization in exchange for the organization's agreement to list the lawyer on a page that discusses legal options for victims of toxic chemicals, because such a listing would constitute a prohibited "recommendation" in exchange for something "of value."

**Rules:** 1.0(a), 7.1(a) & 7.2(a)

### FACTS

1. Inquirer is a lawyer who represents alleged victims of toxic chemicals in personal injury lawsuits. A not-for-profit organization is publishing a website with medical information for victims of toxic chemicals. Inquirer tells us it would be advantageous for their law practice to be identified on the website as a financial supporter or "sponsor" of the organization, because some alleged victims of these toxic products who visit the organization's website may not yet be represented by counsel for a potential personal injury lawsuit.

2. Specifically, in exchange for inquirer's financial donation: (i) the organization's website would acknowledge the In quirer's practice on a page headed "Thank you to our Sponsors" (or similar words); (ii) the organization would list inquirer's practice on a page that discusses legal options for victims; and (iii) inquirer will make an additional payment to place an advertisement on the page discussing legal options for alleged victims. Neither inquirer nor any employee of inquirer's law firm will serve as an officer or director of the organization.

### QUESTIONS

Inquirer poses three questions:

3. May a lawyer pay for an advertisement on the not-for-profit organization's website?

4. May a lawyer agree to be acknowledged as a "sponsor" of the not-for-profit organization's website in exchange for making a financial contribution to the organization?

5. May a lawyer agree to be listed on the not-for-profit's website as a resource for alleged victims of toxic chemicals in exchange for a financial contribution to the not-for-profit organization?

## OPINION

The three questions raise issues regarding advertisements, sponsorships, and recommendations. We will cover these issues one by one.

### Advertisements

6. The first question is whether a personal injury lawyer may pay for an advertisement on a not-for-profit organization's website. Our answer is yes, as long as the advertisement complies with the New York Rules of Professional Conduct (the "Rules"). Nothing in the Rules imposes restrictions on where a lawyer may advertise.

7. The advertisement would thus have to comply with Rule 7.1(a), which prohibits lawyers from disseminating any advertisement that "contains statements or claims that are false, deceptive or misleading" or that "violates a Rule." If the Inquirer complies with Rule 7.1(a), then a permitted method of advertising would include the Inquirer's advertisement on an organization's website. Cf. N.Y. State 915 (2012) ("Assuming relevant advertising rules are adhered to, a law firm's website may link to the website of a nonlegal entity, and vice versa.").

### Sponsorships

8. The second question is whether a personal injury lawyer may contribute financially to a not-for-profit organization in exchange for the organization's agreement to acknowledge the lawyer as a "sponsor" on the organization's website. Specifically, if the lawyer makes a donation to the organization, the lawyer will be listed on the organization's website on a page headed "Thank you to our Sponsors" (or words to that effect). We see nothing in the Rules that would prohibit this arrangement. Many law firms sponsor not-for-profit organizations and activities. The sponsorship of not-for-profit organizations and activities can have positive effects and in the appropriate circumstances should be encouraged. However, the sponsorship should not involve the organization's additional commentary regarding the quality, effectiveness, suitability, etc., of the sponsor.

9. Even though a lawyer may sponsor a not-for-profit organization, the question arises whether the organization's listing of the lawyer as a sponsor of the not-for-profit organization in exchange for a financial contribution would constitute an "advertisement" that would be subject to the Rules governing advertising. We will now analyze that question.

Rule 1.0(a) defines the term "advertisement." It says:

> "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.

10. A lawyer who agrees to be listed as a sponsor in exchange for a financial contribution to an organization appears to satisfy at least two of the four components of the definition of an "advertisement"—the listing is (i) a "public . . . communication" that is (ii) "by or on behalf of a lawyer. . . . " We do not reach the third element (i.e., whether the listing is "about the lawyer or law firm's services") because we believe that the listing will generally not satisfy the fourth element, which is that the "primary purpose" is "for the retention of the lawyer or law firm." A communication does not fall within the definition of an "advertisement" unless it meets all four of the elements set out in Rule 1.0(a).

11. Sponsorships of non-profit organizations are common and generally indicate support of the organization and, to the extent they serve a professional purpose, they serve to promote general brand awareness. Comment [8] to Rule 7.1 draws a distinction between general marketing and branding, on one hand, and advertisements for purposes of the Rules, on the other hand. Specifically, Comment [8] says:

> [8] . . . Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo, and contact information printed on them do not constitute "advertisements" within the definition of this Rule if their primary purpose is general awareness and branding, rather than the retention of the law firm for a particular matter.

12. We relied on Comment [8] in N.Y. State 937 ¶ 4 (2012), where we concluded that a lawyer who provided a

promotional gift with the law firm's logo in a local hospital welcome package was not engaged in advertising. We explained that "when the intent of a communication is . . . to raise general brand awareness, that intent will be considered its primary purpose." Thus, "even if such communications are more fundamentally motivated by the aim of increasing a lawyer's business, they are not advertising within the meaning of the Rules."

13. Like the promotional gift in N.Y. State 937, a law firm sponsorship of a not-for-profit organization, a social service organization, or a similar organization aims to increase "general brand awareness" of the law firm. Such a sponsorship may also have the purpose of supporting an organization because the law firm believes in the organization's mission and wants to be associated with that mission. While such purposes may have the overall aim of increasing a lawyer's business, they do not demonstrate that the "primary purpose" of the sponsorship "is for the retention of the lawyer or law firm." Accordingly, a sponsorship – without more – is not an "advertisement" within the meaning of the Rules.

**Recommendations**

14. The Inquirer's financial contribution to the organization will also entitle him to be listed on a page of the organization's website that discusses legal options for victims. In our view, this implicates Rule 7.2 ("Payment for Referrals"). The relevant paragraph is Rule 7.2(a), which provides as follows (with exceptions not relevant here):

> (a) A lawyer shall not compensate or give *anything of value* to a person or *organization to recommend* or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client. . . . [Emphasis added.]

15. When an organization's website lists sponsors of the organization, that alone does not constitute a "recommendation" within the meaning of Rule 7.2(a). But if, as here, the organization separately lists (or otherwise singles out) the names of contributing lawyers or law firms who represent victims of toxic chemicals, we believe that the listing rises to the level of a recommendation. Thus, making a financial contribution to an organization in exchange for being listed on a resource page as a lawyer who serves victims of specified products violates Rule 7.2's edict that a lawyer "shall not compensate or give anything of value to a person or organization to recommend . . . employment by a client. . . . " Cf. N.Y. State 1132 (2017) (a lawyer may not pay a "marketing fee" to an entity if the fee includes "an improper payment for a recommendation").

16. We recognize that in N.Y. State 908 (2012) we said that an attorney could ethically appear as a "featured attorney" on the home page of the website of a local bar association to which the attorney belonged. There, however, our approval applied only if the home page contained an appropriate disclaimer stating that the featured attorney had been randomly selected and was neither being endorsed nor recommended by the association over any other attorney. The situation before us now is different because (i) Inquirer here would not be randomly selected but would be listed on the organization's website because he made a financial contribution to the organization, and (ii) the organization's inclusion of Inquirer on a list of lawyers who serve victims of certain products impliedly recommends the lawyer. The combination of a financial contribution to an organization in exchange for an implied recommendation from the organization contravenes the prohibition in Rule 7.2(a).

**CONCLUSION**

17. A lawyer may pay for an advertisement on the website of a not-for-profit organization. Separately, a lawyer who makes a financial contribution to a not-for-profit organization in exchange for the organization's agreement to list the lawyer as a "sponsor" on the organization's website is not engaging in advertising within the meaning of the Rules. But the lawyer may not make a financial contribution to the organization in exchange for the organization's agreement to list the lawyer on a page that lists or discusses legal options for victims of toxic chemicals.

(11-23)

## Opinion 1263 (02/05/2024)

**Topic:** Part-time town attorney's representation of criminal defendants in centralized arraignment part.

**Digest:** A part-time town attorney who has no prosecutorial responsibilities may, in his role as a part-time county public defender, represent criminal defendants at arraignments before a justice of the same town's court even if that justice sometimes sits on rotation in a centralized arraignment part.

**Rules:** 1.7(a)(1), (b)

## FACTS

1. County X recently established a centralized arraignment part (CAP). A CAP is an off-hours arraignment part held in local criminal courts (including town courts) on a rotating basis. The purpose of the CAP is to conduct arraignments and other preliminary proceedings incident to those arraignments. See New York Judiciary Law § 212(1)(w).

Judges and justices of local criminal courts in the county are periodically assigned to the CAP. Town Z has only one town justice, and that town justice sits on the CAP on a rotating basis.

2. The inquirer is an assistant public defender in County X. The chief of the county public defender's office (Chief PD) works part time in the public defender's office and also works part time as a town attorney in Town Z. The Chief PD has no criminal prosecutorial responsibilities for Town Z but nevertheless does not appear on behalf of criminal defendants in the town court in Town Z. The inquirer wants to know whether the Chief PD/part time town attorney may represent criminal defendants at arraignments in the CAP even though a justice in Town Z sits on the CAP on rotation.

**QUESTION**

3. May a part-time town attorney who has no prosecutorial responsibilities and who is also a part-time public defender represent criminal defendants at arraignment in a county's centralized arraignment part even though a justice of the same town's court sometimes sits on rotation in the centralized arraignment part?

**OPINION**

4. In N.Y. State 184 (1971) the Committee stated that a part-time attorney for a local government is disqualified from the private practice of criminal law if the part-time attorney has prosecutorial responsibilities for the local government. This per se disqualification from practicing criminal law extends not only to the local courts where the attorney is employed but also to all courts throughout the state.

5. The basis for this per se disqualification from the private practice of criminal law in all state courts was that, because a local prosecutor represents the people of the state, a prosecutor who also represents criminal defendants in a state court would simultaneously be representing the people in some matters and opposing the people in other matters, thus giving rise to an appearance of professional impropriety.

6. In N.Y. State 234 (1972) the Committee addressed a variation on this question. A part-time town attorney who had no prosecutorial responsibilities asked whether he could represent private clients in criminal proceedings in state courts other than the court of the town he represented. The Committee began by reiterating the per se rule applicable to part-time town attorneys with prosecutorial responsibilities, explaining that "acting as a prosecutor one day and as defense counsel another gives rise to an appearance of professional impropriety." As to the specific issue raised in Opinion 234, the Committee stated that the attorney's representation of a criminal defendant would not create an appearance of impropriety if the attorney had no responsibilities with respect to criminal proceedings on behalf of the town, and the attorney "may therefore, represent clients in criminal matters, except before a town justice in the town he represents . . . ."

7. Ten years later, in N.Y. State 544 (1982) (which interpreted the former Code of Professional Responsibility), the Committee modified the per se rule applicable to part-time municipal attorneys with prosecutorial responsibilities. The modified rule articulated in Opinion 544 stated that if the attorney's prosecutorial responsibilities related solely to violations of local ordinances, then the attorney could ethically represent criminal defendants provided that the attorney also met certain other criteria. One of those other criteria was that "the defense does not require him to appear before a judicial or public officer of the locality the attorney publicly represents." The Committee explained that, because the prosecutor is a representative of the locality, appearing before a judicial officer of the locality on behalf of a criminal defendant would be seen as "representing an interest adverse to that locality."

8. In N.Y. State 657 (1993) the Committee adhered to the criteria stated in N.Y. State 544 (1982), reiterating that even if part-time municipal attorneys have no prosecutorial responsibilities, they nevertheless "may not undertake criminal defense cases pending before judicial officers of the *same locality*, notwithstanding their ability to handle such matters in other courts of the state." (Emphasis added.) The Committee explained in Opinion 657 that "[t]he prohibition on the lawyer/part-time public official's appearance in the courts of the locality engaging the lawyer, flows from representation of the 'locality,' not from the particular type of representation undertaken on behalf of the locality."

9. Similarly, in N.Y. State 874 (2011) the Committee extended this principle to independent contractors. Quoting N.Y. State 657, the Committee in Opinion 874 stated that "an 'independent contractor' or other 'local part-time attorneys for municipalities, regardless of their title or actual responsibilities, may not undertake criminal defense cases pending before judicial officers of the same locality, notwithstanding their ability to handle such matters in other courts of the State.'"

10. As explained above, the Committee's prior opinions have concluded that even part-time municipal attorneys who have no prosecutorial responsibilities may not appear on behalf of criminal defendants in the court of the municipality in which they are employed. This consistent conclusion was based on the view that, in so appearing, the

attorney would be representing an interest adverse to the locality and would thus be representing "differing interests." Today, the Rules of Professional Conduct include the same definition of "differing interests" that was construed in N.Y. State 544. See Rule 1.0(f) ("'Differing interests' include every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest"). In addition, Rule 1.7(a)(1) provides that "a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests," which is substantially similar to the former Code conflict language construed in N.Y. State 544.

11. The present inquiry does not require the Committee to reconsider or modify its prior opinions on part-time municipal attorneys. We adhere to the view that even part-time municipal attorneys who do not prosecute cases on behalf of a local government may not appear on behalf of criminal defendants in the municipality's court. To the extent such an appearance would amount to "representing an interest adverse to that locality" (N.Y. State 544), the Committee believes that no such adverse representation would occur in the situation presented here because the CAP is not the court of the town for which the attorney acts as a part-time town attorney. This factor, along with the limited nature of the proceedings in the CAP, essentially eliminates any perception that the attorney is simultaneously representing both the town and a criminal defendant adverse to the town. In other words, the attorney would not be representing "differing interests."

12. The situation here is similar to that of a part-time town attorney who represents criminal defendants in courts of other towns, which is permitted under N.Y. State 544 (1982) if certain criteria are met. It is true that one of the criteria stated in N.Y. State 544 and other opinions is that the "the defense does not require [the attorney] to appear before a judicial or public officer of the locality the attorney publicly represents." However, in referring to judicial officers or town justices of the same town, the prior opinions referred in substance to the same town's court. Our prior opinions did not contemplate a situation like the situation here, where the town justice is sitting not in the town court but rather on rotation in a centralized court that has only limited jurisdiction over arraignments and related preliminary proceedings. These factors negate any concern that the Chief PD would be representing "differing interests."

**CONCLUSION**

13. A part-time town attorney who has no prosecutorial responsibilities may, in his role as a county public defender, represent criminal defendants at arraignments before a justice of the same town's court when the justice is presiding in a centralized arraignment part.

(14-23)

## Opinion 1264 (03/01/2024)

**Topic:** Listing of degrees by attorney working in nonlegal capacity

**Digest:** An attorney who has earned a juris doctor degree may use a "J.D." designation on letterhead and business cards while working in a nonlegal capacity as long as the lawyer takes care to ensure that any relevant audience is not misled to believe that he or she is acting in a legal capacity.

**Rules:** 1.0(a), 7.1(a) & (b), 8.4(c), 8.5(a) & (b)

**FACTS**

1. The inquirer is admitted to practice in New York State and is working remotely from New York as a development officer for a university located in another state. The university would like the inquirer to use the "J.D." ("Juris Doctor") designation after his name on letterhead and business cards.

**QUESTION**

2. May a New York lawyer use the "J.D." designation on letterhead and business cards while working remotely from New York State as an employee of a university in another state?

**OPINION**

3. In N. Y. State 1089 (2016), we noted that "[a] New York lawyer is bound by the New York Rules of Professional Conduct [the "Rules"], not only with respect to law practice but also with respect to nonlegal activities, both personal and professional." We also opined in Opinion 1089 that "when a lawyer engages in a non-legal business, it is not misleading for the lawyer to identify himself or herself as a lawyer—but a lawyer who does so must take care to avoid confusion. The lawyer must ensure that any relevant audience is not misled to believe that the lawyer is acting as a lawyer."

4. Rule 7.1(b) states that "an advertisement may include information as to: (1) legal and nonlegal education; degrees and other scholastic distinctions." The inquirer's proposed communications as a development officer are not "advertisements" under the Rules because "the primary purpose of [the communications]" is not "for the retention of the lawyer or law firm." Rule 1.0 (a) ("'Advertisement' means any public or private communication made by or on be-

half 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 must be noted, however, that even beyond the context of advertising, Rule 8.4(c) prohibits lawyers from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation."

5. This Committee and another ethics committee in New York have opined that when a lawyer engages in a nonlegal enterprise, such as working in university's development office (as the inquirer does here), "it is not misleading for the lawyer to identify himself or herself as a lawyer." N.Y. State 1089; see also N.Y. City 1994-5 (1994) (opining that an attorney may properly append the suffix "Esq." to his or her name when not acting in a legal capacity). Similarly, we do not believe that the use of the designation "J.D." on letterhead or a business card by one who has earned a juris doctor degree constitutes "dishonesty, fraud, deceit or misrepresentation" in violation of Rule 8.4(c). See N.Y. State 105(a) (1969) (opining that a lawyer may "list any earned law degrees" including J.D. and LL.M.). We repeat, however, that the inquirer must take care to avoid confusion and "must ensure that any relevant audience is not misled to believe that the [inquirer] is acting as a lawyer" when the lawyer engages in a non-legal capacity. See N. Y. State 1089 (discussing various ways to dispel any such confusion).

6. The inquirer has only disclosed being licensed as an attorney in New York State. If the inquirer is also licensed in another jurisdiction, however, then pursuant to Rule 8.5(a) he may be "subject to the disciplinary authority of both this state [New York] and another jurisdiction where the lawyer is admitted for the same conduct." In other words, if the inquirer is licensed as an attorney in another jurisdiction outside of New York, then his proposed conduct may also be regulated by the professional conduct rules of that other jurisdiction, and the analysis under the other jurisdiction's rules of professional conduct may lead to a different conclusion, especially if the other jurisdiction has adopted a different version of Rule 8.5(b). Compare ABA Model Rule 8.5(b) with New York Rule 8.5(b).

7. If the inquirer is admitted only in New York, then the New York Rules of Professional Conduct will apply. *See* Rule 8.5(b)(2)(i) ("If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state"). But if the inquirer is admitted in New York and in another jurisdiction, then under New York Rule 8.5(b) the answer will depend on whether or not the inquirer's conduct occurs in connection with a proceeding in a court before which the inquirer has been admitted.

8. If the inquirer's conduct occurs in connection with a proceeding in a court before which he has been admitted (permanently or pro hac vice), then Rule 8.5(b)(1) governs, and ordinarily the rules of the jurisdiction where the court sits will apply.

9. For all other conduct (including conduct of any kind not in connection with a court proceeding), then Rule 8.5(b)(2)(ii) governs, and the main questions will be where the inquirer "principally practices" and where the "predominant effect" of his conduct clearly occurs. Answering those questions requires a complex, multi-factored analysis. See N.Y. State 1027 (2014) (analyzing Rule 8.5(b) line by line). We do not undertake that analysis because we do not know whether the inquirer is licensed to practice in a jurisdiction other than New York, but if he is licensed outside New York, then he should undertake that analysis himself.

### CONCLUSION

10. A lawyer who has earned a juris doctor degree may use a "J.D." designation on letterhead and business cards while working in a nonlegal capacity as long as the lawyer takes care to ensure that any relevant audience is not misled to believe that he or she is acting in a legal capacity.

(21-23)

## Opinion 1265 (04/26/2024)

**Topic**: Conflicts of interest, former clients

**Digest**: A lawyer formerly employed by a Legal Aid Society office would not have a conflict in representing a client in a matter adverse to a party who had been represented by other lawyers in that office at that time unless the lawyer, while at Legal Aid, acquired confidential information that was material to the new matter and the matters were substantially related.

**Rules:** 1.0(h), 1.6(a), 1.9(b)-(c)

### FACTS

1. The inquirer was employed by the Legal Aid Society of her county for a number of years, representing clients in family court. She left employment at Legal Aid and practiced in another area of the law and now is representing clients in the same family court in private practice (not as an employee of the Legal Aid Society). She inquires whether she has a conflict in representing clients adverse to a party that was represented in family court by another Legal Aid Society lawyer during the time she was employed by the society.

### QUESTION

2. Does a lawyer formerly employed by the Legal Aid Society have a conflict of interest in appearing in family

court adverse to a party who was represented by a different Legal Aid Society lawyer during the time that the inquiring lawyer was employed by the society?

## OPINION

3. This inquiry is governed by Rule 1.9 of the New York Rules of Professional Conduct (the "Rules"), and in particular by Rule 1.9(b), which provides:

> Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a *substantially related* matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had *acquired information* protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter. [Emphasis added.]

4. The Rules define the term "firm" to include a Legal Aid Society office. *See* Rule 1.0(h) (defining "firm" to include "lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law" and "lawyers employed in a qualified legal assistance organization"). Paragraph (c) of Rule 1.9, also referred to in the excerpt quoted above, bars a lawyer who formerly represented a client, or whose law firm formerly represented a client, from using confidential information of the client protected by Rule 1.6 adverse to the former client or revealing such information in most circumstances.

5. Rule 1.6(a) provides that a "lawyer shall not reveal confidential information. . . or use such information to the disadvantage of a client" unless certain requirements are met. "'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."

6. Under Rule 1.9(b), a lawyer who did not herself represent a client of the Legal Aid Society would have a conflict in representing someone "materially adverse" to that former Legal Aid Society client only if the lawyer had "acquired" confidential information that was "material" to the new matter and if the matters were "substantially related." Comment [3] to Rule 1.9 explains that "[m]atters are substantially related for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." We are unable to determine whether the two matters in question here are substantially related. But even if the matters were substantially related, if the lawyer did not acquire material confidential information about the former matter on which other Legal Aid Society lawyers worked (but on which the inquirer personally did not work), then the lawyer would have no conflict appearing adverse to the former Legal Aid Society client.

## CONCLUSION

7. A lawyer formerly employed by a Legal Aid Society office would not have a conflict in representing a client in a matter adverse to a party who had been represented by other lawyers in that office at that time unless the lawyer, while at Legal Aid, acquired confidential information that was material to the new matter and the matters were substantially related.

(02-24)

# Opinion 1266 (06/14/2024)

**Topic:** Disclosing confidential information to government agency that is funding a client's representation

**Digest:** An attorney may not report a client's confidential information to a government agency that funds the representation of the client without the client's informed consent.

**Rule:** 1.0(j), 1.4, 1.6(a)-(b), 1.8(f), 1.9(c), 1.18(b)

## FACTS

1. The inquirer receives funding from a government agency to support the representation of clients in immigration matters. The agency requires information from funding recipients regarding individual representations, including the identity of individual clients, personal information regarding the clients, and the outcome of the representations.

## QUESTION

2. When a lawyer receives funding from a government agency to represent clients, under what circumstances may the lawyer provide information to the funder regarding the clients and their matters?

## OPINION

3. Rule 1.6(a) provides in pertinent part that "[a] lawyer shall not knowingly reveal confidential information . . . unless . . . the client gives informed consent [or] . . . the disclosure is impliedly authorized to advance the

best interests of the client and is either reasonable under the circumstances or customary in the professional community" or an exception in Rule 1.6(b) applies. The rule defines confidential information as "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." A lawyer is subject to a similar duty of confidentiality with respect to a prospective client, and the duty of confidentiality continues even after the lawyer's relationship with the client or prospective client ends. See Rules 1.18(b) & 1.9(c).

4. Although client identities and other information sought by the funding agency are unlikely to be protected by the attorney-client privilege, any or all of the information may be confidential information subject to Rule 1.6(a), either because the client seeks to keep it confidential or because its disclosure would be embarrassing or detrimental to the client. *Cf.* N.Y State 1088 (2016) (clients' identities may be, but are not necessarily, confidential information). That is for the lawyer to determine in consultation with the client or prospective client. Addressing a similar question in N.Y. State 1059 (2015), we observed that it was uncertain whether information sought by a third-party—in that instance, the Vera Institute of Justice, which was conducting research regarding immigration proceedings—would be "confidential information" of minor clients in immigration proceedings. But we stated that the lawyer for the minor clients could not disclose information relating to any such representation without determining in the individual case that the information was not confidential under Rule 1.6(a). We observed:

> Here, with the exception of the last item of data sought (the results of interviews designed to capture the client's understanding of immigration proceedings), the data being sought disclose procedural steps in the course of administrative or court proceedings, and such information is clearly not protected by the attorney-client privilege. Whether disclosure of the information to Vera would be embarrassing or detrimental to the clients depends on the context and the precise nature of the information involved. It is not, however, readily apparent that disclosure to a research organization of the fact that a child is involved in removal proceedings or that a court or administrative body has taken certain procedural steps would be embarrassing or detrimental to the child in the typical case. Those facts will already be known to the parts of U.S. Citizenship and Immigration Services most concerned with the clients' cases, so the disclosure here will merely bring it to the attention of Vera, which is required by contract to redact and/or anonymize the data before disclosing it to the granting agencies. Nevertheless, not every case is typical, *so the inquirers must weigh in each case whether disclosure would be embarrassing or detrimental to the child.*
>
> *Id.* at para. 9 (emphasis added).

5. In some contexts, lawyers have been able to share information with funders in anonymized or aggregated form without thereby disclosing confidential information. *See* N.Y State 1059 (2015). In the inquirer's situation, if it were possible to provide information in this manner so that "there [were] no reasonable likelihood that the [agency] will be able to ascertain the identity of the client," Rule 1.6, Cmt. [4], then disclosure would be permissible. However, we understand that, in this case, the agency requires that individual clients be identified. Therefore, if the information in question, such as the client's identity and the outcome of the representation, will be "confidential information" (for example, if the disclosure would be embarrassing or detrimental to the client), then the lawyer may not share that information with the funding agency unless (i) the client gives informed consent, or (ii) the disclosure is impliedly authorized, or (iii) a confidentiality exception applies pursuant to Rule 1.6(b).

6. We do not believe the lawyer is impliedly authorized to disclose information to the funding agency. Comment [5] to Rule 1.6 addresses the concept of implied authorization, in part, as follows:

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

*See generally* N.Y. State 1084 (2016) (lawyer may have implied authority to disclose deceased client's confidential information to exonerate a co-defendant, if doing so is consistent with the deceased client's previous wishes).

In retaining a lawyer in an immigration matter, a client does not impliedly authorize the lawyer to disclose confidential information to a funder, because doing so does not advance the client's interests in the immigration matter in which the lawyer represents the client. Therefore, the client would not expect the information to be disclosed. *Cf.* N.Y. State 991 (2013) ("The 'impliedly authorized' exception is intended mainly for situations in which time is of the essence and it is impractical for the lawyer to wait for the client's informed consent (such as during settlement negotiations or trial), or for situations in which revealing information about a client with diminished capacity is 'necessary to take protective action to safeguard the client's interests.'").

7. Nor do we believe any exception in Rule 1.6(b) to the confidentiality duty applies. The only plausible candidate is Rule 1.6(b)(6), which allows a lawyer to disclose confidential information "to the extent that the lawyer reasonably believes necessary . . . when permitted or required . . . to comply with other law. . . . " It may be that when lawyers accept government funding to represent clients in immigration matters, lawyers undertake a statutory or regulatory obligation—and not just a contractual obligation—to report back specified information relating to the representations. Whether that is true, and whether such a requirement would pass constitutional muster, are questions of law that we cannot answer. But even assuming that there is such a legal obligation, it does not follow that the lawyer must undertake a representation that would be subject to such a disclosure obligation. And if the lawyer does accept a representation eligible for government funding, the lawyer is not also required to accept that government funding in connection with the representation of any given client. In any event, any such federal law requiring individualized disclosures about clients in exchange for government funding does not relieve a lawyer of the obligation, before undertaking the representation, to obtain the client's informed consent to make the requisite disclosures. *See also* Rule 1.4. Clients are entitled to know that if they accept a lawyer's free services, the lawyer will be required to disclose their confidential information to a government agency, and they are entitled to make an informed decision whether to retain the lawyer subject to that condition.

8. Rule 1.0(j) defines "informed consent" as:

> the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks and reasonably available alternatives to the proposed course of conduct.

Comment [6] to Rule 1.0 provides the following guidance regarding informed consent:

> The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel
>
> . . . . In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decision of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

9. Accordingly, if the client gives informed consent before the representation commences or at the outset of the representation, the lawyer may undertake the representation and, relying on the client's consent, make the requisite disclosures to the government agency. N.Y. State 1059 (2015), para. 12.

10. Some prospective clients may be incapable of understanding the risks of disclosure of their information to the government agency and/or incapable of making a reasoned judgment whether to retain the lawyer subject to the disclosure obligation. In that event, or if the prospective client declines to give informed consent, the lawyer may not undertake the representation subject to an obligation to disclose confidential information to the funding agency. The lawyer may decline the representation, represent the client without funding conditioned on disclosure of confidential information, or seek an agreement by the government agency to forgo receiving confidential information.

11. All of what we have said above is consistent with Rule 1.8(f), which provides that a lawyer shall not accept "compensation for representing a client, or anything of value related to the lawyer's representation of the client, from

one other than the client" (which would include the government) unless three conditions are satisfied, including: "(1) the client gives informed consent" and "(3) the client's confidential information is protected as required by Rule 1.6." In our view, the government funding in this situation is either "compensation for representing a client" or it is something "of value related to the lawyer's representation of the client. . . . " Accordingly, each client's confidential information must be "protected as required by Rule 1.6," which means that the lawyer cannot disclose the information at issue without obtaining the client's informed consent.

**CONCLUSION**

12. A lawyer may disclose information relating to a representation to a government agency that funds the representation if the information is not confidential under Rule 1.6(a). However, the lawyer may not disclose the client's confidential information to the agency unless the client gives informed consent.

(17-23)

## Opinion 1267 (06/14/2024)

**Topic**: Paying for a recommendation or referral

**Digest**: A website that promises to connect potential clients with attorneys whom the website claims have excellent qualifications and are carefully vetted constitutes an "advertisement" on behalf of the lawyers available through the website (see Rule 1.0(a) and Rule 7.1), and the lawyers' payment to the business providing this service constitutes an improper payment for a recommendation in violation of Rule 7.2(a). The inquirer's operation of the website, in turn, violates Rule 8.4(a) because it induces this misconduct by the lawyers who offer their services.

**Rule**: 1.0(a), 7.1(a), (f), &(h), 7.2(a), 8.4(a).

**FACTS**

1. The inquirer is a lawyer who is a part owner of a business that connects potential clients with attorneys. The connection between the potential clients and the attorneys occurs either when a potential client either (i) texts a specified number provided by the business's website or (ii) clicks on a chat box on the website. The website then instructs the potential client to select the area of law in which the individual needs assistance. In return, the website represents that the potential client will be linked directly with a lawyer in the relevant area of law with "excellent qualifications." The website promises to match the potential clients with lawyers who have strong reputations in the appropriate area of law. The website also assures potential clients that the website carefully vets the attorneys in the website's network and connects people with top-flight attorneys. Lawyers who wish to participate in this service pay a fee to the business operating the service.

2. The inquirer asks whether the website is required to state on its home page that it is "attorney advertising." The business model described in the inquiry also raises issues about whether it involves a payment for a recommendation.

**QUESTIONS**

3. Does the inquirer's website constitute an "advertisement" on behalf of the participating lawyers that is governed by the Rules' advertising guidelines?

4. Do payments from participating lawyers to the business in exchange for being listed on the website constitute an impermissible payment for a recommendation?

**OPINION**

5. As a threshold matter, this opinion does not address whether the business implicates § 495(1)(d) of the Judiciary Law, which prohibits a corporation from "furnish[ing] attorneys or counsel" as that is a question of law beyond our committee's jurisdiction.

**Advertising and Required Disclosures**

6. Rule 7.1 governs lawyer advertisements. Rule 1.0(a) defines "advertisement" for purposes of the various regulations on advertising contained in the Rules. Rule 1.0(a) provides:

> "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.

Here, because the lawyers pay for the privilege of participating in the website, the business's website is a communication "on behalf of" the lawyers participating in the website's service for the "primary purpose" of retention of the lawyers by potential clients. The website is therefore an "advertisement" within the meaning of Rule 1.0(a). See N.Y. State 1132 (2017) (website of business that markets the services of participating lawyers is an "advertisement" governed by the Rules); N.Y. State 1131 (2017) (website on which potential clients provide their contact information and agree to be contacted by participating lawyers is an "advertisement" by or on behalf of the lawyers and is subject to the Rules advertising regulations).

7. Rule 7.1(a) prohibits a lawyer from participating in an advertisement that "(1) contains statements or claims that are false, deceptive or misleading or (2) violates a Rule." Rule 7.1 also requires that certain advertisements contain prescribed disclosures, such as the label "Attorney Advertising," and information about the lawyer or lawyers whose services are advertised. See Rules 7.1(f), 7.1(h); N.Y. State 1131. Even though the business, not the participating lawyers, creates and disseminates the business's website, each participating lawyer is taking part in this advertising and therefore has a duty to ensure that the content of the website follows Rule 7.1's prescriptions.

8. Rule 7.1(h) requires that "[a]ll advertisements shall include the name, principal law office and telephone number of the lawyer or law firm whose services are being offered." We have previously determined that lawyers may not engage in advertising on the internet, including group advertising, without complying with Rule 7.1(h). See N.Y. State 1131, N.Y. State 839 (2010).

**Referrals and Referral Fees**

9. Rule 7.2(a) states 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 . . ." The Rule contains three exceptions that are not relevant to this inquiry: (1) referrals without monetary rewards, which are permitted by Rule 5.8, (2) referrals to another lawyer, which are permitted by Rule 1.5(g), and (3) referrals by a qualified legal assistance organization, which are permitted by Rule 7.2(b). The first exception is inapplicable because, among other things, the website receives monetary rewards from the participating lawyers. The second exception only applies to situations where a lawyer is dividing a fee for legal services. And the third exception does not apply because the website here does not constitute a "qualified legal assistance organization" as defined in Rule 1.0(p) ("an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof").

10. Since the business that is the subject of this inquiry does not qualify for any of the Rule 7.2(a) exceptions, the dispositive question is whether the participating lawyers are paying the business to "recommend" the participating lawyers or to obtain employment of the participating lawyers by clients. See N.Y. State 1131. Guidance is contained in portions of Comment [1] to Rule 7.2, which was amended in 2015 to illustrate how the prohibition on paying for referrals or employment applies to paying for client leads. In relevant part, Comment [1] states that:

> [A] lawyer may pay others for generating leads, such as Internet-based client leads, as long as . . . the lead generator does not recommend the lawyers. . .To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, or making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. [Emphasis added.]

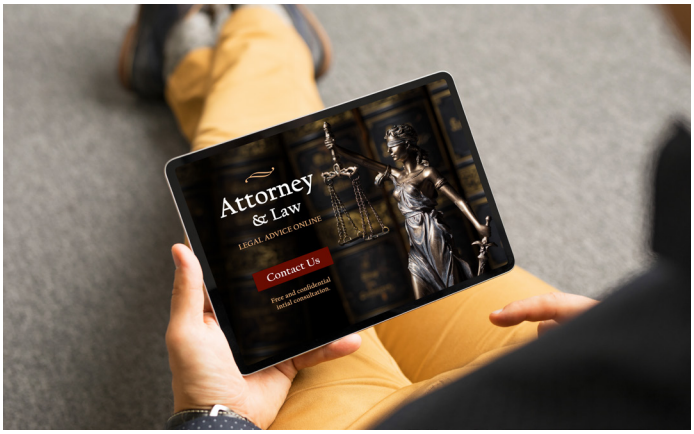
Comment [1] to Rule 7.2, includes the following definition of the term "recommendation":

> A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities.

Moreover, as we observed in N.Y. State 1131 ¶ 20 (2017), to "recommend" also includes identifying a specific lawyer or lawyers to a potential client as "a right" or the "the right" lawyer for the client's situation following an analysis of the client's legal problem. See also N.Y. State 799 (2007) ("For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more attorneys in that area, the website is "recommending" those lawyers").

11. Here, it is difficult to escape the conclusion that the language contained on the business's website creates the impression that the business is indeed recommending the participating lawyers. The website represents that the potential client will be linked with a lawyer in the relevant area of law with excellent qualifications. The website promises to offer lawyers with strong reputations in the appropriate area of law. The website also assures potential clients that they carefully vet the attorneys in their network and match people with top-flight attorneys. The most reasonable inference to be drawn from that representation is that the business has engaged in a substantive review of the lawyers' work and determined that they have excellent qualifications in their areas of practice. *See* N.Y. State 1132 (although Avvo claimed on its website that its rating did not constitute an endorsement of any particular lawyer, Avvo's use of a rating system together with its statement that Avvo worked only with "highly qualified lawyers" created the impression that it was "recommending" the participating lawyers).

12. In the inquiry before us, the website's explicit claim that it uses a review process aimed at finding the lawyers




who deliver a high level of service constitutes a substantive recommendation. Cf. N.Y. State 1131 (a business that accepts only participating lawyers who are in good standing in their jurisdiction would not render the business's selection of a lawyer a recommendation if it uses neutral, non-qualitative criteria); N.J. Committee on Attorney Advertising Op. 2004-1 (lawyer may pay flat fee to internet marketing company for an exclusive website listing for a particular location in specific practice area if the listing includes a prominent, clear disclaimer indicating that listings are not endorsements); Arizona Op. 11-02 (internet advertisement listing one lawyer for each zip code are acceptable where an advertisement does not imply that the website listing is an endorsement).

13. Because lawyers participating in the website are violating Rule 7.2(a) by paying for recommendations, the inquirer's operation of the website violates Rule 8.4(a), which forbids a lawyer to "induce another" to violate the Rules of Professional Conduct. In our view, the website induces unwary lawyers to violate the Rules by paying for recommendations.

## CONCLUSION

14. A website that promises to connect potential clients with attorneys whom the website claims have excellent qualifications and are carefully vetted, constitutes an "advertisement" on behalf of the lawyers available through the website (see Rule 1.0(a) and Rule 7.1), and the lawyers' payment to the business providing this service constitutes an improper payment for a recommendation in violation of Rule 7.2(a). The inquirer's operation of the website, in turn, violates Rule 8.4(a) because it induces this misconduct by the lawyers who offer their services.

(16-23)

## Opinion 1268 (07/03/2024)

**Topic**: Confidential information; publication of article about issues arising in a case handled by the lawyer

**Digest**: After the termination of the representation, a lawyer may publish an article that discusses legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files.

**Rules:** 1.1(c), 1.6(a), 1.7(a), 1.7(b), 1.8(b), 1.9(c), 7.1(r).

## FACTS

1. The inquirer represents one of two partners ("Client A") in a contentious dissolution of a business. The case has raised several interesting legal issues. The inquirer also writes on legal issues and would like to write an article about the case. Client A is very wary of publicity and believes that publicity about the case could be damaging to his reputation.

## QUESTION

2. May the inquirer publish an article on legal issues arising in a case in which he represented one of the parties, if the article isn't published until after the conclusion of the proceeding and discusses the issues only from a strictly intellectual perspective?

## OPINION

3. Rule 7.1(r) of the New York Rules of Professional Conduct (the "Rules") encourages lawyers to speak publicly and write for publication on legal topics to help lay persons identify legal problems. Similar policy considerations apply to lawyers who speak or write for the legal community on legal issues that may arise. *See also* Rule 7.1, Cmt. [9] ("[L]awyers should encourage and participate in educational . . . programs concerning the legal system, with particular reference to legal problems that frequently arise"); N.Y. State 1251 ¶ 3 (2023) ("It is not unethical for a lawyer to write articles, give lectures, or write a blog about topics of general or specific interest, including the law. In fact, such activities are encouraged and protected, reflecting well on the legal profession and its members as examples of lawyers . . . seeking to contribute to the general well-being of the public").

4. The inquirer's concern is that Client A is wary of publicity and believes that publicity about the case could be damaging to his reputation. That raises the question whether

the proposed article would violate any other provisions of the Rules.

**The Duty of Loyalty and the Duty Not To Harm the Client**

5. One of the hallmarks of the legal profession is the duty of loyalty to the client. *See* Rule 1.7, Cmt. [1] ("Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client"); Preamble to the Rules, ¶ 2 ("The touchstone of the client-lawyer relationship is the lawyer's obligation to act with loyalty during the period of the representation.").

6. Rule 1.1(c)(2) reflects the lawyer's duty of loyalty to the client by prohibiting the lawyer from acting against the interests of the client. It says: "A lawyer shall not intentionally prejudice or damage the client during the course of the representation except as permitted or required by these Rules." The exception refers to Rules that authorize a lawyer to take actions that might prejudice or damage the client in limited circumstances, such as disclosures permitted under Rule 1.6(b), withdrawal permitted by Rule 1.16, and disclosure to a court under Rules 3.3(a) and (b). None of those Rules apply here.

7. By its terms, Rule 1.1(c) applies *during the course of the representation*. Thus, Rule 1.1(c) does not apply to former clients. *See* Roy Simon, Simon's New York Rules of Professional Conduct Annotated ("Simon's") at § 1.1:44 ("the word 'during' makes clear that the duty not to prejudice or damage the client applies only to *current* clients, not to *former* clients.") (emphasis in original).

8. Similarly, Rule 1.8(b)—one of the rules concerning "specific" conflicts of interest with current clients—provides that a lawyer may not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent or the disclosure is permitted or required by the Rules. But this Rule, too, applies only to current clients. Indeed, the title of Rule 1.8 is "*Current* Clients: Specific Conflicts of Interest" (emphasis added).

**When Does a Current Client Become a Former Client?**

9. Different confidentiality rules apply once a client becomes a former client. The lawyer's confidentiality duties to a former client are set forth in Rule 1.9(c), which prohibits a lawyer from using or revealing the former client's confidential information unless there is an exception in Rule 1.6 (the confidentiality rule). Specifically, Rule 1.9(c) reads, in relevant part, as follows:

> (c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:
>
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

10. The inquirer will therefore have to determine whether Client A remains a current client in the matter of the representation. In N.Y. State 1008 (2014), we addressed this issue, noting that whether a person is a current client or a former client is a mixed issue of fact and law that the Committee cannot resolve. *See* Rules, Scope ¶ 9 ("principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."). We stated in Opinion 1008, however, that termination of the attorney-client relationship does not depend on whether the lawyer has sent a termination letter. Rather, a representation often ends when the lawyer has accomplished the purpose of the representation. As we explained in Opn 1008 ¶ 10:

> . . . [A]n attorney-client relationship may also terminate without a termination letter. *See, e.g., Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 389-91 (S.D.N.Y. 2010) ("'In what is perhaps the most typical situation, an attorney-client relationship . . . is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place,'"; *Miller v. Miller*, 203 A.D.2d 338, 339, 610 N.Y.S.2d 88, 89 (2d Dep't 1994) ("When the Family Court matter concluded, so did the attorney-client relationship"); Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a lawyer's actual authority to represent a client ends when . . . the lawyer has completed the contemplated services").

Sometimes, on the other hand, even accomplishing the purpose of the representation does not end the representation of the client. As we said in N.Y. State 1008 ¶ 11:

> . . . Other circumstances, such as a long-standing pattern of representation over the

> years or the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation, could also preserve an attorney-client relationship, even if the Law Firm has no specific pending assignment . . . at a given moment.

The remainder of our opinion here assumes that the attorney-client relationship in the particular matter before us has indeed ended, and that Client A is now a former client.

**Would the Article Use Confidential Information in Violation of Rule 1.6?**

11. As noted above, a lawyer's duty of confidentiality to a former client is set forth in Rule 1.9(c), which depends on whether information is "protected by Rule 1.6." Rule 1.6(a) prohibits a lawyer from knowingly revealing "confidential information" (as defined in Rule 1.6), or using it to the disadvantage of the client or for the advantage of the lawyer, unless the client gives informed consent. Rule 1.6 defines the term "confidential information"—and thus defines the information "protected by Rule 1.6"—as follows:

> "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. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

In addition, the client and lawyer may agree that other information will be held confidential. *See* Rule 1.6, Cmt. [4A] ("[W]here the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research.").

12. The inquirer states that Client A is worried about information the inquirer gained during or relating to the representation that is "likely to be embarrassing or detrimental to the client if disclosed." Whether any particular information meets this requirement is a question of fact that we cannot resolve. However, if the article would discuss the legal issues arising in the matter from a strictly intellectual perspective without discussing particular facts of the matter that are not generally known, and if the lawyer has not agreed with the client to refrain from publishing material related to the matter, we do not believe the article would run afoul of Rule 1.9(c).

13. The definition of confidential information in the black letter text of Rule 1.6 (quoted earlier) excludes the lawyer's "legal knowledge or legal research." Comment [4A] elaborates by saying: "The accumulation of legal knowledge or legal research that the lawyer acquires through practice ordinarily is not client information protected by this Rule." Consequently, an article restricted to discussing legal issues and either omitting or masking the facts that come from Client A's matter should not run afoul of Rule 1.6 unless the inquirer has agreed with the client to keep "a particular product of the lawyer's research" confidential. But if the article uses facts from the client's matter, the inquirer should ensure that readers cannot use those facts to ascertain the identity of the client. *See* Rule 1.6, Cmt. [4] ("A lawyer's use of a hypothetical to discuss issues relating to the representation . . . is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client."); N.Y. State 1026 ¶ 15 (2014) (in the context of a lawyer writing a novel based on her career as a lawyer-mediator, the Committee stated that "if confidential information is sufficiently altered, disguised, rearranged, and infused with the inquirer's own imagination so that no one can trace particular information to a particular client, then the book will not reveal 'confidential information' within the meaning of Rule 1.6.").

14. Another important exception in the definition of "confidential information" excludes information that is "generally known" in the local community or in the trade, field or profession to which the information relates. We explained the meaning of the phrase "generally known" in N.Y. State 991 ¶¶ 20 (2013): "In our view, information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'" . . . As explained by Rule 1.6, Cmt. [4A], "Information is not 'generally known' simply because it is in the public domain or available in a public file."

15. In N.Y. State 1057 (2015), the inquirer's client wanted him to use allegations the client had made in pleadings in other cases about lawyers and judges involved in those cases. The inquirer asked us if he could provide copies of these pleadings to the judge in support of his withdrawal motion, even if using those documents might prejudice the judge against the client. After quoting Comment [4A] to Rule 1.6, we said in Opinion 1057:

> Here, we believe that, unless the allegations in the client's other lawsuits were reported in the public media, or unless the client him-

> self has widely publicized the allegations, the documents in the client's other cases do not fall within the [generally known] exception and therefore constitute confidential information of the client.

*See generally* ABA 479 (2017) (discussing the "generally known" exception).

16. We continue to believe that pleadings and other documents filed in a court case are not "generally known" within the meaning of Rule 1.6. Consequently, facts set forth in a court decision should be deemed to be confidential unless those facts are "known to a sizeable percentage of people" in the community, trade, field or profession.

#### Undermining or Negating the Lawyer's Work for the Client

17. As noted above, after termination of the relationship with Client A, Rule 1.9 would prohibit the inquirer from thereafter representing another client whose interests are materially adverse in a "substantially related" matter. A subset of this prohibition involves representations that would involve the inquirer in attacking or undermining work done for Client A. *See* Rule 1.9, Cmt. [1] ("a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client"). We believe the same principle would apply to an article written by the inquirer—a lawyer may not write an article about a former client that attacks or undermines the legal work the lawyer did for that client. However, it is our understanding that the proposed article would not undermine any positions taken by the inquirer in the representation.

### CONCLUSION

18. After the termination of the representation, a lawyer may publish an article that discusses legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files.

(03-24)

## Opinion 1269 (07/16/2024)

**Topic**: Part-time judge; part-time public defender; conflict of interest;

**Digest**: A part-time assistant public defender whose law partner is both his cousin and a part-time town court judge may not represent clients of the public defender's office in the town court where his cousin/law partner and his cousin's co-judge serve because that representation would violate Rule 8.4(f). The assistant public defender may, however, represent defendants in a centralized arraignment part when his cousin and his cousin's co-judge are not presiding, even when the case is subsequently assigned to the town court where his cousin is a part-time judge, as long as the assistant public defender no longer represents the client after the arraignment and does not appear on behalf of the client in the town court where his cousin is a judge. Such limited representation at the centralized arraignment part does not violate Rule 8.4(f).

**Rules:** 1.0(h), 8.4(f)

### FACTS

1, The inquirer is an attorney who is the public defender in a county public defenders' office. Two of that county's assistant public defenders (APDs) work part-time and perform their APD duties out of their own private offices. These duties include client contact, correspondence, drafting motions and pleadings, and maintaining case file.

2. One of the part-time APDs is also a partner in a private law firm. His partner is a part-time judge in the local town court and is also his cousin. One other judge, a non-lawyer, serves in the same town court.

3. The attorneys working in the public defender's office have represented defendants at the centralized arraignment part of the county jail as counsel at first appearance (CAFA). The APDs have rotating assignments to appear as CAFA in the centralized arraignment part. Similarly, local town court judges take turns presiding over this centralized arraignment part on a rotating basis. The inquirer, his law partner cousin/judge, and his cousin's co-judge, all take turns appearing in this centralized arraignment part. After arraignment, a case is transferred to the appropriate town court with jurisdiction over the charges. When the APD's cousin or his cousin's co-judge is presiding over the centralized arraignment part, the APD does not appear as CAFA for any defendants. There are cases, however, where the APD appears as CAFA in the centralized arraignment part but the case is then transferred to the town court where his cousin presides. In these situations, the APD will no longer represent the defendant in the case after the arraignment, and another APD will be assigned instead.

## QUESTION

4. May a part-time assistant public defender whose cousin and law partner is a part-time town court judge appear solely as CAFA at a defendant's arraignment in a centralized arraignment part if neither the APD's cousin nor his cousin's co-judge are presiding, if the case will be transferred immediately after arraignment to the town court where the assistant public defender's cousin presides as a part-time judge (after which another attorney will take over as counsel for the defendant)?

## OPINION

5. The question asks about two related situations: (A) May an APD represent a defendant in the town court before his cousin or his cousin's co-judge? and (B) if so, may an APD represent a defendant solely as CAFA in a centralized arraignment part when neither the APD's cousin nor his cousin's co-judge are presiding if the defendant's case will be transferred immediately after arraignment to the cousin's town court, where another attorney will take over the representation?

### A Part-Time Assistant Public Defender May Not Represent Clients in a Town Court Where His Law Partner/Cousin, or the Law Partner/Cousin's Co-Judge, Preside

6. The part-time APD clearly cannot appear in the town court in which his cousin and his cousin's co-judge preside. This follows from N.Y. State 1243 (2022), where we said that a part-time APD whose law partner is both his cousin and a part-time town court judge is precluded from representing clients of the public defender's office in the town court where the part-time judge serves because such representation would appear to violate both Judiciary Law Section 471 and the Rules of Judicial Conduct found in 22 N.Y.C.R.R. Part 100, thereby constituting a violation of Rule 8.4(f) of the New York Rules of Professional Conduct ("Rules").

7. Rule 8.4(f) states that: "a lawyer or law firm shall not . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law." The "applicable rules of judicial conduct" include the Rules of the Chief Administrative Judge set forth in 22 N.Y.C.R.R. Part 100, and "other law" includes sections of the Judiciary Law that may be applicable to the inquiry. Interpreting the New York Judiciary Law is beyond the committee's jurisdiction, so we express no views on it, but the rules of judicial conduct are within our jurisdiction so we will discuss their relevance to this inquiry.

8. Section 100.6(B)(2) of the rules of judicial conduct provides that a part-time judge "shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located. . . . " (This seems consistent with Judiciary Law § 16, which states: "A judge shall not practice or act as an attorney or counsellor in a court of which he is, or is entitled to act as a member, or in an action, claim, matter, motion or proceeding originating in that court.")

9. This prohibition also applies to the part-time judge's partners and associates as well. Rule 1.0(h) of the Rules defines "firm" or "law firm" as including but not limited to, "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization."

10. Section 100.6(B)(3) of the Rules of Judicial Conduct prohibits a law partner from practicing in the town court where his partner and cousin work as a part-time judge. (A part-time judge "shall not permit his or her partners or associates to practice law in the court in which he or she is a judge, and shall not permit the practice of law in his or her court by the law partners or associates of another judge of the same court who is permitted to practice law."). Correspondingly, § 471 of the New York Judiciary Law states that:

> The law partner or clerk of a judge shall not practice before him, as attorney or counsellor in any cause, or be employed in any cause which originated before him. A law partner of, or person connected in law business with a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member, or in a cause originating in that court; except where the latter is a member of a court, ex officio, and does not officiate or take part, as a member of that court, in any of the proceedings therein

11. As noted in N.Y. State 1243 (2022), the remittal provision in § 100.3(F) of the Rules of Judicial Conduct allows the court and the parties in some cases to waive judicial disqualification, but § 100.3(F) does not appear to apply in situations described in RJC 100.6(B)(3).

**A Part-Time Assistant Public Defender May Represent a Defendant in a Centralized Arraignment Part When Neither His Law Partner/Cousin Nor His Cousin's Co-Judge Are Assigned, When the Case Will Be Sent for Adjudication to His Cousin's Town Court as Long as the Case Is Reassigned to Another Assistant Public Defender After Arraignment**

12. The part-time APD says he does not appear as a CAFA when his cousin or his cousin's co-judge are presiding in the centralized arraignment part. Occasionally, however, he does represent defendants in the centralized arraignment part as a CAFA when the case will be transferred for jurisdictional reasons to the town court where his cousin presides. When such a transfer to the cousin's town court occurs, another APD is assigned to the case after the arraignment.

13. Section 100.2 of the Rules of Judicial Conduct, entitled "[A] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," sets forth in § 100.2 (A) and (B) the following requirements for judicial conduct:

> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

14. If the APD continued to represent the client after a transfer to his cousin's town court, that representation would violate Rule 8.4(f) (which provides that "a lawyer or law firm shall not . . . (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law") because the APD would be causing his cousin to violate §§ 100.6(B)(3) and 100.2 (A) and (B) (quoted above).

15. As we noted in N.Y. State 1115 ¶ 11 (2017), which discusses Rule 8.4(f):

> Under this provision, a lawyer may not knowingly undertake a representation when doing so would cause a judge to violate his or her own ethical obligations under the Rules of Judicial Conduct (such as the obligation in § 100.6(B)(3) not to "permit his or her partners or associates to practice law in the court in which he or she is a judge").

16. In our view, a part-time APD may appear in the centralized arraignment part for the sole purpose of representing a defendant for arraignment, when the defendant's charges will subsequently be transferred to the same town court on which the part-time APD's cousin/law partner sits, provided the APD does not represent a client in front of his cousin or his cousin's co-judge. That would be consistent with the strictures discussed in N.Y. State 1115. The APD's cousin (as judge) or the APD's cousin's co-judge are not under the APD's control and as judges they will presumably take whatever action they deem appropriate when a case that the APD appeared on at the central arraignment part comes before them in their town court, but under Rule 8.4(f) the APD may not knowingly assist them in conduct that violates the applicable rules of judicial conduct or other law.

## CONCLUSION

17. A part-time assistant public defender whose law partner is both his cousin and a part-time town court judge may not represent clients of the public defender's office in the town court where his cousin and law partner, and his cousin's co-judge, serve because that representation would violate Rule 8.4(f). The assistant public defender may, however, represent defendants in a centralized arraignment part when his cousin and his cousin's co-judge are not presiding, even when the case is subsequently assigned to the town court where his cousin is a part-time judge, as long as the assistant public defender no longer represents the client after the arraignment and does not appear on behalf of the client in the town court where his cousin is a judge. Such limited representation at the centralized arraignment part does not violate Rule 8.4(f).

(18-23)

NEW YORK STATE BAR ASSOCIATION
**GENERAL PRACTICE SECTION**
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